



# JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL



## Joint Committee on the Draft Defamation Bill Oral and associated written evidence Volume II (HL Paper 203 & HC 930-II)

### Contents

Lord Lester of Herne Hill.....	3
Written Evidence, Lord Lester of Herne Hill QC (EV 03) .....	3
Supplementary written evidence, Lord Lester of Herne Hill QC (EV 46) .....	12
Oral Evidence, 27 April 2011, Q 1—40.....	26
Libel Reform Campaign.....	48
Written Evidence, Libel Reform Campaign (EV 04).....	48
Written Evidence, Dr Evan Harris, Libel Reform Campaign (EV 05) .....	53
Supplementary written evidence, The Libel Reform Campaign (EV 13).....	60
Written Evidence, English PEN (EV 18) .....	78
Written Evidence, Index on Censorship (EV 48).....	83
Supplementary written evidence, The Libel Reform Campaign (EV 45).....	92
Oral Evidence, 4 May 2011, Q 41—59.....	93
Professor Alastair Mullis and Dr Andrew Scott .....	106
Written Evidence, Professor Alastair Mullis and Dr Andrew Scott (EV 06) .....	106
Oral Evidence, 4 May 2011, Q 60—89.....	116
Reynolds Porter Chamberlain, Finers Stephens Innocent, David Price Solicitors and Advocates and Media Law Association .....	129
Oral Evidence, 9 May 2011, Q 90—121.....	129
Carter-Ruck, Schillings Solicitors, Jones and Walker Solicitors and Charles Russell LLP .....	145
Written Evidence, Schillings (EV 49) .....	145
Written Evidence, The Media lawyers Association (EV 43) .....	150
Oral Evidence, 9 May 2011, Q 122—171.....	155
The Guardian, Daily Telegraph and The Times.....	172
Oral Evidence, 11 May 2011, Q 172—244.....	172
Liberty, Which?, Global Witness and Mumsnet .....	199
Written Evidence, Liberty (EV 37).....	199
Written Evidence, Which? (EV 08) .....	210
Written Evidence, Global Witness (EV 29) .....	218
Memorandum submitted by Mumsnet (EV 09) .....	225
Oral Evidence, 18 May 2011, Q 245—296.....	235
Lord Mackay of Clashfern and Lord Wakeham.....	251
Oral Evidence, 18 May 2011, Q 297—325.....	251
Internet Service Providers Association, Yahoo and Professor Ian Walden .....	264
Written Evidence, The Internet Services Providers' Association (ISPA) (EV 56)....	264
Written Evidence, Yahoo! UK & Ireland (EV 44).....	271
Written Evidence, Professor Ian Walden (EV 64).....	274
Oral Evidence, 23 May 2011, Q 326—370.....	278
The Publishers Association, The Booksellers Association and the National Union of Journalists .....	293

Written Evidence, The Publishers Association (EV 38) .....	293
Written Evidence, The Booksellers Association of the United Kingdom & Ireland Limited (EV 11).....	303
Written Evidence, National Union of Journalists (NUJ) (EV 19).....	310
Oral Evidence, 23 May 2011, Q 371–397 .....	314
BBC and Tom Bower.....	324
Oral Evidence, 13 June 2011, Q 298–439.....	324
Dr Ben Goldacre, Nature, British Medical Journal and Dr Simon Singh .....	335
Written Evidence, Dr Ben Goldacre (EV 27).....	335
Written Evidence, Nature (EV 42).....	338
Written Evidence, Dr Simon Singh (EV 24) .....	341
Supplementary written evidence, Dr Simon Singh (EV 52) .....	355
Supplementary written evidence, Dr Simon Singh (EV 53) .....	357
Oral Evidence, 13 June 2011, Q 440–469.....	358
Kenneth Clarke MP, Lord McNally and Jeremy Hunt MP .....	372
Written Evidence, Lord McNally (EV 47) .....	372
Written Evidence, Lord McNally (EV 50) .....	375
Oral Evidence, 15 June 2011, Q 470–254.....	389
Baronesses Scotland of Asthal QC, Lord Falconer of Thoroton PC QC and Jack Straw MP .....	411
Oral Evidence, 20 June 2011, Q 525–562.....	411
Raymond Buildings, Matrix Chambers and Johnsons Solicitors.....	430
Written Evidence Paul Tweed, Senior Partner, Johnsons (EV 10) .....	430
Oral Evidence, 22 June 2011. Q 563–614.....	434
Lord Neuberger of Abbotsbury and Mr Justice Tugendhat .....	460
Oral Evidence, 6 July 2011, Q 615–939 .....	460
Sir Charles Gray, Sir Stephen Sedley and Lord Woolf of Barnes .....	475
Oral Evidence, 6 July 2011, 640–667.....	475
Ian Hislop, Private Eye .....	487
Oral Evidence, 11 July 2011, Q 668–729 .....	487
Edward Garnier QC MP, Solicitor General .....	506
Oral Evidence Session, 18 July 2011, Q 730–748 .....	506
Paul Dacre and Matthew Parris .....	513
Oral Evidence, 18 July 2011, Q 749–800 .....	513

## Lord Lester of Herne Hill

### Written Evidence, Lord Lester of Herne Hill QC (EV 03)

#### THE HUMAN RIGHTS ACT AND THE FAIR BALANCE BETWEEN FREE SPEECH AND PRIVACY PROTECTION INHERENT IN THE CONVENTION

1. Section 12 of the HRA was designed to ensure that British courts would pay particular regard to the Convention right to freedom of expression. Section 12 contains special provision stating that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
2. This reflects the position in defamation cases, and as stated by the Strasbourg Court in the *Spycatcher* case, namely, that

“the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of its value and interest”: *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153 at 191, para 60.
3. It is also well established by the Strasbourg Court that public figures can expect less protection under Article 10(2) than private persons, because of the importance of freedom of political debate in a democracy.
4. Where proceedings relate to journalistic, literary or artistic material (or to conduct connected with such material) Section 12 requires the court to have particular regard to the extent to which:
  - a. the material has or is about to become available to the public, or would be in the public interest for the material to be published; and
  - b. any relevant privacy code.
5. The House of Lords has called the public interest test the “ultimate balancing exercise” requiring an “intense focus” on competing interests being claimed, and has developed circumstance-specific principles as to how this exercise is to be carried out: *Re SA (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, per Lord Steyn. In striking that fair balance, context is everything.
6. Section 12(3) of the HRA requires that in a freedom of speech case no relief is to be granted so as to restrain publication before trial “unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”
7. But circumstances may arise “where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice ....Circumstances where this may be so include ... where the potential

adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for relief pending the trial ....” : *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 (HL), para 22, per Lord Nicholls.

8. The reference in Section 12 to “any relevant privacy code” was included to emphasise the importance of self-regulation by the media.
9. To recall what the Home Secretary, Jack Straw said during the Committee Stage debate on 2<sup>nd</sup> July 1998, (315 HC Official Report (6<sup>th</sup> series, cols 538-39):

“ What, then, will the domestic courts say if a television soap opera star, a relative of the Queen, or a backbench Member of Parliament seeks an injunction to stop a Sunday newspaper from publishing the secrets of their private life in circumstances where the article is said to involve no public interest considerations? Judges will be less likely to intervene to find that a newspaper article would unjustifiably invade privacy the more confident they are that there is an expert body which will fairly consider complaints and give effective remedies to victims of abuses of the right to freedom of expression. The Press Complaints Commission Code of practice, for example, maintains a fair balance by protecting privacy save where there are competing public interest considerations.”

## THE PROTECTION OF PERSONAL PRIVACY UNDER UK LAW

10. Traditionally, advocates of privacy legislation have been concerned to protect individuals against unwarranted intrusion by the media or by public authorities (as in the case of telephone tapping). It is only recently that the granting of privacy injunctions has led to pressure from some sections of the media to introduce legislation to limit the protection given for personal privacy so as to widen their ability to publish information about the private lives of public figures.
11. Before the Human Rights Act 1998 brought the Convention right to respect for private life, home and correspondence into UK law, various bodies had examined the case for and against privacy legislation. An official inquiry chaired by Sir Kenneth Younger decided that it would be wrong to introduce legislation to protect personal privacy<sup>1</sup>, with Alex Lyon MP, former Minister of State at the Home Office in Harold Wilson’s second administration (1974-76) strongly dissenting. Wilson was personally keen on such legislation and but the Home Secretary (Roy Jenkins) was firmly opposed on grounds of freedom of speech and of the press.
12. Sir David Calcutt QC’s inquiry into Privacy and Related Matters was set up in 1989 following completion of two Private member’s Bills concerned with Privacy (John Browne MP, Con) and the Right of Reply (Tony Worthington

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<sup>1</sup> Report of the (Younger) Committee on Privacy, Cmnd 5012, October, 1995.

MP, Lab). The Report (Cmnd 1102 (1990)) also was against privacy legislation, but recommended that the Press Council should be replaced by the Press Complaints Commission, which would have eighteen months to demonstrate that self-regulation could be made to work effectively in dealing with complaints..

13. In 1995, the Conservative Government's White Paper, *Privacy and Media Intrusion*, rejected proposals for statutory press regulation., and approved continuing self regulation. The Labour Government continued this approach after 1997.
14. The House of Commons Committee on Culture Media and Sport's Report on *Press Standards, Privacy and Libel* (Second Report of Session 2009-10, 24 February 2010) did not support the need for privacy legislation.
15. The English Court of Appeal decided for its part that there was no enforceable civil right of privacy in English law, even though the "so-called right to be let alone" had been developed by Victorian courts.. The English Court of Appeal had regretted the failure of the common law and statute to protect personal privacy, stated that the right to privacy could only be recognised by Parliament, and had expressed the hope that Parliament would enact appropriate legislation to give protection.<sup>2</sup>
16. The result of the refusal by the courts to act as law-makers was that a claim based on an invasion of privacy could be made only if it could be brought as a breach of confidence, or some other physical tort, whether trespass or harassment, and so forth. That meant that there was no effective legal remedy for violations of Article 8 of the Convention in cases of media intrusion on private life, home and correspondence.
17. Article 8 of the Convention guarantees a general right to privacy as part of respect for family life, home and correspondence, that is, an opportunity to live out one's private life free from undue interference, comment, intrusion, recording or monitoring in both private and (where appropriate) public spaces. The notion of "private life" is a broad concept encompassing, among other things, the right to personal autonomy and personal development. It is a right that has both negative dimensions, creating rights against the state, and positive obligations, requiring the state to protect an individual's private life from intrusion by others, including intrusion by the media.
18. It was the likelihood that Convention case law would develop an enforceable right to be protected against unwarranted media intrusion that created opposition to the Human Rights Act from some sections of the media.
19. Article 13 of the Convention also requires the UK to provide effective remedies for violations of the right to respect for private life under Article 8 and the right to freedom of expression under Article 10.

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<sup>2</sup> *Kaye v Robertson* [1991] F.S.R. 62 (CA), *per* Bingham LJ. discussed in Anthony Lester QC, *English Judges as Law Makers*, Public Law (1993),269, at 284-6.

20. The jurisprudence of the Strasbourg Court has been uncertain about whether the right to personal privacy in the context of media intrusion is an exception to the right to freedom of expression under Article 10 (2) or a fundamental right under Article 8. The Court has tended to tilt the balance towards privacy where “public figures” are concerned (unlike its approach in defamation cases).
21. For example, in the *Von Hannover* case, Princess Caroline of Monaco was pursued by German paparazzi photographers. She sought injunctive relief from the German court, which granted relief so far as pictures of her with her children were concerned, but refused so far as they depicted her in public going about her daily life. The German court decided that considerations of press freedom and the public’s interest in a “figure of contemporary society” militated against injunctive relief. Princess Grace complained to the Strasbourg Court which upheld her claim of breach of Article 8: *Von Hannover v Germany* [2005] 40 EHRR 1.
22. Our courts have developed the tort of “misuse of private information” in giving effect to the UK’s positive obligations under Article 8 of the Convention. Consistent with Strasbourg jurisprudence, the basic elements of the tort require the courts to answer two questions:
- i. whether, in all the circumstances of the case, a claimant has a “reasonable expectation of privacy” in respect of the disclosed facts (or facts threatened to be disclosed) in order to engage Article 8: *Campbell v MGN Ltd* [2004] 2 AC 157 (HL), per Lord Nicholls at paragraphs 11-22; and, if so
  - ii. whether any countervailing public interest (under Article 8 (2) or 10) justifies interference with the claimant’s prima facie Article 8 rights: *Campbell v MGN Ltd* [2004] 2 AC 457 (HL), per Baroness Hale at paragraph 137.
23. English law also provides further effective remedies for interference with privacy rights under the Data Protection Act 1998 (“the DP Act”) which implements the requirements of the EC Data Protection Directive. : Directive 95/46/EC. The scheme of the DP Act strikes a fair balance between personal data rights and freedom of expression, in particular by granting specific exemption (section 32) for processing of personal data for the specific purpose of journalism up to, including and after publication of news material. Section 32 (4) and (5) impose a procedural stay on certain proceedings against journalist data controllers under the DP Act preventing the merits of those proceedings being determined until after publication. The purpose of these provisions is to prevent the restriction of freedom of expression that might otherwise result from gagging injunctions: *Campbell v MGN* [2003] QB 633 (CA), per Lord Phillips MR at par 116.
24. New Zealand courts recognize that the primary remedy for invasion of privacy is the award of damages rather than an injunction: *Hosking and Hosking v Simon Runting and Anor* [2004] NZCA 34, per Keith J at para 258. English courts adopt a flexible approach to the remedies to be given, having regard to the particular context and the elements of the wrongdoing.

25. For example, in *John Terry (LNS) v Persons Unknown* [2010] EWHC 119, Mr John Terry, the football team captain, referred to anonymously in Mr Justice Tugendhat's judgment as "LNS", applied successfully for an interim injunction (without notice to the press) to restrain publication to the world of details of his relationship with the ex-partner of a fellow team mate. He was able to obtain a wide ranging injunction on the basis of "rumours" circulating among the sporting community concerning his private life. However, the Judge later discharged the injunction, having concluded, among other things, that damages would be an adequate remedy in the circumstances of the case. He observed that:

"This is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence, ... I do not think it likely that LNS regards as particularly sensitive information of the kind that is sought to be protected. As Eady J has observed in *Mosley* [26], different people have different views on matters of conduct. But since the attributes of the applicant are amongst the relevant circumstances, the less sensitive the information is considered by the applicant to be, and the more robust the personality of the applicant, and the wider the information has already spread in the world in which the applicant lives and works, the less the court may find a need to interfere with the freedom of expression of others by means of an injunction. The test includes proportionality. Damages may be an adequate remedy in some cases, if not in all."

26. The *John Terry* case also illustrates that an injunction can be an over-effective and disproportionate remedy as the interim order which he persuaded a court to grant was a so-called "super-injunction" which sealed the court file and prevented the press from even reporting the fact that an injunction had been granted.

27. The application by Max Mosley, pending before the Strasbourg Court, goes further. It contends that the United Kingdom is in breach of the positive duty under Article 8, read on its own and with Article 13 of the Convention, by failing to impose any duty on newspapers and other media, enforceable by criminal or regulatory sanctions, to give prior notification to a person of publication which will infringe their Article 8 right to private life by publishing private information so that the person may seek an injunction from the court prior to publication. Mr Mosley's approach would appear to give absolute protection to the right to respect for personal privacy at the pre-publication stage by ensuring that an application could always be made for an interim injunction to prevent publication. That would create an imbalance between the competing rights and freedoms previously unknown in English law or in the laws of modern democratic societies<sup>3</sup>.

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<sup>3</sup> The author was co-counsel for Guardian News and Media Ltd in applying as a third party intervener opposing Mr Mosley's case. This Note draws upon the submissions made in that case.

28. There is an international consensus among the great majority of States parties to the Convention, and in the wider common law world (eg., Australia, Canada, New Zealand, South Africa, the United Kingdom and the United States) against the imposition of a duty of the kind sought in the *Mosley* case, because of the importance of freedom of expression. However, Article 49 of the Russian Statute on the Mass Media provides, as regards the Duties of Journalists, that “The journalist shall be obliged to obtain the consent of a private citizen or his lawful representatives (except where it is necessary to protect public interests) to the spread in a mass medium of information about his private life.” Similar provisions are to be found in Albania, Azerbaijan, Latvia, Lithuania, Moldova, Poland, and Ukraine, requiring prior notice, at least where the public interest is not implicated.
29. The relevant conclusions and recommendations of the House of Commons Committee on Culture Media and Sport’s Report on *Press Standards, Privacy and Libel* are attached. The Report recommended, among other things, that the Lord Chancellor, the Lord Chief Justice and the courts should rectify the serious deficiency in gathering data on injunctions and should commission research on the operation of section 12 of the Human Rights Act.
30. The Lord Chancellor’s chief statistician is reported (*Financial Times*, 23/24 April 2011) to be considering how the Ministry of Justice might collect evidence about the volume of injunctions being granted by judges to the super-rich amid growing concerns among politicians over the privacy law “creep”, after a spate of cases in which celebrities have used the measures to protect their privacy.
31. The controversy about privacy injunctions and so-called “super injunctions” is currently being examined by a committee chaired by Lord Neuberger MR, and is expected to report next month. Judgment is also awaited in the *Mosley* case, which may be referred to the Grand Chamber of the Strasbourg Court.
32. A Privacy Act would probably do little more than codify the existing Convention and UK legal criteria as to how the balance should be struck between free speech and personal privacy. It would have to be compatible with Convention jurisprudence. Such a measure might tilt the balance slightly more towards freedom of speech by adopting the “highly offensive to a reasonable person” test, developed in New Zealand and Australia, by reference to the United States’ Restatement of Torts: see eg., *Hosking & Hosking v Simon Runtin and Anor* [2004] NZCA 34, paras 66-68, 127 and 158, per Gault P. See further *Campbell v MGN Ltd* [2004] 2 AC 457 (HL), per Lord Nicholls at para 22. This is arguably a less strict threshold than the current approach of UK courts, but such an approach could be adopted by English courts without the need for privacy legislation.

April 2011

### **Privacy and breach of confidence**

1. We understand that the refusal by a court to grant an injunction does not necessarily mean the defendant can publish straightaway: if the claimant



appeals the decision, then the Court of Appeal has to hold the ring, pending the outcome of that appeal. That said, it seems to us wrong that once an interim injunction has been either refused or granted in cases involving the Convention right to freedom of expression a final decision should be unduly delayed. Such delay may give an unfair advantage to the applicant for the injunction as newspapers often rely on the currency of their articles. We recommend that the Ministry of Justice should seek to develop a fast-track appeal system where interim injunctions are concerned, in order to minimise the impact of delay on the media and the costs of a case, while at the same time taking account of the entitlement of the individual claimant seeking the protection of the courts. (Paragraph 32)

2. Without appropriate data on injunctions we are unable to come to definitive conclusions about the operation of section 12 of the Human Rights Act, nor do we believe that the Ministry of Justice can effectively assess its impact. We recommend that the Lord Chancellor, Lord Chief Justice and the courts should rectify the serious deficiency in gathering data on injunctions and should commission research on the operation of section 12 as soon as possible. (Paragraph 37)
3. We do not overlook the fact that, in *Cream Holdings v Bannerjee*, the House of Lords held that the effect of section 12(3) of the Human Rights Act was that, in general, no injunction should be granted in proceedings where Article 10 was engaged unless the claimant satisfied the court that he or she was more likely than not to succeed at trial. Although there is little statistical evidence available, we are nevertheless concerned at the anecdotal evidence we have received on this matter. Section 12 of the Human Rights Act is fundamental in protecting the freedom of the press. It is essential that this is recognised by the Courts. (Paragraph 38)
4. It is entirely understandable, as news and gossip spread fast, that parties bringing privacy (and confidence) cases may wish to bind the press in its entirety, not just a single enquiring publication. On the face of it, however, this appears contrary to the intention behind section 12, if the press has not been given proper notice and opportunity to contest an injunction. We recommend, therefore, that the Lord Chancellor and Lord Chief Justice also closely review these practices. (Paragraph 39)
5. A culture in which the threats made to Women A and B could be seen as defensible is to be deplored. The fact that *News of the World* executives still do not fully accept the inappropriateness of what took place is extremely worrying. The 'choice' given to the women by Neville Thurlbeck was in fact no choice at all, given the threat of exposure if they did not co-operate. (Paragraph 56)
6. We found the *News of the World* editor's attempts to justify the Max Mosley story on 'public interest' grounds wholly unpersuasive, although we have no doubt the public was interested in it. (Paragraph 57)
7. The Human Rights Act has only been in force for nine years and inevitably the number of judgments involving freedom of expression and privacy is limited.

We agree with the Lord Chancellor that law relating to privacy will become clearer as more cases are decided by the courts. On balance we recognise that this may take some considerable time. We note, however, that the media industry itself is not united on the desirability, or otherwise, of privacy legislation, or how it might be drafted. Given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude, therefore, that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute. (Paragraph 67)

8. We have received no evidence in this inquiry that the judgments of Mr Justice Eady in the area of privacy have departed from following the principles set out by the House of Lords and the European Court of Human Rights. While witnesses have criticised some of the judge's individual decisions, they have praised others. If he, or indeed any other High Court judge, departed from these principles, we would expect the matter to be successfully appealed to a higher court. The focus on this one judge regarding the development of privacy law, however, is misplaced and risks distracting from the ongoing national debate on the relationship between freedom of speech and the individual's right to privacy. (Paragraph 76)
9. Clearly pre-notification, in the form of giving opportunity to comment, is the norm across the industry. Nevertheless we were surprised to learn that the PCC does not provide any guidance on pre-notification. Giving subjects of articles the opportunity to comment is often crucial to fair and balanced reporting, and there needs to be explicit provision in the PCC Code itself. (Paragraph 91)
10. We recommend that the PCC should amend the Code to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a "public interest" test, and should provide guidance for journalists and editors on pre-notifying in the Editors' Codebook. (Paragraph 92)
11. We have concluded that a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a "public interest" exception. Instead we believe that it would be appropriate to encourage editors and journalists to notify in advance the subject of a critical story or report by permitting courts to take account of any failure to notify when assessing damages in any subsequent proceedings for breach of Article 8. We therefore recommend that the Ministry of Justice should amend the Civil Procedure Rules to make failure to pre-notify an aggravating factor in assessing damages in a breach of Article 8. We further suggest that amendment to the Rules should stipulate that no entitlement to aggravated damages arises in cases where there is a public interest in the release of that private information. (Paragraph 93)
12. The free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. In the UK, publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers

Act 1840. They cannot be fettered by a court order. However, the confusion over this issue has caused us the very gravest concern that this freedom is being undermined. We therefore repeat previous recommendations from the Committee on Parliamentary Privilege that the Ministry of Justice replace the Parliamentary Papers Act 1840 with a clear and comprehensible modern statute. (Paragraph 101)

13. We welcome the Speaker's determination to defend freedom of speech in Parliament, as well as the comments by the Lord Chief Justice on the Trafigura affair, and strongly urge that a way is found to limit the use of super-injunctions as far as is possible and to make clear that they are not intended to fetter the fundamental rights of the press to report the proceedings of Parliament. Given the importance of these issues, we hope that a clear statement regarding the way forward is made before the end of this Parliament. (Paragraph 102)
14. The evidence we have heard shows the impact of the internet on the leaking of information has fundamentally altered the dissemination of information, and consequently breaches of confidence. (Paragraph 112)
15. In particular, the Trafigura and Barclays cases raise issues over the use of injunctions for breach of confidence by companies which do not have Article 8 rights to defend, the ease with which they appear to be granted and the consistency of practice in the court system. (Paragraph 113)

*April 2011*

## Supplementary written evidence, Lord Lester of Herne Hill QC (EV 46)

### *Introductory*

*This further evidence is given in response to the request by the Chair of the Joint Parliamentary Committee considering the Government's draft Defamation Bill. It responds to the questions raised by the Joint Committee and to evidence by others. The author is grateful for the opportunity to do so. If the response is insufficient or incomplete in any respect, the author would be glad to provide further information and opinion.*

1. Will the Government's responsible publication defence overcome the concerns associated with the existing Reynolds defence, including its cost, unpredictability and inflexibility?
  1. Two particular problems have been identified in relation to the existing *Reynolds* defence: (i) the courts have tended to treat the list of criteria relevant to the determination of whether the publisher behaved responsibly as a check list, rather than a list of factors which may be relevant depending on context; and (ii) the defence has been difficult to use outside the context of mainstream journalism. This creates a chilling effect when NGOs, scientists, bloggers and others are discouraged from publishing because they are not confident of being able to rely on the defence.
  2. Clause 2 of the draft Bill alleviates these problems. Sub-clause (2) emphasises that the court *may* have regard to the matters listed, *amongst others*. This would discourage the courts from treating the factors as a checklist to be ticked mechanically. The inclusion of "the nature of the publication and its context" at the beginning of the list of factors emphasises that the defence should be available to those publishing outside the context of mainstream journalism, and that different factors might be relevant in different contexts in order to establish that publication was responsible.
  3. Clause 1(3) of my Bill requires the court to have regard to all the circumstances of the case when determining whether the defendant acted responsibly. This further emphasises the importance of context, since in law as elsewhere context is everything. The inclusion of a similar provision in clause 2 of the Government's Bill might go some way to address the concerns of those publishing outside mainstream journalism. The provision could be improved by inserting the word "relevant" before "circumstances" in order to ensure that the court is not obliged to consider irrelevant circumstances.
  4. Clause 2 should also state explicitly that inferences and expressions of opinion are covered, so as to avoid the risk of lengthy arguments about which parts of a publication are covered by the defence and which are not. It should be made clear that the defence does not apply to pure expressions of opinion, where honest opinion is the appropriate defence, and to avoid defendants pleading both defences at the same time.

5. It has been suggested that the common law *Reynolds* defence should be abolished so as to avoid claimants running the two defences as alternatives. The common law defences of fair comment and justification would be abolished by the Bill for the same reason and it would be logical to do the same with the *Reynolds* defence.
6. My Bill includes in the list of factors a reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines. The aim of this is to encourage self-regulation on the part of the media in accordance with accepted professional standards and practice. Where the defendant is subject to a particular code of conduct (such as the PCC Editors' Code or Ofcom Broadcasting Code), compliance (or failure to comply) with its terms may well be relevant to determining whether the defendant acted responsibly.
7. The draft Bill does not include a similar provision, because of Departmental concerns about satellite litigation and potential confusion. However, section 12(4)(b) of the Human Rights Act 1998 requires the court to have regard to "any relevant privacy code" and this has not given rise to practical difficulties. Similarly, section 32(3) of the Data Protection Act 1998 provides that regard should be had to "compliance with any code of practice which is relevant to the publication in question" in determining whether a belief that publication would be in the public interest was reasonable. There is a powerful case for doing the same here, so as to encourage effective self-regulation without the need to have recourse to litigation.<sup>4</sup>
8. Another factor which might be included in the list of factors is the resources available to the defendant. This would emphasise the fact that a publisher with limited resources, such as an NGO, should not be expected to take the same steps in ensuring responsible publication as a national newspaper. In law as everywhere context is everything.
9. Clause 2(2)(e) requires consideration of whether the defendant sought the claimant's views prior to publication. This is obviously good practice for journalists, but it may not always be appropriate. For example a publisher may fear that a wealthy claimant would seek to block publication on the basis of interference with Article 8 Convention rights; an NGO investigating corruption or illegality may fear physical violence; a journalist may wish to protect the confidentiality of a source. That is why I included the caveat "If appropriate" in the equivalent clause - 1(4)(e) - of my own Bill.
10. Clause 2(2)(h) as it stands risks encouraging avoidable legal argument as to the distinction between suspicions, opinions, allegations and proven facts. It would be preferable if it were removed. If (contrary to my view) there were to be a provision referring to the 'tone' of the article it is important that it should

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<sup>4</sup> However, it may be necessary to revise some of the codes if such a provision is to be included. For example, the PCC Editors' Code imposes a high threshold in its definition of "public interest" which could have the effect of limiting the defence.

allow sufficient room for editorial discretion, so that the courts do not sit in judgment on matters of editorial judgment beyond their proper province.

11. It has been suggested that an alternative approach would be a test similar to that contained in section 32 of the Data Protection Act 1998, which provides for a public interest defence if the defendant reasonably believes that publication would be in the public interest. However, focusing on the subjective point of view of the publisher would be inappropriate in the context of the responsible publication defence, which requires the courts to be impartial arbiters of an objective standard of responsibility.
  12. Clause 1(5) of my Bill better reflects the common law *reportage* defence than clause 2(3) of the draft Bill, which narrows it unnecessarily to the reporting of a dispute between the claimant and another person.
2. *Are you content with the differences between your own Bill and the Government's Bill in relation to the truth defence? In particular, do you anticipate problems concerning single allegation cases, the use of the term "imputations" and the repetition rule?*
13. Clause 3 of the draft Bill (unlike my Bill) does not address a key problem with the justification defence. Section 5 of the Defamation Act 1952 provides that where a publication makes two or more defamatory allegations, a defence of justification does not necessarily fail by reason of the fact that the defendant fails to prove all of them, where what is not proved does not "materially injure" the claimant's reputation, having regard to what has been proved to be true.
  14. This provision is important in striking the balance between the claimant's and defendant's rights. It reinforces the notion that what is required is that the defendant should prove that what was published is "substantially" true. The claimant does not win automatically, by virtue of a technical rule, if the defendant fails to prove every single allegation. The court looks at the substance of the matter, in effect, at what is proportionate in the circumstances. If the defendant proves the main substance of the allegations, she or he will succeed if what is left unproved does not "materially injure" the claimant.
  15. But section 5 does not apply to cases where there is only one allegation. In a claim for libel, where the claimant complains about one defamatory allegation, the court should look at what the defendant has proved (in relation to that allegation) and the defence of truth should not necessarily fail if the defendant has not proved all of that allegation, if, having regard to what she or he has proved, what is not proved does not "materially injure" the claimant's reputation.
  16. It might be thought that there is no need for the section to deal with this point in a single-allegation case, because it is already the law that the defendant is required only to prove "substantial truth". But this is an area bedevilled by technicalities relating to the tactical formulation of cases and the pleading of

“meaning”. It is necessary to have a clear statutory provision to apply the “material injury” test in the context of single-allegation cases.

3. *What are your views on the proposed honest opinion defence? Should the scope of the defence be broadened? Is its relationship to the responsible publication defence both clear and appropriate?*

17. The proposals to rename and simplify the defence are welcome and should remove some of the uncertainties making it easier to use. The clause broadly reflects the approach taken in my Bill.

18. One difference between the two provisions is that clause 3(6) of my Bill seeks to make clear that the defence should not fail because the defendant cannot prove that she or he knew of the underlying factual basis prior to publication, or that the facts relied on are not stated within the publication. This is intended to avoid the complexities which have arisen in the case law about the extent to which the opinion must be based on facts which are sufficiently true, and the extent to which the statement explicitly or implicitly refers to those facts. The draft Bill merely requires that an honest person could have held the opinion on the basis of facts that existed or privileged material. Given that this issue has arisen often in the case law it would be desirable to state the position clearly. Otherwise the clause may perpetuate the uncertainty.

19. There is potential for confusion in using the phrase “public interest” in relation to honest opinion where it bears a different meaning from that employed in the context of the responsible publication defence. There will inevitably be some overlap between the two defences, because they can both be applied to opinions. However, the defences have quite different rationales. The responsible publication defence is intended to apply where information is published in a story which is of public interest. In this situation the publisher has a defence provided that she or he has acted responsibly in gathering and publishing information, in light of the relevant context. This rationale would be undermined if the defence distinguished between statements of fact and statements of opinion. This distinction is not relevant to the rationale of the defence and would lead to unnecessary technical arguments as to which parts of the publication were protected by the defence and which were not.

20. The honest opinion defence is underpinned by the principle that it would be contrary to the right to freedom of expression, and unnecessary in order to protect personal reputation, to restrict the publication of comment and opinion which is not objectively verifiable. The public interest element of this defence aims to exclude the publication of comment and opinion on purely private matters, where the privacy rights of those involved may be infringed. Given that these interests are protected by privacy and data protection law, it is no longer necessary to retain this element of the defence.

4. *Should Parliamentary Privilege be reformed by the draft Bill including to clarify the reporting of Parliamentary references to super-injunctions, or is this best left to a specific Privileges Bill?*

21. Clause 7 of my Bill did not purport to reform Parliamentary Privilege, but to provide absolute privilege in defamation proceedings for reports of Parliamentary proceedings. Given that the draft Defamation Bill deals with other forms of privilege (in defamation) it would be logical to include privilege for reports of Parliamentary proceedings in the same place and deal with the substance of Parliamentary Privilege in a draft Parliamentary Privilege Bill. Any provision should therefore focus on liability in defamation for reporting of Parliamentary proceedings, and leave the wider issues of privacy and injunctions to the Joint Committee established to consider those matters.
22. Section 1 of the Printed Papers Act 1840 prevents any civil or criminal proceedings from being brought in respect of a 'report, paper, votes or proceedings' published by order of either House. Section 2 confers similar protection on copies of such publications. Section 3 confers a lesser degree of protection on 'any extract from or abstract of' such publications. An extract or abstract must be published in good faith and without malice.
23. The Joint Committee on Parliamentary Privilege described the 1840 Act as being 'drafted in a somewhat impenetrable early Victorian style' and recommended that the protection given to the media by the 1840 Act and the common law should be retained, but that it should be replaced with a modern statute in order to be more transparent and accessible.<sup>5</sup>
24. The Culture, Media and Sports Committee (Whittingdale) Report on Press Standards, Privacy and Libel<sup>6</sup> also considered the 1840 Act in relation to the *Trafigura* case in which it was contended that the existence of a so-called "super-injunction" prevented newspapers from reporting the substance of a parliamentary question relating to the case in question.
25. The Whittingdale Report concluded that publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840 and cannot be fettered by a court order. However, it expressed concern that confusion over the issue may mean that this freedom is being undermined, and the Report repeated previous recommendations that the Parliamentary Papers Act 1840 be replaced with a clear and comprehensible modern statute.
26. The recent Report of the (Neuberger) Committee on Super-Injunctions noted that protection already exists in defamation proceedings at common law for honest, fair and accurate reporting of Parliamentary proceedings.<sup>7</sup> This was established in *Wason v Walter* (1868) 4 QB 73, in which Cockburn CJ stated

'[given the] paramount public and national importance that proceedings of the Houses of Parliament shall be communicated to the public, ... to us it seems clear that the principles on which the publication of reports of

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<sup>5</sup> HL43 1999, para 374.

<sup>6</sup> HC362 2010.

<sup>7</sup> Report of the Committee on Super-Injunctions: Super-injunctions, Anonymised Injunctions and Open Justice 2011, chaired by Lord Neuberger MR, para 6.28



proceedings of Courts of Justice have been held to be privileged apply to the reports of Parliamentary proceedings. The analogy between the two cases is in each respect complete.<sup>8</sup>

27. Fair, accurate and contemporaneous reports of court proceedings are absolutely privileged in defamation proceedings under section 14 of the Defamation Act 1996, and it is the intention to retain and extend this protection under section 5 of the draft Bill. Given that a common rationale underpins this form of privilege and common law privilege for reports of Parliamentary proceedings, it would be logical to make provision for such proceedings in the Bill in the same terms. Such a provision would not have a bearing on the extent of any protection against contempt proceedings, in the same way that section 14 of the 1996 Act does not determine contempt liability in relation to reports of proceedings in court. Nor would it affect the substance of Parliamentary Privilege or the sub-judice rules.

5. *Does the current law provide adequate protection for internet service providers, online forums, blogs and other electronic media? Would clause 9 of your Bill have been a useful addition to the law (despite the consultation paper noting confusion in relation to its terminology and practical operation)?*

28. The current law does not provide adequate protection for ISPs, online forums, and other electronic media, which is why a provision to deal with this is included in my Bill. The aim of that provision was to ameliorate the current position whereby, on receipt of notice, such defendants must remove material immediately or face liability. This also deprives the author of the opportunity to defend the publication. The aim of clause 9 is to require claimants to identify more clearly the material on which the complaint is based and allow the defendant a period of time in which to consider or investigate the merits of the claim before accepting liability for the material or removing it. It also seeks to clarify which forms of electronic media should be regarded merely as distributors because they have no real involvement with the content, and which should be regarded as intermediaries – the middle category – which will sometimes be liable for defamatory material.

29. It has been suggested that the law should go further, requiring that a claimant be required to approach the author directly or obtain a court order before an intermediary is required to remove material. However, it may be difficult and time consuming to identify the author of material posted on the internet, who may be outside of the jurisdiction, or otherwise not a realistic target for someone seeking the removal of defamatory material. Introducing a requirement that the claimant attempt to contact the author first would enable allegedly defamatory material to be in circulation for longer, compounding any damage if the claim is meritorious. The use of interim injunctions is uncommon in defamation proceedings because the threshold

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<sup>8</sup> (1868) 4 QB 73, at 89, cited at para 6.29 of the Report of the Committee on Super-injunctions.

for granting an injunction is very high.<sup>9</sup> Such a requirement would be costly and place a significant burden on the claimant.

30. Clause 9 of my Bill has been criticised on the basis that the terminology is confusing. It has been suggested that it would be clearer if the terminology used in the Electronic Commerce Directive, of online intermediaries (including conduit, cache or host) were retained. The terminology in clause 9 is intended to be applicable both to online and offline publishers, and to be flexible enough to provide a set of principles which could be adapted to future technological developments. One of the problems with the current regime is that it is unclear how it applies in relation to the range of online activity that now exists. Any new provision should provide a framework of overarching principles of liability which may be applied to any set of circumstances.
31. Another approach has been suggested which would require the intermediary, on receipt of a complaint, to publish a fair and accurate summary of the complaint – a so-called *Loutchansky* notice. If the claimant still wanted the material removed entirely the claimant would then have to obtain a court order. If the claimant did not issue legal proceedings within the limitation period then the intermediary would be entitled to remove the notice without incurring liability. Publication of such a notice could be an alternative option to the take down procedure in clause 9 of my Bill. This approach has the merit of enabling the intermediary to avoid becoming embroiled in a dispute over material the veracity of which it has no way of establishing, whilst preventing the continued distribution of unchallenged defamatory material. It has much to commend it, in my view.
6. Do you consider that preventing corporations from pursuing libel claims would be incompatible with the European Convention on Human Rights?
32. The European Court of Human Rights may receive applications from any person, non-governmental organization or group of individuals claiming to be a victim of a violation of Convention rights (ECHR Article 34).
33. The Convention right to the peaceful enjoyment of one's possessions is expressly stated by Article 1 of Protocol No. 1 to the Convention to be enjoyed by natural and legal persons. Other Convention rights may be enjoyed by legal persons as the context requires. A company does not have feelings but it and its owners may be harmed or damaged in ways that involve breaches of Convention rights.
34. The right to freedom of expression protected by Article 10 of the Convention is not personal to the individual and is capable of being enjoyed by corporate legal persons: Application 12726/87, *Autronic AG v Switzerland* (1990) 12 EHRR 485, para 47, and Application 15450/89, *Casado Coca v Spain* (1994) 18 EHRR 1, para 35, where the Court observed that Article 10

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<sup>9</sup> (1) The statement is arguably defamatory; (2) there are no grounds for concluding that it may be true; (3) there is no other defence which might succeed; and (4) there is evidence of intent to repeat or publish: *Coys Ltd v Autocherish Ltd* [2004] EWHC 1334 QBD.

guarantees freedom of expression to “everyone”, and that pursuit by the applicant of a profit-making activity is irrelevant.

*Where appropriate, Article 8 of the Convention extends to legal persons, for example, in protecting business premises (‘homes’) against unreasonable searches, or correspondence and communications: Application 37971/97, Societe Colas Est v France (2004) 39 EHRR 373, para 40.*

35. Article 8 includes protection of one’s honour and reputation as part of respect for ‘private life’: Application 17101/90, *Fayed v United Kingdom* (1994) 18 EHRR 393; Application 12556/03, *Pfeifer v Austria* (2009) 48 EHRR 175, paras 35-36 but only where the “*factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant’s private life*” (*Mikolajová v. Slovakia*, Application no. 4479/03, 18 January 2011, para. 55). This means that the right to reputation is not merely an exception under Article 10(2) but a freestanding aspect of Article 8: Application no. 64915/01, *Chauvy & others v France* (2005) 41 EHRR 29.

36. A fair balance must be struck between the values protected by Article 8 and Article 10: Application 39401/04, *MGN v United Kingdom*, Judgment of 18 January 2011 as they are equal rights which ‘*merit, in principle, equal protection*’: Application 12268/03, *Hachette Filipacchi Associés (ICI PARIS) v. France*, Judgment of 23 July 2009, para. 41.

37. The right to a good reputation is a civil right protected by Article 6 of the Convention, and everyone (whether a natural or legal person) is entitled to effective access to the courts in the determination of civil rights and obligations. The enjoyment of Article 6 rights is protected by Article 14 of the Convention against discriminatory differences of treatment. It would be a breach of Article 6 read with Article 14 to prevent a commercial company from having access to the courts to determine whether its good trading reputation and goodwill had been harmed by defamatory statements.

38. However it would be possible to justify different treatment of natural and legal persons under Article 14 provided that an adequate remedy was available for any harm suffered. Where a government body or other public authority sought to vindicate its governing reputation, it would be compatible with the right to freedom of expression under Article 10 and of the right of access to court under Article 6 to require it to prove bad faith or reckless disregard for truth (as in *Derbyshire County Council v Times Newspapers* [1993] AC 534 (HL)). Similarly, it would be compatible with Article 6 and Article 14 requirements to impose conditions as to costs that would secure equality of arms between unequal parties, such as a powerful commercial organization and a private individual of limited means. But it would be difficult to justify a rule precluding a corporate NGO or a one-person company from suing for libel as distinct from malicious falsehood, and any general rule would be either over-inclusive or under-inclusive in its reach.

7. *Is there a need for scientific or academic “peer-reviewed” articles to be covered expressly by qualified privilege?*

39. Science and academia depend upon critical discourse for progress. The issues involved are almost invariably in the public interest and the process of peer-review requires robust and independent assessment of the research.

40. Extending qualified privilege protection to scientific or academic peer-reviewed articles would have the advantage of preventing the advancement of such knowledge becoming distorted by the threat of libel proceedings. This is of particular importance in relation to scientific and medical research where powerful organisations with vested interests may seek to silence critics.<sup>10</sup> In many cases such publications would fulfil the requirements of the responsible publication defence, however, this is likely to remain a relatively onerous defence because of the need to adduce evidence of how information was obtained and dealt with. The threat of libel proceedings will continue to chill academic and scientific discourse unless such publications are protected by qualified privilege so as to enable authors to publish without fear of litigation, but subject to explanation or contradiction.

8. *You stated that the Government should take bold action in relation to some of the issues on which it is consulting. Could you provide an explanation of what action should be taken (to the extent that you were unable to raise any of those points during oral evidence)?*

41. The Government are consulting on whether or not to extend the *Derbyshire* principle to other public bodies. As discussed above at paragraph 38, in *Derbyshire County Council v Times Newspapers* [1993] AC 534, the House of Lords decided that, since it is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for libel would place an undesirable fetter on the freedom to express such criticism, it is contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for damages for defamation, and that accordingly the council was not entitled to bring an action for libel against the defendant newspapers. Individual councillors or other officers could maintain libel proceedings but not the body itself.

42. This decision was followed in *British Coal v National Union of Mineworkers* (unreported, 28 June 1996) in which the *Derbyshire* principle was applied to British Coal.

43. In *Goldsmith v Bhoyrul* [1997] All ER 268 it was held that it is against the public interest for a political party, even when set up as a corporation, to have any right at common law to maintain an action for defamation. Explaining the decision, Buckley J stated:

“[I]t is clear that the principle which led to [Lord Keith’s conclusion in *Derbyshire*] is that in a free, democratic society those who hold office in government and/ or are responsible for public administration (central or local) must always be open to criticism and it is contrary to the public interest

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<sup>10</sup> Such as in Dr Wilmshurst’s and Dr Simon Singh’s cases.

to permit them to sue in defamation because that would place an undesirable fetter on freedom of speech.

...

“[I]t seems to me that the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is also sufficiently strong to justify withholding the right to sue.” [271]

44. The Bill should provide that if an alleged libel concerns the manner in which a public authority, within the meaning of section 6 of the Human Rights Act 1998, has performed or failed to perform its public functions, by parity of reasoning with *Derbyshire*, the claimant should not be able to use libel law to vindicate its “governing reputation”, but may bring a claim for malicious falsehood. This would not of course prevent individual members of the public authority from being able to use libel law to vindicate reputation.
45. It is important that the Bill addresses the issue of liability for publication on the internet. This is one of the main areas in which the current law is out of date and the Bill would lack credibility if it did not attempt to deal with it.
46. The new adjudication procedure proposed in the consultation paper is an important measure for enabling better management of cases and thus controlling costs. Whilst this Bill is not the appropriate place to deal with procedural and cost issues it is extremely important that the Government deals with these issues urgently. Reform of the substantive law alone will not resolve many of the problems raised in evidence.
9. *What are your views of the two-tier defamation procedure that has been proposed by Professor Mullis and Dr Scott?*
47. A two tier scheme as proposed by Professor Mullis and Dr Scott, in which it would be possible to run different defences on each track, would undoubtedly complicate the law and increase costs.
10. *Professor Mullis and Dr Scott stated that a single publication rule created a risk for people who suffer harm from damaging and defamatory statements that continue to be available after the limitation period has expired. They propose a defence of “non-culpable republication”. What are your views on this defence and the best ways (if any) of dealing with the harm that may be caused to people after the limitation period has expired? For example, should people be able to obtain a declaration of falsity as recommended by the Culture, Media and Sport Committee at para 230 of its report?*
48. Under the Government’s proposals the courts would retain the discretion under section 32A of the Limitation Act 1980 to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. This is sufficient to guard against any injustice.
11. *In your view, would it be compatible with the European Convention on Human Rights to implement the Libel Reform Campaign’s proposal in relation to*

*corporate claimants, namely by removing the right to pursue a claim except for declarations of falsity and malicious falsehood. What would be the practical impact of the Libel Reform Campaign's proposal? In particular, do you think that it would prevent companies from using litigation as an abusive tool?*

49. Please see answer to Question 6 regarding compatibility with the Convention.
50. Common law authority limiting the ability of corporations to sue in defamation already exists. Words which merely disparage goods or products, but do not reflect on personal or trading character, are not defamatory: *Charterhouse etc Ltd v Richmond Pharmacology* [2003] EWHC 1099 (QB).<sup>11</sup> Giving judgment, Morland J stated:
- In my judgment, on the authorities, a libel so called on the product of a provider of a product, whether that product be a service or a manufactured thing or a supplied thing, does not give rise to a cause of action in defamation. If proved to be false by a claimant, it can give rise to a sustainable claim for malicious falsehood. In my judgment, it is the duty of the courts to keep claims alleging trade libels within their proper bounds, particularly having regard to Section 12(4) of the Human Rights Act 1998 and Article 10 of the Convention, bearing in mind that libel is a tort of strict liability.<sup>12</sup>
51. A publication which disparages goods is defamatory where it reflects on the character of the owner or manufacturer of the goods as a person or trader.<sup>13</sup> This is a more principled distinction than one drawn merely between legal and natural persons.
52. Limiting the rights of corporations to sue except for declarations of falsity and malicious falsehood raises problems apart from compatibility with the Convention. It would be wrong to prevent corporations from recovering damages for financial loss when this is precisely the kind of harm that they are likely to suffer. Malicious falsehood requires a high burden of proof, and successful actions are rare. Further, whilst malicious falsehood restricts the availability of damages it may still be used to obtain injunctive relief.<sup>14</sup>
53. Corporations should be restricted to recovering damages for financial loss, to reflect the fact (already acknowledged in the case law) that they cannot suffer hurt feelings. However, financial loss must be clearly defined as loss of revenue, rather than, for example, a reduction in share value or expenditure on public relations. Careful consideration also needs to be given to how not-for-profit organisations should be treated.

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<sup>11</sup> Also *Evans v Harlow* (1844) 5 QB 624

<sup>12</sup> [2003] EWHC 1099 (QB), para 14.

<sup>13</sup> *South Hetton Coal v NE News Ass* [1984] 1 QB 133 CA; *Drummond-Jackson v BMA* [1970] 1 WLR 688 CA.

<sup>14</sup> An increase in the number of injunctions sought and granted has been reported in Australia as a consequence of the changes brought about by the National Uniform Defamation Laws 2005: *Corporations' Right to Sue for Defamation: An Australian Perspective* D. Rolph (2011) 22 Entertainment Law Review (forthcoming).

54. It would be preferable to deal with the problem of inequality of arms, whereby companies use litigation as an abusive tool, by controlling costs. This can be done both by dealing with excessive costs in defamation proceedings generally, and by enabling the courts to intervene to impose limits on costs at an early stage.
12. *The Libel Reform Campaign called for the Reynolds defence to be extended to protect any publication relating to a matter of public interest provided it is made honestly by an author who has not acted recklessly. What are your views on this proposal and the way that it would operate in practice?*
55. The Libel Reform Campaign's suggestion essentially amounts to a reversal of the burden of proof for "public interest" information. This would tip the balance too far in favour of the defendant, and might breach the right to reputation. It would be preferable to include a provision which encourages responsible self-regulation on the part of the press in exercising their right to freedom of expression. The Libel Reform Campaign's proposal to use a much narrower definition of "public interest" information than that which is recognised at common law would remove the existing protection for responsibly published information which did not pass this new test. The proposal does not therefore represent a straightforward extension to *Reynolds*, but would also substantially limit the scope of the defence.
56. The use of declarations of falsity as a remedy would undermine the logic of the responsible publication defence, which, as explained in response to Question 3, is underpinned by responsibility, not truth.
13. *Please explain the differences between Clause 7 of the Government Bill and Clause 13 of your Bill.*
57. The principal difference is that clause 13 of my Bill is harm based, whereas the Government's clause is based on the most appropriate forum with regard to where the defendant is domiciled. Clause 13 of my Bill also purports to apply to cases with an EU connection, whereas the Government's clause applies only to cases where the defendant is domiciled outside the EU.
58. Within the EU, if material is published in a number of different jurisdictions, the claimant has a choice. The claimant can (a) sue the defendant in the place where it is based (in respect of all the publication); or (b) sue the defendant in any place where the "harmful event" within the meaning of Article 5(3) of the Brussels Convention, in this case the publication, has occurred.<sup>15</sup>
59. It is for the national authorities to define as a matter of domestic law what constitutes a "harmful event". The fact that damage is *presumed* in

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<sup>15</sup> Case C-83/93, *Shevill v Presse Alliance* [1996] AC 959 ECJ/HL.

defamation cases in the UK means that “publication” currently constitutes a “harmful event” even if there has been no real damage or loss.

60. My clause 13 provides that the mere fact that publication has taken place within the jurisdiction will not automatically mean that there has been a “harmful event” here. The court would be required to consider whether substantial harm has been caused to the claimant’s reputation in the jurisdiction, and in doing so, take account of the impact of publication elsewhere.

## **Other comments**

### *Substantial harm*

61. It has been suggested that clause 1 should focus on the seriousness of the imputation rather than harm or potential harm. However, this formulation does not take account of consequences. It would be possible for a serious imputation to cause very little harm in certain circumstances, for example where publication was limited (or largely abroad). The focus should remain on the actual or potential consequences of the libel therefore. However, it would be desirable to prevent the front loading of costs by claimants adducing extensive evidence on this issue, through procedural measures, such as enabling the judge to deal with it as an initial issue on paper. Substantial harm would be an appropriate issue to be dealt with under the new adjudication procedure outlined in Annex D of the Government’s Consultation Paper.

### *Single Publication Rule*

62. It has been suggested that it is unnecessary to limit the single publication rule to republication of the same material *by the same author*. Although this was the approach taken in my Bill, I would agree that that the single publication rule should also apply to subsequent republication of the same material by a different author, subject to section 32A of the Limitation Act 1980 which would allow a defamation action to proceed outside the one year limitation period where it is equitable to do so.

### *Juries*

63. Several witnesses have given evidence as to the importance of retaining juries in certain circumstances.<sup>16</sup> This indeed is the aim of clause 15 of my Bill, and the list of circumstances in clause 15(3) seeks to reflect the kind of issues which have arisen in evidence to the Joint Committee. However, whilst the court should retain a discretion to order a jury trial in exceptional

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<sup>16</sup> Mr Alan Rusbridger suggested that juries are important when the issue in question is whether or not a person is telling the truth; Mr Desmond Browne QC cited a case in which Tugendhat J suggested that the discretion should be exercised in favour of jury trial where the defendant is the state or a public authority; Baroness Scotland QC suggested there should be jury trial where the question is one of fact, rather than law, and there is great public interest or importance.



circumstances, this should not detract from the importance of reversing the current presumption in favour of jury trial to enable better case management and a reduction in the costs of libel litigation. Although it is true that jury trials have become less common in defamation, the threat of an expensive jury trial remains a potent weapon with which to suppress publication, as you heard in evidence from Mr Paul Tweed. It would also enable judges to take a more interventionist approach to case management and bring the jurisprudential benefit of reasoned judgments.

### *Remedies*

64. It has been suggested that declarations of falsity should be more widely used as a remedy in defamation proceedings. A power already exists for the court to grant a declaration that the statement was false and defamatory of the claimant under the summary procedure provided for by sections 8 and 9 of the 1996 Act. These sections apply to proceedings worth £10,000 or less where it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried. The procedure is used only in clear cases where there is no defence, no conflict of evidence and all the relevant parties are before the court.
65. The principal objection to extending this procedure is that the court is not sitting in an inquisitorial capacity with the aim of establishing truth or falsity, but adjudicating in an adversarial process between the two parties. Often the issue between the parties is not truth or falsity, but rather whether a statement is an expression of opinion or a statement of fact; or whether the defendant acted responsibly in publishing the information; or what the words themselves mean. In such situations the court should limit the issues to what is necessary or proportionate to make this determination. A declaration of falsity would have no value in this situation because the court would not have inquired into the issue of truth or falsity.
66. It is possible for the parties to agree what the position is, and to set the public record straight by means of a statement in open court. However, even in this situation it would be undesirable for the court to make a declaration to this effect, as the agreement of the parties may have been arrived at by negotiation and compromise and would not necessarily represent the “truth”.
67. The role of the court in an adversarial system is not to act on behalf of the public or to notify other interested parties of the accuracy of a publication, but to adjudicate on the issues before it as presented by the parties involved. Where the defendant does run a defence of justification (or truth), and falsity is therefore the issue between the parties, the judgment of the court is the claimant’s vindication.
68. Similar objections apply to the suggestion that newspapers could be forced to publish an apology following an adverse ruling. An editor may well stand by a publication despite having been unable to convince the court of its truth, or to adduce sufficient evidence of responsible publication. There may be

very good reasons as to why it was not possible to establish the truth, such as the protection of confidential sources. Or, it might be possible to prove most of the allegations but not all, or to prove a less serious meaning than that which the court accepts. Forcing a newspaper to publish an insincere apology would be an unacceptable infringement on editorial discretion and at odds with the principle of a free press.

*July 2011*

**Oral Evidence, 27 April 2011, Q 1—40**

Evidence Session I

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

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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.



## Libel Reform Campaign

### Written Evidence, Libel Reform Campaign (EV 04)

The Libel Reform Campaign is a coalition of three charities, English PEN, Index on Censorship and Sense About Science, that is calling for reform of the libel laws to protect free expression and the rights of citizen critics against silencing by powerful interests.

In November 2009, after a year-long inquiry, the 'Free Speech Is Not For Sale' report published by English PEN and Index on Censorship concluded that English libel law has a negative impact on freedom of expression. In June 2009, Sense About Science launched the Keep Libel Laws out of Science campaign to investigate and publicise libel threats against scientists such as Simon Singh and Peter Wilmshurst. In December 2009 the three charities formed the Libel Reform Campaign with the support of a cross-party parliamentary group convened by Dr Evan Harris.

The case for reform has been made by the public, by Parliament and by representatives of science, the arts and human rights:

- 249 MPs, the majority of those eligible, signed EDM 423 on Libel Law Reform, making it the largest new EDM during the last Parliament.
- 21 peers contributed to the second reading debate on Lord Lester of Herne Hill's Private Members Defamation Bill.
- At the 2010 general election all three main parties made a manifesto commitment to reform the libel laws to protect free expression.
- Over 50,000 people signed a petition calling for reform of the libel laws in the public interest, thousands wrote to their MPs and hundreds came to a mass lobby of Parliament in March 2010, described by then Justice Secretary Jack Straw as 'the biggest public meeting I've seen in Parliament for many years'.
- Hundreds of high profile figures including the Poet Laureate, the Astronomer Royal, Stephen Fry, Dara Ó Briain, Professor Richard Dawkins, Monica Ali, Jonathan Ross, Professor Brian Cox and Jo Brand have publicised their support; commentators, performers, scientists and authors from over 30 countries have written and spoken on the need to reform our libel laws.
- Mumsnet, Amnesty UK, the NUJ, *Which?* and Facebook have joined medical Royal Colleges, publishing companies, human rights NGOs, scientific societies, patient and consumer groups to highlight the adverse effects of the libel laws on their members, and to add their voices to the campaign (there is a complete list of organisations at <http://www.libelreform.org/who-supports-us>)

The need for reform has been recognised by international bodies:

- The UN Committee on Human Rights reported in 2008 that England's laws are affecting freedom of expression worldwide on matters of public interest.
- In 2010 President Obama introduced legislation to protect US citizens from the rulings of our libel courts.
- A specially convened Ministry of Justice Working Group on libel reported in March 2010 that debates in the public interest are being chilled.



- Senior judges, including the Lord Chief Justice of England and Wales and the Master of the Rolls, have criticised the current laws as likely to chill matters of public interest.
- A Culture, Media and Sport Select Committee report in 2010 found that scientific and other discussions in the public interest were being adversely affected by the libel laws and recommended reform.
- In July 2010 Justice Minister Lord McNally announced that the Government will bring forward a draft defamation bill, which was published in March 2011.

England's current libel laws are unfair, unnecessarily complicated and out of date. They are stifling public debate worldwide. Citizens are paying this high price for a law that protects the wealthy and powerful from criticism, but offers little protection for people whose reputations are genuinely damaged.

- The laws are unjust. They are unbalanced against defendants; claimants can pursue actions where publication has caused them no substantial harm, and corporations can threaten expensive actions against individuals, NGOs and newspapers.
- Defences in libel law are complicated and inadequate: the available defences of justification and fair comment are complicated, the courts are unpredictable in agreeing what the defendant's words mean, and whether they are expressions of opinion or statements of fact. Hence, there is great uncertainty about whether a publisher will win out if a good case is defended. Moreover, there is no reliable defence for discussion of matters of public interest.
- The laws are out of date: the definition of publication in English libel law, where each newspaper sold or website hit means a fresh libel, doesn't reflect the age of global communication and the internet. The current law makes Internet Service Providers and forum hosts liable for material hosted on them, putting ISPs in the position of judge and jury over content they know nothing about.
- The laws are stifling debate: the complexity of the laws means cases can take years; they are heard in the High Court so routinely cost £200,000 and often cost over £500,000. Rich organisations can exploit this to force retractions of material they simply don't like and cause people to hold back information and opinions from the public domain.

Reforming the laws in favour of free expression and protection for the citizen will require fundamental changes which must be made by Parliament. Reform of libel law requires:

- easier 'strike out' of trivial or inappropriate claims
- more effective and clearer defences
- modernisation to adapt to the internet
- rebalancing of the law to protect the ordinary individual or responsible publisher
- reduction in costs (and therefore more equal access for all parties).

The measure of success will be:

- whether bullying and trivial libel actions are reduced

- whether the chill on free speech and publication on matters in the public interest is lifted
- whether there is improved protection for internet publication, including “citizen publishing” and historical archives
- whether individual citizens who have been defamed by a malicious, reckless or irresponsible false allegation can gain an effective remedy.

The combination of the law reforms set out below, alongside measures falling outside the proposed libel reform bill to reduce costs and improve access to justice, would tackle the problems of

- the chill on free expression and the freedom of citizens to pursue public interest discussions
- the outrageous costs of defending libel actions and
- the poor reputation of our libel laws internationally

The Libel Reform Campaign will submit full written evidence on specific proposals in the draft bill shortly. Below is our blueprint of what a defamation bill should contain.

## **1 Easier ‘strike out’ of trivial or inappropriate claims**

### 1.1 Higher hurdles for launching a libel action

To avoid expense (and the associated chill) incurred in being served with or having to defend libel proceedings in cases below a reasonable threshold of likely harm in a jurisdiction covered by the courts of England and Wales.

For proceedings to be served, claimants should be required to show that the publication in the jurisdiction is likely to cause serious harm to their reputation here given the extent of publication outside the jurisdiction.

## **2 Stronger defences**

### 2.1 A statutory public interest defence which is clear and effective

To recognise the public interest in free debate about matters of power and responsibility, to protect the citizen journalist, to speed resolution and to overcome the current restrictive, national-media oriented common law Reynolds defence.

It should be a defence that the publication, whether report or opinion, was on a matter of public interest. This defence would be defeated if the publication was malicious or reckless.

Any requirement of responsible publication must allow for the nature and context of the publication.

### 2.2 Fairer defence of justification (truth)

To resolve ambiguity in meaning, where the defendant claims the words are justified, in favour of permitting publication rather than punishing it.

The meaning of the words complained of should be one which the defendant reasonably intended and which is likely to have been perceived by the reader, rather than any possible meaning asserted by the claimant.

### 2.3 Strengthened defence of fair comment (honest opinion)

To replace the existing fair comment defence which is not well described and is overly complex.

The defendant should merely be required to hold the opinion honestly, based on one or more facts known at the time. The defence should cover all expressions of opinion.

#### 2.4 Extension and updating of statutory qualified privilege

To ensure that the statute is up to date and consistently applies the principle of qualified privilege (which describes privileged communication where there is some protection from libel action - such as the fair and accurate reporting of parliamentary debates and the provision of timely information about court proceedings) in accordance with the need to protect the public interest in transparency.

Qualified privilege should include more international settings and meetings, including the proceedings of NGOs and scholarly research.

### **3 Bringing the law up to date with an internet age**

#### 3.1 Application of a Single Publication Rule

To abolish the multiple publication rule where every download of online material represents a separate publication and to limit liability for archive material to one year from original publication.

The law should apply a single publication rule with a limitation period of one year from original publication, except in extraordinary circumstances where the interests of justice so demand.

#### 3.2 Updated provisions for online services

To protect free speech in the context of self-publishing and the internet age, and to overcome the privatisation of censorship whereby service providers and forum hosts remove content published by others in response to a threat of libel action.

Claimants should be required to approach the author or primary publisher of the words complained of, where this is known, to seek correction or removal.

### **4 Preventing bullying by powerful complainants while enabling individual citizens to protect reputation**

#### 4.1 Incorporate and extend the law as stated in *Derbyshire CC v Times Newspapers Ltd*

To protect the freedom of citizens in a democracy to comment on and criticise bodies in a position of economic power or regulatory authority.

Under existing law public authorities cannot sue in libel (unless the publication was malicious or reckless). This should be incorporated into the statute and extended to any organisation performing a public function, for example private companies providing security services to prisons.

#### 4.2 Restrict the ability of companies and other non-natural persons to sue in libel

To stop the libel laws offering greater protection to those who already wield greatest influence in society and to prevent cases of libel bullying.

Incorporate malicious falsehood into the statute as a remedy in libel for all non-natural persons (ie companies and other organisations). Cases would succeed where the claimant shows that the publication of a defamatory false statement has or will cause actual financial harm and is reckless or malicious; and otherwise corporate claimants should be restricted to being able to set the record straight via the courts rather than pursue publishers for financial awards.

## **5 Measures outside a Defamation Bill**

### **5.1 Reduce the cost of litigation in libel actions**

To increase access to justice for claimants and defendants and to reduce the chill on free speech.

The Government's response to the Jackson Review of Civil Litigation Costs should reduce costs while retaining a viable conditional fee system. Other mechanisms include amending the Court Rules so that libel actions are served in designated County Courts rather than in the High Court.

### **5.2 Develop alternatives for the settlement of disputes**

To increase access to justice and enable rapid dispute resolution and remedy in cases of defamation, where claimants currently suffer as defendants do from prolonged expensive proceedings.

Alternative dispute resolution (ADR), regulator intervention and discursive remedies should be researched and developed.

*April 2011*

## Written Evidence, Dr Evan Harris, Libel Reform Campaign (EV 05)

### Introduction

Evan Harris was MP for Oxford West and Abingdon 1997-2010. In 2009 he founded the Libel Reform Campaign bringing together Index on Censorship, English PEN and Sense about Science. This followed both the publication of the Index/PEN report, *Free Speech is not For Sale* and Sense about Science's Keep Libel Laws out of Science campaign prompted by Simon Singh's case.

During his time in Parliament Evan Harris was responsible for amendments to Bills which curbed the proposed law on criminalising incitement to religious hatred (2006), abolished blasphemy offences (2008), abolished seditious libel and criminal defamation offences (2009). He chaired the cross-party Parliamentary Libel Reform Campaign (2009-10). He is a trustee of Article 19.

The Libel Reform Campaign set as its interim objective that every political party should include in their manifesto a commitment to libel reform, which was achieved in March 2010. Evan Harris now serves on the steering group of the LRC with representatives from Index on Censorship, English PEN, Sense about Science and Dr. Simon Singh.

The Libel Reform Campaign seeks to:

- improve the defences available to defendants
- preserve (and where necessary enhance) the ability of individual citizens who have been seriously and substantially harmed by false and irresponsible or malicious publications to obtain vindication and, if appropriate, damages for this.
- reduce the costs for both plaintiff and defendant in taking an action or defending one's publication
- reduce the chill on free expression, on matters of public interest, caused by the existing laws of defamation

This submission deals with the last of these points. Other submissions from the Libel Reform Campaign, to which I have contributed, will deal with specific measures in the draft Bill and in the consultation paper that touch on all the requirements of libel law reform.

### **1. The chilling effect of libel laws**

1.1 Free expression is legitimately interfered with when a publication can be shown to be libellous, that is, that it damages in a significant way the reputation of someone without a lawful defence. **However free expression is currently chilled - on matters of public interest - in a number of ways, which libel law reform must address in order to be effective.**

#### **1.2 Free expression is chilled by**

- the fear of losing a libel action
- the fear of losing money even when successfully defending a libel action
- the fear of being engaged in costly and time consuming litigation of uncertain outcome

**This chilling of free expression is caused not just by the receipt of a libel suit but also by the threat of one or the fear of one.**

## **2. The limited role of improving existing defences and/or providing new defences**

2.1 There is an important role for existing and new defences in improving free expression

- Existing defences must be made more robust so that those who are sued, but whose publication is legitimate, do not end up losing
- Existing defences must be made more robust in order that those defending a libel action have more confidence that they will not lose at the end of the court process and are therefore not unduly pressured into settling through fear of losing.
- Existing defences must be seen to be made more robust by this legislation, **without our having to wait for five or more years of case law to demonstrate that they are more robust**, in order that publishers have more confidence that they will not lose a libel action when in fact their words can be defended. In addition, ensuring that existing defences are seen to be more robust would have the benefit of deterring those with unjustifiable, vexatious, trivial and/or bullying claims from pursuing them.

2.2 However, even the achievement of all three of the above approaches will have only limited effect, even if the cost of defending a claim is reduced. This is because as set out in para 1.2 above many publishers will simply not take the risk of being engaged in a lengthy, time-consuming and costly process, and would rather retract their words, however justified, and settle, rather than defend them.

2.3 While this situation exists, and would continue to exist even if defences are made more robust, the chilling of criticism of powerful individuals and interests will remain. **The availability of more robust defences does not prevent the chilling effect of the potential of lengthy, costly and uncertain court processes impacting on lawful free expression, in particular investigative journalism.**

## **3. The approaches needed to reduce the chilling effect of English and Welsh libel laws**

3.1 To tackle the chill discussed in para 1.2 above, it is vital that reform of libel law:

- a) Provides for early disposal (strike out or summary judgement) of vexatious, trivial and/or bullying claims which are not justified, and is *clearly seen to do so*. **(Early disposal)**
- b) Prevents, and is *clearly seen to prevent*, libel actions that are vexatious, trivial and/or bullying from being launched in the first place. **(Preventing launch)**
- c) Removes, *and is seen to remove*, potential causes of action or the inappropriate imposition of liability, in areas where existing causes of action and liabilities for libel have clearly had an unjustified and disproportionate impact on free expression. **(Reducing exposure)**
- d) Prevents, and is known to prevent, even the threat of libel action, by ensuring that such a threat would be an empty threat because the libel action would be

doomed to be struck out, or impossible to properly launch in the first place. Lawyers would be forced to advise clients that there is no cause of action or no prospect of success. This would prevent the chill that comes from powerful individuals and interests using the threat of libel proceedings to deter investigative journalists and citizen critics from investigating or writing about their activities, when these activities engage the public interest. **(Preventing threats)**

3.2 Therefore in order to remove or reduce the chilling effect of libel laws on free expression, libel law reform must provide the means by which points (a)-(d) above are delivered. It must be recognised that this cannot be delivered solely, or even mainly, by improving existing defences or introducing new defences, even if there was confidence that the new or improved defences would assist defendants without a decade of new case law being developed on them.

#### **4. Specific reforms needed to reduce the chill on free expression from libel laws**

4.1 The following matters before the joint committee are of vital importance for increasing free expression on matters of public interest, for limiting the ability of powerful individuals and interests using libel law to bully, and for tackling the chill identified in para 1.2 above

##### **A) The substantial harm test in Clause 1 of the draft Bill**

This must be a proper hurdle, before libel actions can be launched, and be seen to be. In its current proposed form it is not such an effective hurdle. The Libel Reform Campaign will make in its submissions some clear suggestions as to how this important Clause can be improved to deliver its objectives.

##### **B) The Public Interest Defence in Clause 2 of the draft Bill**

In its current form this is not much more than a statutory version of the existing common-law *Reynolds* defence, extended to non-media defendants. Even if it is wider in its scope than the Reynolds defence it is not radically different. In any event it could well be subject to prolonged testing in the courts as to its scope and interpretation. In order for publications on matters of public interest to be seen to be free from the chill that currently surrounds them, significant improvements will be needed to the shape of this defence and the Libel Reform Campaign and others will be making specific proposals.

##### **C) Protection of scientific and academic debate with QP – Clause 5 of the draft bill**

There has been cross-party recognition of the need to provide significantly more protection for scientists and academics conducting their business from libel actions. Such libel actions or the threat of them directly, or even more so indirectly through their chilling effect, prevent the necessary (often robust) critical discourse that takes place in medical, scientific and other academic arenas. In this area it is particularly important to prevent libel law having the chilling effects identified above.

**An additional approach that needs to be taken, therefore, is to provide that peer-reviewed scientific and academic publications are regarded as privileged by being added to the list of privileged material and occasions set out in the Schedule 1 to the 1996 Act and dealt with by Clause 5 of the draft Bill.**

The logic of this position is very clear:

- 1) Reporting of medical and scientific conferences, the content of which is generally subject to less checking than the content of peer-reviewed scientific and academic papers, is already proposed to be covered by QP in Clause 5. It is logical to grant protection to peer-reviewed publications which, compared to the content of scientific meetings, are subject to more oversight and which are even more important to the public interest than conferences.
- 2) Unlike publications that report or record the proceedings of medical and scientific meetings, peer-reviewed publications invariably provide for – and indeed encourage – a right of reply consistent with the architecture and basis of Part 2 of the Schedule.
- 3) There is authority (in case law) for the view that the public interest in the unfettered publication of peer-reviewed scientific and academic literature is precisely the sort of public interest for which some of the occasions currently covered by Qualified Privilege came to be so covered.
- 4) While peer-review is not claimed to be perfect, it is a robust check for the validity and relevance of published views, and is an expensive and time-consuming process. Two things flow from this:
  - a) It would be a significant benefit if publications which were peer-reviewed (and in addition of course subject to stringent editorial oversight) did not have to incur the additional cost of being checked for libel before publication or being insured for libel.
  - b) It would be an incentive for scientific and academic publishers to use peer-review if the costs of instituting a peer-review system could be partly off-set by the savings on libel insurance and legal checks.
- 5) Being unequivocally covered by Qualified Privilege would mean that *any libel action would not only be liable for early disposal, but would be clearly seen to be protected in this way*, thereby reducing the fear of libel action among authors and publishers who invest in peer-review as a way of seeking to enhance the validity and relevance of their publication.
- 6) A significant advantage for free debate on matters of scientific (and therefore public) interest, is that it would provide indirect protection for non-peer reviewed commentary on peer-reviewed material. Both the existing ‘fair comment’ common-law defence and the proposed new “honest



opinion” statutory defence provide protection for statements of opinion, on matters of public interest, based on one or more facts *or based on privileged material*. This means that, for example, editorials or letters to the editor in medical journals, or other commentary publications which are not themselves peer-reviewed, but which criticise the peer-reviewed literature (and make clear that they are doing so), would be clearly covered by the honest opinion defence, in the absence of malice. Therefore defendants in cases like *BCA vs Singh*, would more clearly be able to avail themselves of this defence.

- 7) There is an alternative approach that has been suggested during consideration of the draft bill.
  - a) Since peer-reviewed publication clearly demonstrates responsibility, authors and publishers could rely on the public interest defence set out in Clause 2 of the draft Bill. However, as set out above, the cost of contesting a claim up to the point at which such a defence would be successful is prohibitive – or at least a major deterrent - to many scientific authors and publishers who may be up against pharmaceutical companies or environmental polluters with deep pockets. Covering such publications by Qualified Privilege rather than by the “Responsible Publication in the Public Interest” defence is more transparently protective of this work and is more clearly liable to lead to early disposal through summary judgement if an action is launched.
  - b) It has been suggested that Clause 2 includes a ‘deeming’ provision, whereby peer-reviewed publications are explicitly deemed to be responsible and in the public interest. But it is not clear that this is better than using QP for the reason given in (6) above (honest opinion on privileged material). The honest opinion defence refers to the comment being made on the basis of a fact or privileged material, and it is not clear that something covered by a ‘deeming’ provision in Clause 2, in the public interest defence, would as clearly be seen as being privileged material, in the same way as something that is covered in the QP Schedule. Furthermore, a Clause 2 deeming provision would not capture the requirement for a right of reply that is provided for by inclusion in part 2 of the Schedule. Even the common-law *Reynolds* defence, which is in fact sometimes called the *Reynolds* privilege, is not unanimously considered to be ‘proper’ privilege by the judges *in obiter* the most recent leading case (*Jameel vs Wall Street Journal*).

- 8) While there could always be legal wrangling over whether a publication which claims to be privileged by virtue of being peer-reviewed, was subject to a sufficiently robust peer-review:
- a) Other material or occasions purportedly covered by QP are often subject of debate as to whether QP applies so this would not be unique to peer review.
  - b) More argument takes place in court about the validity of QP when it is dependent on the nature of the recipients of the publication (see *Bowler vs RSPB* for a recent example) than when it is dependent merely on the occasion (ie nature) of the publication
  - c) There is greater agreement across the world of academic and scientific publishing of the requirements of peer-review than there is on other matters included in Part 2 of the Schedule (e.g. “scientific conferences”, “public meetings”) so it is less liable, in the vast majority of cases, to be contentious. By reference to the other terminology used in the Schedule it does not require any more legal definition
  - d) There is a public policy benefit in ensuring that journals that purport to conduct peer-review do indeed do so robustly, and they would be incentivised to do so by only being confident in relying on QP if they met basic community standards or peer review.

**D) Removal of liability from internet service providers (ISPs) and web-hosts who do not exercise editorial control of content**

There is currently *essentially private censorship*, outside the rule of law, of web-based material by virtue of threats made to ISPs and web-hosts that they will be liable for statements made by others. The Consultation Paper fails to mention the existing chill on web-based publications caused by the potential liability of third-parties, and the threats that can be made against them.

There is no harm in such 3<sup>rd</sup> parties deciding to take down offending material voluntarily. But the extra-judicial policing of web-based publications through threats to third-parties must be prevented. This can be done by providing that liability of such third-parties in libel should only result from the decision of a court. This would mean that a powerful individual or interest could not shut down any criticism of their conduct or their products by spraying around threats of liability to innocent third-parties who will seek to avoid being caught up in defamation proceedings to which they are unconnected other than by being a innocent provider of internet services.

The Libel Reform Campaign will be proposing a mechanism by which complainants can secure, without great expense, a court decision which transfers liability to 3<sup>rd</sup> party internet service providers or web-hosts, subject to certain basic tests being passed to exclude trivial, vexatious, bullying and unjustified actions.

**E) Removal of the ability of non-natural persons (including corporations) to sue in libel**

Much of the chill that exists against investigative journalists and citizen critics comes from corporations who use the threat of or the launching of libel action as

a means of (at best) reputation management and (at worst) suppression of criticism by deterring investigative journalism. Some corporate libel complainants search the internet for references to themselves and threaten libel action in a manner which is bullying and contrary to the interests of public policy. Removing the right of corporations to sue in libel would at a stroke remove much of the chill from the worlds of investigative journalism and the citizen critic.

Corporations and other non-natural persons would still have plenty of remedies available to them to guard against malicious allegations which cause them financial harm, or against nefarious advertising or other business practices by their rivals. Any particularly damaging allegations, if they can be shown to harm the reputation of those leading the company, can be sued in libel by the company directors as individuals. In addition consideration could be given to making declarations of falsity by the court more readily available to non-natural persons to enable them to get vindication and to require, where appropriate, publishers to set the record straight. This would immediately tackle the problem of inequality of arms for cases where the powerful complainant is a non-natural person. The Libel Reform Campaign will be among those arguing for this.

### **Summary**

*Free expression is currently chilled - on matters of public interest - in a number of ways, which libel law reform must address in order to be effective. Free expression is chilled by*

- the fear of losing a libel action
- the fear of losing money even when successfully defending a libel action
- the fear of being engaged in costly and time consuming litigation of uncertain outcome

*This chilling of free expression is caused not just by the receipt of a libel suit but also by the threat of one or the fear of one.*

*For this once in a generation opportunity for libel reform to be truly effective in delivering more free expression (while retaining the ability of individuals whose reputations are seriously harmed by malicious or reckless and false publications to sue in libel for vindication and damages) five clear steps need to be taken beyond what is proposed in the draft bill.*

- Beefing up of the substantial harm test in Clause 1
- Improving the Public Interest Defence in Clause 2
- Protection of scientific & academic debate with QP for peer-reviewed publications – Clause 5
- Removal of liability from internet service providers (ISPs) and web-hosts who do not exercise editorial control of content
- Removal of the ability of non-natural persons (including corporations) to sue in libel

*April 2011*

## **Supplementary written evidence, The Libel Reform Campaign (EV 13)**

The Libel Reform Campaign was set up by Index on Censorship, English PEN and Sense About Science to obtain major changes in the English libel laws to better protect free expression. We have enclosed our response to the Joint Committee on the Draft Defamation Bill's call for evidence.

The Libel Reform Campaign welcomes the government's commitment to reforming English libel law. The UN Human Rights Committee, the House of Commons Culture, Media and Sport select committee, and the Ministry of Justice working group on libel all raised significant concerns over the negative impact of libel on free speech. All three main political parties made a commitment to libel reform in their general election manifestos, and the coalition agreement included a pledge to libel reform. This consensus for reform provides a unique opportunity to overhaul these failing laws. This opportunity must not be wasted with a partial codification of the existing common law.

We are delighted that the Committee is now considering the draft Defamation Bill and related matters in detail. In this submission we set out our answers to your questions regarding the Bill. Each organisation behind the Libel Reform Campaign – Sense About Science, Index on Censorship and English PEN – will separately submit short additional evidence showing the impact of the current law on scientists, investigative reporters and authors, respectively.

The purpose of libel law is to give individuals redress where their psychological integrity has been violated by an ungrounded attack on their reputation. Several lawyers and legal academics have argued powerfully for the social importance of reputation as an aspect of the Article 8 right to privacy. Some even say that they believe in free speech, but that reputation is as or more important. This seems difficult to sustain. Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: "I may not agree with [your reputation], but I will defend to the death your right to [protect] it". It seems unlikely.

Or in the words of the preamble to the Universal Declaration of Human Rights: "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want [and the right to protect their reputation] has been proclaimed as the highest aspiration of the common people". Not four freedoms but five? No: reputation, whilst indeed protected under the UDHR, has never been one of the public's primary concerns.

There is a good reason for this. Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression. Individuals whose reputations are unjustifiably damaged deserve the right to vindication. But to valorise reputation too highly risks creating precisely the situation we find ourselves in now, where free speech has to defend itself against attacks which may or may not be motivated by a genuine desire to protect one's reputation.

The challenge is to balance the law in such a way that speech which can be justified in terms of its public interest value, its truthfulness, or its expressive value as honest opinion is not prevented, whilst unjustifiably damaging speech is deterred.

The need to find this balance is understood by the 55,000 signatories to the Libel Reform Campaign's online petition; the 249 MPs who signed EDM 423 calling for libel reform in the last Parliament; and the 60 organisations which have backed our general calls for reform – including the Royal College of General Practitioners, Amnesty International, the Publishers Association, the Royal Statistical Society, the University and College Union, Mumsnet and Christian Aid.

We have identified the following four areas where the draft Defamation Bill currently falls crucially short of the public's expectations from reform:

- **The law chills speech on matters of public interest and expressions of opinion on matters in the public realm.** The draft Bill includes an approximate codification of the common law Reynolds defence for responsible publication. This has been shown to be impracticable for many contemporary authors and publishers, including NGOs, scientists and online commentators. We believe that, where genuine public interest can be demonstrated (rather than merely statements which may interest the public), and where any errors of fact are promptly corrected, the burden of proof in this defence should be shifted to the claimant, who should prove malice or recklessness on the defendant's part. And in order to avoid legal uncertainty, we believe that the 'public interest' test should be removed from the defence of honest opinion.
- **The law is used by corporations and other non-natural persons to manage their brand.** The draft Bill does not include measures to prevent non-natural persons from suing in libel. Whilst non-natural persons may benefit from some human rights, they cannot benefit from Article 8's protection of psychological integrity. Their ability to sue in libel should be tightly restrained, as recommended by the Culture, Media & Sport select committee. We propose four remedies that would be more appropriate for non-natural persons than suing in libel for damages.
- **The law does not reflect the nature of 21st-century digital publication.** Without tackling the role of online intermediaries, the law encourages private censorship by bodies which are neither authors nor traditional publishers. The Bill must be revised to allow judicial oversight of threatened libel actions against online hosts and intermediaries, by requiring claimants to obtain a court order against such a secondary publisher where the original author or publisher of a statement cannot be identified or contacted.
- **The law allows trivial and vexatious claims.** The substantial harm test in the draft Bill does not raise the bar sufficiently high to prevent time-wasting and bullying claims by litigants who are not interested in justice. We recommend that this test should be considerably strengthened, to prevent vexatious use of the law to silence legitimate criticism. A high threshold should not prevent claims from individuals whose psychological integrity has been violated by a libellous statement.

As Justice Minister Lord McNally has said, the law as it stands is “not fit for purpose”. There are other areas in the Bill where we wish to see improvements but we are particularly concerned that, without these changes, the Government’s stated ambition of turning English libel law from a “laughing stock” into an “international blueprint for reform” will fall flat.

These substantive legal reforms must be accompanied by changes to procedure – on which we will submit further evidence – and costs. The cost of defending a defamation action has a significant chilling effect on freedom of expression. Defendants are routinely left tens of thousands of pounds poorer after a libel action, even after a successful defence as in the cases of Dr Simon Singh and Dr Ben Goldacre/the *Guardian*; and it is not uncommon for even successful defendants to be left £100,000 out of pocket.

In our submission to the Government’s consultation on the Jackson review of costs in civil litigation we proposed a maximum recoverable uplift of 25% on Conditional Fee Agreements (CFAs), in an attempt to reduce the chilling effect of costs on defendants without preventing claimants from launching an action; we also argued that Part 36 offers ought to be incentivised for defendants against claimants; and that there should be no increase in damages for claimants who obtain a judgement no better than their Part 36 offer. Without the availability of CFAs for both claimants and defendants, alongside meaningful procedural reforms, including staged maximum recoverable costs, the Article 8 and 10 rights of all those without deep pockets may be infringed. An outline of our Jackson submission is available here: <http://tiny.cc/8070j>.

We would be happy to discuss our evidence with you at any point.

This submission has been prepared by the organisations leading the Libel Reform Campaign, English PEN, Index on Censorship and Sense About Science, and Dr Evan Harris, Parliamentary advisor to the Libel Reform Campaign.

Libel Reform Campaign  
Evidence to Joint Committee on the Draft Defamation Bill

**Clause 1: definition of defamation; a ‘substantial harm’ test  
Should there be a statutory definition of ‘defamation’? If so, what should it be?**

1. Clause 1 should include a definition of ‘defamation’ or a statutory *interpretation* of ‘defamation’ to replace arcane definitions in case law. This would deter the bringing of trivial cases which restrict free expression in the area of parody or ridicule or where there is no real damage to reputation. We will submit supplementary detail on this.
2. The need for this definition is clear from the following examples:
  - In *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 QB, Tugendhat J set out the definitions of defamation from the last 200 years and concluded that some of those definitions were, taken on their own, not sufficiently damaging to be defamatory. In that case, concerning the practice of a professional writer, the judge ruled that not all slights on professional skill or competence were defamatory.

- In ***Berkoff v Burchill*** [1996] 4 All ER 1008 the claimant was able to sue in libel for a description (“hideously ugly”) which in the context of the article (and in any context these days) could not be said to concern character, conduct, professional competence, or a state of health which should amount to defamation.
- Criticisms of products produced by someone should not ordinarily be seen as giving rise to a claim in libel. **Rodial**, the manufacturer of a ‘boob-job’ cream that claimed to deliver breast augmentation from topical application, threatened libel action against a consultant plastic surgeon who criticised the claim.
- **Mumsnet** have demonstrated that they were in receipt of letters from a putative claimant claiming that parodic insults on a discussion forum were defamatory. It needs to be made clear that insulting public figures, for example by hyperbole, in the context of comedy or parody does not give rise to a libel action.

**What are your views on the clarity and potential impact of the ‘substantial harm’ test, including its relationship to other elements of the current law such as the presumption of damage in libel claims?**

3. The test must be made meaningful and effective in order to deter trivial and hopeless claims and to avoid unnecessary frontloading of costs for the claimant and defendant. The current drafting is inadequate because:
  - It provides less of a hurdle than the existing common law.
  - The test is not yet effective enough to counteract any greater potential for front-loading of costs.
  - It is a missed opportunity since a meaningful threshold of harm test would be effective at deterring weak and vexatious claims.
4. In addition to our proposal to narrow the definition of defamation (see question 1 above), we have four proposals to bring this test into an effective harm test.
  - I. The test should be ‘serious and substantial’ (because substantial in law merely means non-trivial or negligible, while serious means that it is serious enough to bring before a court). Existing case law talks of serious harm as the test, and a substantial harm test could end up being a lower test than is available in common law.
  - II. Harm to reputation from publication in the jurisdiction must be judged having regard to the extent of publication elsewhere as set out in Lord Lester’s Bill (clause 13 (2)).  
 This would protect authors or publishers domiciled in the EU (so not covered by clause 7 of this Bill) from claimants with a reputation elsewhere in circumstances where the majority of publication is outside England and Wales such that the proportion here does not cause serious and substantial harm. This would have protected **Dr Peter Wilmshurst** from a prolonged and potentially ruinous libel action from a US corporation for remarks made to a Canadian journalist in the USA and which appeared on a Canadian website with little readership in this country.

- III. The clause should incorporate the common law stipulation (*Jameel v Dow Jones* [2005] EWCA Civ 75) that no case should proceed where:
  - a. there is no real prospect of vindication, or
  - b. the vindication obtained – such as it is – is likely to be disproportionate to the cost of achieving it.

This provision has been more effective than the serious harm threshold in allowing weak cases to be struck out. It responds to the ECHR Article 10 requirement that interference with freedom of expression should be proportionate.
- IV. There should be mandatory strike out, as proposed in the Lester Bill, in the event of the claim not passing the ‘serious and substantial’ test. The current discretionary approach leaves open the threat that frivolous or hopeless cases might proceed. This means such cases could still have a chilling effect on legitimate expression due to uncertainty.

## **Clause 2: Responsible publication in the public interest**

### **Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not, what changes should be made?**

5. The responsible publication defence does not overcome the concerns associated with the existing Reynolds defence. The Reynolds defence is unpredictable because there is uncertainty about how the list of circumstances that establish the defendant’s responsibility will be applied when a case reaches court. The courts’ recent efforts to discourage the application of the circumstances as an exhaustive list are, and would continue to be, undermined by the inherent presumption that publication is irresponsible unless the defendant can prove otherwise.
6. The public interest defence needs to be as simple and clear as possible and to reflect the importance of free speech on matters of public interest. Protection of free speech in an open society recognises that open debate and the search for truth requires the publication of uncertain or one-sided material and that the law should err on the side of publication. The public interest defence needs to be available and of benefit to writers such as **Dr Simon Singh** and **Dr Ben Goldacre** (who were both seeking to discuss misleading claims in health care) which is not the case under the current common law, nor under the proposed statutory defence.
7. We recommend a new approach which protects genuine public interest statements while providing safeguards to ensure that statements which cannot be shown to be true but which were made in good faith on a matter of genuine public interest are corrected.

**The defendant should show that the publication was on a matter of public interest. If it passes that hurdle then the defence should only be defeated if the claimant is able to show that the publication was malicious or reckless (grossly negligent).**

8. This would be combined with a number of safeguards and measures to protect those who are the subject of statements that cannot be shown to be true:



- I. A narrower definition of public interest to make clear that this is not about salacious gossip. The current Press Complaints Commission (PCC) definition (see Appendix 1) is narrower and would serve the purpose of giving the PCC more status as a guide to good practice. As this is the definition used by the press it provides an accepted benchmark.
- II. To benefit from the defence in this form the defendant must be willing to publish a correction or explanation for those statements it accepts cannot be justified. We fully accept the view that there is no public interest in unjustified statements going uncorrected. This is analogous to an 'offer of amends' procedure and would greatly incentivise early resolution of cases where the public interest was clearly engaged and there was no malice but factual statements were wrong (or opinions unjustified) or could not be shown to be true.
- III. If a defendant seeks to defend the original publication and chooses not to print a correction or explanation (see above), the burden should be on the claimant to show, having regard to the nature and context of publication and publisher, that publication was irresponsible. This would make the defence more effective than the existing common law Reynolds defence.
- IV. In further recognition that there is no public interest in the propagation of false information, claimants should be able to obtain a declaration of falsity from the court in all cases where they can prove a defamatory allegation of fact to be false. A free-standing declaration of falsity could be sought as an alternative to a libel action but should also be an option within any libel case where a defence of justification/truth fails or is not attempted.

We believe that this combination of a stronger public interest defence with a free-standing remedy of a declaration of falsity would achieve the desired rebalancing of the law in favour of free speech and the public interest, while allowing a discursive remedy where falsehood is proved. This free-standing remedy has been proposed or supported by those on both sides of the libel debate.

9. The claimant could still seek a declaration of falsity in the event that the public interest defence succeeds but the facts supporting the defence are proved to be wrong.
10. Along with this approach, we believe that it is desirable, for clarity, to abolish the common law Reynolds defence.
11. If the common law of Reynolds remains we recommend that the statutory changes closely mirror the common law list to prevent extended and expensive legal argument on any differences.

**Should the meaning of 'public interest' be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?**

12. See previous section for our answer to this.

### Clause 3: Truth

**What are your views on the proposed changes to the defence of justification? In particular, would it be appropriate to reverse the burden of proof in relation to individuals or companies?**

13. The Libel Reform Campaign has accepted that there is no consensus for a reversal of the burden of proof in libel (but see below for our approach for companies and other non-natural persons). Instead we have recommended that the defences in clause 2 and for internet publishers and intermediaries are improved and that chilling and trivial claims are prevented by our proposals for companies and the strengthening of the harm threshold test in clause 1.
14. The current drafting of clause 3 is not satisfactory for the following reasons:
  - I. Changing the defence from 'justification' to 'truth' implies a narrowing of the defence because it suggests that what is necessary is to demonstrate the 'whole truth and nothing but the truth' of the statement, when in fact the existing case law and the proposed statute considers a statement justified when the 'substantial truth' of a defamatory imputation is demonstrated.
  - II. The defence of truth should not fail only because one meaning alleged by the claimant is not shown to be substantially true, if that meaning would not materially injure (see sub-paragraph 3 here) the claimant's reputation in the light of what the defendant has otherwise shown to be substantially true. This was provided for in clause 5(3) of Lord Lester's Bill.
  - III. There is possible confusion between the language here ('materially injure') and the language in clause 1 ('serious and substantial harm'). We suggest that the language should be consistent.

### Clause 4: Honest opinion

**What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened?**

15. The common law fair comment defence has not afforded sufficient protection to the expression of honestly held opinions. Seven directors of **Sheffield Wednesday Football Club** launched a libel action after critical comments were posted on the **Owlstalk** internet forum. The directors viewed the comment "What an embarrassing, pathetic, laughing stock of a football club we've become" as defamatory. In order to better protect such expressions of opinion we support the change of name of the defence.
16. However, we believe that the public interest test should be removed, for the following reasons:
  - I. Public interest is very broadly defined in the common law defence. It means, effectively, not 'private'. As such it is redundant because privacy law covers publication on matters of a private nature (medical records etc).

- II. The transposition of the term into statute causes confusion with the narrower use of the term 'public interest' in clause 2 (public interest defence).
  - III. People should be free to express an opinion, without risk of liability, on any matter in the public realm, not just matters in the public interest.
  - IV. The inclusion of a public interest requirement might cast doubt on the availability of the defence to opinions published in the context of a work of art or literature (e.g. a memoir, or a novel, play or poem with some resemblance to real figures).
17. The new condition 3, an "honest person could have held the opinion", is not clear and would limit the practical value of the defence. It is not clear from the proposed drafting whether this means that an honest opinion requires the defendant:
- I. to be aware of the pre-existing fact or privileged material at the time of the comment; or
  - II. to make any reference, even in general terms, if it is not already obvious from the context (e.g. theatre or restaurant review), to the underlying fact or privileged material.
18. If neither is required this may not deliver fairness for an individual defamed. The Libel Reform Campaign believes that there are far better ways to rebalance the law towards defendants (see our suggestions on clause 1 and clause 2 in particular) than making complex and uncertain revisions to the fair comment (honest opinion) defence at the point in its evolution where its ground rules have been made clearer.
19. The Supreme Court has clarified the ingredients of the defence in its recent judgement in ***Spiller v Joseph* [2010] UKSC 53**. If it is the intention of condition 3 to cover the existing position as set out in ***Spiller v Joseph***, this should be made clear. Otherwise it may also lead to extensive and complex new case law which would add to expense.

**Is its relationship to the responsible publication defence both clear and appropriate?**

20. See answer to previous question on the different connotations of 'public interest' in the two clauses.
21. The responsible publication defence covers statements of fact and opinion. This is sensible as it prevents prolonged argument on whether statements are factual or are opinion. Defendants should, as usual, be able to rely on either defence (rather than choose one at an early stage) for statements of opinion, as the draft bill allows.
22. Lord Lester's Bill allowed statements of honest opinion based on matters covered by the public interest defence to benefit from the honest opinion defence, whereas the draft bill allows the defence only for statements of honest opinion made on the basis of facts shown to be substantially true or which are privileged in the conventional sense. Statements of opinion on matters already determined to have 'public interest privilege' should be able to benefit from the honest opinion defence.

## **Clause 5: Privilege**

### **Are the proposals to extend the defences of absolute and qualified privilege appropriate and sufficient?**

23. In order to give clear protection to peer-reviewed academic publications such publications should be included under statutory qualified privilege. This would effectively prevent threats of libel action interfering with this form of publication. This is consistent with the inclusion of reports of scientific conferences because researchers are professionally obliged to report the findings of their research. Furthermore, such publications are subject to explanation and contradiction, which has been a requirement of part 2 of the schedule.
24. We recommend that statutory qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired.
25. In both of these cases, we see no reason why the narrow historical basis for existing statutory qualified privilege should restrict valuable and effective law reform in this area where the forms of publication covered are sufficiently discrete.

## **Clause 6: Single publication rule**

### **Do you agree with replacing the multiple publication rule with a single publication rule, including the ‘materially different’ test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired?**

26. We welcome the introduction of a single publication rule. We agree that it should not apply where the manner of subsequent publication is materially different. The single publication rule should still apply to republication by a different publisher which does not materially alter the manner of publication.
27. However, we remain concerned about the position of archives. Those who publish material online as part of an archive are not exercising editorial control. They should therefore benefit from the protections available to secondary publishers, in the absence of a court ruling declaring any specific material to be defamatory or libellous. We outline these protections in our answers to the consultation question on the internet.
28. We are also concerned about the position of open access online scholarly publishing. It is now a common practice for journal content that is published initially on a subscription basis to be made publicly available after a period of time – often more than a year. This is a desirable practice as it enables scientific and medical advances to be accessible to developing countries that cannot afford subscriptions. This practice would place such a form of publication at risk of being considered materially different and not protected by the single publication rule. There should be a specific exemption in the definition of a materially different manner to cover the narrow circumstances of scholarly journals being converted into an open access form.

## Clause 7: Jurisdiction – ‘Libel tourism’

**Is ‘Libel tourism’ a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach?**

29. Libel tourism is indeed a problem. Its extent cannot be measured in final judgements because the vast majority of defendants are forced to settle early because of the inequality of arms and the inadequacy of the current libel laws. In addition, overseas claimants are able to use the threat of libel proceedings to intimidate publishers into unjustified self-censorship and into taking down material from the internet.
30. We support this clause, therefore, as it tackles the problem of non-EU defendants being inappropriately sued in London courts.
31. We recognise that EU law means that this clause and the provisions behind it only apply to non-EU defendants and that this provides no restrictions on the ability of ‘libel tourists’ to sue in England and Wales where the defendant is domiciled in the EU. We believe that this requires further action to deal with bullying claims and have recommended this in our response to clause 1.

## Clause 8: Jury trial

**Do you agree that the existing presumption in favour of trial by jury should be removed? Should there be statutory (or other) factors to determine when a jury trial is appropriate?**

32. We recognise the merit of improving access to justice for both sides through lower costs. One way this can be facilitated is reducing the need for extensive pre-hearings on what can later be put before a jury and through early resolution of non-jury trials. We support the right to a jury trial being retained under the circumstances described in the consultation.

## Consultation issues

**Does the current law provide adequate protection for internet service providers (ISPs), online forums, blogs and other forms of electronic media?**

33. The internet is the front line for free speech today. We are witnessing an unprecedented revolution in communication. However, under the current law internet intermediaries (including ISPs, search engines, web hosts, social networks and discussion boards) are not adequately covered.
- Some entities such as search engines and mere conduits are exempt from liability in almost all circumstances although this is not clear in the statute.
  - Other intermediaries such as those who host user-generated content or blogs are forms of **secondary publisher** (some are the online version of bookshops, providing a platform but having no relationship at all to content), and do not have the information or resources to check the material against claims. They should not be liable to the same degree as **primary publishers** such as authors or editors. However currently they are especially vulnerable to vexatious threats from claimants, for whom they are easier targets than the authors who may be willing and able to defend the publication.

34. It is therefore essential that the defamation bill modernises the law in order to provide the necessary protection for freedom of expression online. Without this reform, the most significant development in freedom of speech in 600 years will be disabled by what has been dubbed the privatisation of censorship, as published material is removed on the basis of threats and fear with no judicial oversight.
35. The main problem under the current law is that parties who were not responsible for composing, writing, editing or approving allegedly defamatory content may be sued for libel. There is pressure to censor in response to the threat of a libel action, with the result that content is removed, often an entire website rather than the offending comment. Powerful interests regularly threaten internet intermediaries because this is an effective tool of 'reputation management' that is, getting rid of unwanted criticism, such as about a product or service.
36. This problem has been recognised for many years:  
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 secondary publishers under some pressure 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, whom claimants often see as "tactical targets". There is a possible conflict between the 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.  
Law Commission: Defamation and the Internet, 2002.  
Para 1.12
37. However, the problem is not adequately recognised in that part of the consultation document which discusses the existing arrangements.
38. It cannot be right that those without editorial control of publications, and who are not in a position to judge the material complained of, are forced to censor material for fear of liability. The author has no opportunity to justify or defend their words and no proper access to the protections in clauses 1, 2, 3, 4 and 5 of this Bill. It can lead to disproportionate interference with the primary publisher's right to free speech, which is contrary to Article 10 ECHR.
39. An appropriate scheme such as our 'court-based liability gateway' (below) would have the following properties:
- Ensure that authors and editors (so called primary publishers) are primarily responsible for their words
  - Provide more certainty to online secondary publishers, such as web hosts and other internet intermediaries, and indeed to off-line secondary publishers, such as booksellers
  - Encourage post-publication moderation of user-generated content by being clear that this does *not* bring liability
  - Be fair and low cost to those defamed

- Be manageable by the courts and straightforward in legislative terms
- Align English law properly with the provisions of the E-Commerce Directive and ensure that English law is updated with regard to search engines and other developments on the internet

40. A broad outline of such a scheme might be as follows:

- I. A claimant must obtain a court authorisation in order to apply potential liability to a secondary publisher such as a web-host or internet intermediary. (This would be regardless of whether a claimant has asked the web-host or intermediary to remove the allegedly defamatory material on an informal discretionary basis and it has not been removed.)
- II. In the application for that authorisation the claimant must specify:
  - a. the words or matters complained of and the person (or persons) to whom they relate
  - b. the publication that contains those words or matters
  - c. why the claimant considers the words or matters to be defamatory
  - d. the details of any matters relied on in the publication which the claimant considers to be untrue
  - e. why the claimant considers the words or matters to be harmful in the circumstances in which they were published
  - f. whether and when they contacted any primary publisher (either directly or via others) to request that material be removed and what the response of the primary publisher was, and
  - g. whether and when they contacted any secondary publisher to request 'take down' on a voluntary, discretionary basis (this is merely to aid the court in deciding any further notice period)
- III. Potential liability of secondary publishers should flow, without prejudice to decisions or pleadings in later proceedings, only from the issue of an initial court decision, that on the basis of the information available to the court:
  - a. the publication passes the serious and substantial harm test in clause 1
  - b. the material is not obviously a privileged publication
  - c. a cause of action in libel will not be prevented either
    - by virtue of the clause 7 provisions regarding the appropriate forum for defendants who are not EU domiciles;
    - by limitation under the single publication rule; or
    - any other basis;
  - d. the alleged web-host or intermediary is not exempt from liability under existing law (e.g. mere conduits under the E-commerce directive)
  - e. the alleged secondary publisher is not already liable by virtue of being a primary publisher
  - f. primary publishers have been contacted and have not come forward to defend the publication, and
  - g. the most appropriate (proximal) intermediary is the subject of the application (i.e. the one who can remove the words not just the website)

41. This scheme can be delivered at a level below the High Court and on the basis of a written application, and the respondent can join proceedings via an appeal. Further details of options for such a scheme are being supplied in a separate response to this consultation, together with an analysis of what changes are required to update English law. Our primary concern is that the scheme would

remove the problems of automatic removal of material and privatised censorship described.

**What are your views on the proposals that aim to support early-resolution of defamation proceedings? Do you favour any specific types of formal court-based powers, informal resolution procedures or the creation of a libel tribunal?**

42. We are strongly in favour of early resolution of defamation proceedings. Claimants and defendants want quick and cheap resolution of cases. Only bullies want protracted proceedings. For example the US medical device company **NMT Medical** used prolonged and potentially ruinous proceedings to try to silence cardiologist **Dr Peter Wilmshurst**.
43. We are currently conducting research into a range of options to resolve both preliminary issues and the entirety of an action through early determination and/or forms of ADR under a steering group chaired by Sir Stephen Sedley. These alternatives to a High Court trial are crucial in reducing the costs of a libel action, facilitating access to justice, and restoring legal certainty for both claimants and defendants. We welcome the Government's proposal for some form of early resolution procedure within the Court system but alongside this, careful consideration must be given to whether the High Court is the most suitable forum for all defamation disputes.
44. We note the Government is, separately, consulting on increasing the exclusive jurisdiction limit of money claims so that all civil cases worth under £100,000 must be issued in the County Courts. The average amount of damages in libel cases falls well below this. We believe it is worth considering whether defamation actions may be started in the County Courts, where specialist judges may be appointed. The proposed early resolution hearing will not be about legally complex issues that need to be argued over by Queen's Counsel in front of a High Court judge. If a case is particularly complex the powers to transfer to the High Court remain. This procedure could be set alongside a requirement for the parties to try to use alternative forms of dispute resolution, either before or after the early resolution hearing.
45. In addition, we agree with most of the considerations raised in Annex D of the Government's consultation. We would urge the Government to strengthen the Pre-Action Protocol – and its policing – whether or not these measures are adopted.
46. The proposed procedure needs to be activated early on in a case. Costs will not be reduced if significant amounts of work have been done pre-proceedings, or if it takes six months after the issue of the claim for the hearing to take place.
47. Clear trigger points are needed so that the issues to be resolved at the early hearing are identified quickly, and this leads to a hearing being automatically listed. To provide such clarity, specific defamation forms could be developed for the claim and defence.
48. Once the hearing has taken place and a decision has been made on preliminary issues, the parties should be given the opportunity to settle the case without need



for a full hearing on the issues, or at least to narrow the issues in dispute. We believe that serious consideration ought to be given to whether the parties should be required to try to solve the remaining issues through the use of alternative dispute resolution at this point. If, after a specified period, the case has not settled, the parties could be required to serve a statement of issues in dispute, allowing the Court to make appropriate directions.

49. Court fees could be staged appropriately so that there is a lower fee to pay to issue the claim and deal with the early hearing, and further fees payable if the case needs to progress.
50. We would also urge the Government to ensure that the early hearing is used as an opportunity to ensure that cases are carefully managed by the courts. Whether the new hearings take place in the High Court or County Court, they would benefit significantly from case management to prepare the matters for trial. The Court could also exercise its powers to control the costs of the parties at this stage.

**Is there a problem with inequality of arms between particular types of claimant and defendant in defamation proceedings? Should specific restrictions be introduced for corporate libel claimants?**

51. There is a problem with inequality of arms between wealthy and powerful claimants and defendants. The law as it stands gives more power to those who already hold the most power in society.
52. In addition there is a problem, not identified in the consultation document, with organisations using threats of libel actions and lengthy proceedings to close down criticism of their products or practices.
53. Well-known examples of corporate bodies and other organisations using the libel law to silence criticisms include:
  - **McDonalds** who sued two campaigners in the McLibel Case
  - **NMT Medical**, an American medical devices company, who sued British cardiologist Dr Peter Wilmshurst for whistle-blowing comments he made to a Canadian journalist in the USA and then again when the *Today* programme covered the issue 2 years later
  - The **British Chiropractic Association** who sued Dr Simon Singh for his comments on the lack of evidence for the efficacy of spinal manipulation for childhood asthma and colic
  - **GE Healthcare** who initiated proceedings against Danish radiologist Henrik Thomsen for comments he made about the safety of an MRI contrast medium
  - Israeli lie detector manufacturer **Nemesysco** who threatened to sue an academic journal for publishing a critical review of their technology, which was under review by the UK Department of Work and Pensions and in use by local authorities across the UK
  - **Rodial Ltd**, a cosmetics company, who threatened to sue a plastic surgeon for comments she made in the *Daily Mail* about the validity of claims that a skin cream could cause breast enhancement
  - **Trafigura** who sued Newsnight for libel over reports on the impact of dumped toxic waste in West Africa

54. Restrictions should be introduced for corporate claimants and other non-natural persons. While non-natural persons, including companies, are entitled to some human rights protection – for instance, media companies enjoy some Article 10 protection because they are the means through which individual citizens are able to receive and impart information and ideas – they do not have psychological integrity or a family life to protect, and cannot therefore benefit from the development of an Article 8 ‘right to reputation’ in Strasbourg case law.
55. We believe it is reasonable and appropriate to treat non-natural persons (including corporate bodies) in a different way from natural persons. Non-natural persons do need a remedy for damage to reputation with respect to Article 10 (2).
56. We believe that all non-natural persons suing in libel should have to show actual (or likely) financial harm and show malice or recklessness. Non-natural persons also have other means with which to vindicate their reputations:
- I. Malicious falsehood. This requires a claimant to show actual financial harm (special damage), that a statement was false, and to demonstrate that the defendant was motivated by malice or was reckless as to the truth of the statement. It could be placed on a statutory footing, and could involve a reversal of the burden of proof in the malice test when a case involves two companies.
  - II. Libel actions by company directors (or equivalent) in their own name which pass the serious and substantial harm threshold; this clearly preserves a cause of action for serious defamation relating to allegations of misconduct and defamation of small (and family) businesses and other organisations synonymous with an individual.
  - III. As suggested above under the public interest defence (clause 2) a free-standing remedy of obtaining a declaration of falsity should be made available for this purpose (they are currently only available under a summary judgement or via an application under section 6 of the Human Rights Act). Where actual (or likely) financial damage has also been demonstrated the courts should have the discretion to require publication of the declaration.
  - IV. Other remedies have recently been made available – such as the Business Protection from Misleading Marketing Regulations 2008 (BPRs) which came into force on 26 May 2008 and deal with false advertising claims amongst other issues.
57. This would bring private entities into line with public authorities who are currently barred from using libel by the Derbyshire principle. We support the Derbyshire principle being brought into statute and made applicable to all non-natural persons who perform a public function when the allegedly defamatory statement relates to that function. It is important that state services which are increasingly delivered by private bodies are not able to use the threat of libel action to prevent comment by citizens. It is also important to avoid discrimination: private contractors delivering public services should not be given greater protection than public bodies doing the same.

## Overarching issues

### **Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?**

58. The Libel Reform Campaign welcomes the government's commitment to reforming English libel law. The UN Human Rights Committee, the House of Commons Culture, Media and Sport select committee, and the Ministry of Justice working group on libel all raised significant concerns over the negative impact of libel on free speech. All three main political parties made a commitment to libel reform in their general election manifestos, and the coalition agreement included a pledge to libel reform. This consensus for reform provides a unique opportunity to overhaul these archaic laws. This opportunity must not be wasted with a partial codification of the existing common law.
59. We are delighted that the Committee is now considering the draft Defamation Bill and related matters in detail. In this submission we set out our answers to your questions regarding the Bill. Each organisation behind the Libel Reform Campaign – Sense About Science, Index on Censorship and English PEN – will separately submit short additional evidence showing the impact of the current law on scientists, investigative reporters and authors, respectively.
60. The purpose of libel law is to give individuals redress where their psychological integrity has been violated by an ungrounded attack on their reputation. Several lawyers and legal academics have argued powerfully for the social importance of reputation as an aspect of the Article 8 right to privacy. Some even say that they believe in free speech, but that reputation is as or more important. This seems difficult to sustain. Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: "I may not agree with [your reputation], but I will defend to the death your right to [protect] it". It seems unlikely.
61. Or in the words of the preamble to the Universal Declaration of Human Rights: "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want [and the right to protect their reputation] has been proclaimed as the highest aspiration of the common people". Not four freedoms but five? No: reputation, whilst indeed protected under the UDHR, has never been one of the public's primary concerns.
62. There is a good reason for this. Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression. Individuals whose reputations are unjustifiably damaged deserve the right to vindication. But to valorise reputation too highly risks creating precisely the situation we find ourselves in now, where free speech has to defend itself against attacks which may or may not be motivated by a genuine desire to protect one's reputation.
63. The challenge is to balance the law in such a way that speech which can be justified in terms of its public interest value, its truthfulness, or its expressive value

as honest opinion is not prevented, whilst unjustifiably damaging speech is deterred.

64. The need to find this balance is understood by the 55,000 signatories to the Libel Reform Campaign's online petition; the 249 MPs who signed EDM 423 calling for libel reform in the last Parliament; and the 60 organisations which have backed our general calls for reform – including the Royal College of General Practitioners, Amnesty International, the Publishers Association, the Royal Statistical Society, the University and College Union, Mumsnet and Christian Aid.

**Will the draft Bill and Consultation proposals adequately address the problems that are associated with the current law and practise of defamation? If not, what additional changes should be made?**

65. We have identified the following four areas where the draft Defamation Bill currently falls crucially short of the public's expectations from reform:

- **The law chills speech on matters of public interest and expressions of opinion on matters in the public realm.** The draft Bill includes an approximate codification of the common law Reynolds defence for responsible publication. This has been shown to be impracticable for many contemporary authors and publishers, including NGOs, scientists and online commentators. We believe that, where genuine public interest can be demonstrated (rather than merely statements which may interest the public), and where any errors of fact are promptly corrected, the burden of proof in this defence should be shifted to the claimant, who should prove malice or recklessness on the defendant's part. And in order to avoid legal uncertainty, we believe that the 'public interest' test should be removed from the defence of honest opinion.
- **The law is used by corporations and other non-natural persons to manage their brand.** The draft Bill does not include measures to prevent non-natural persons from suing in libel. Whilst non-natural persons may benefit from some human rights, they cannot benefit from Article 8's protection of psychological integrity. Their ability to sue in libel should be tightly restrained, as recommended by the Culture, Media & Sport select committee. We propose four remedies that would be more appropriate for non-natural persons than suing in libel for damages.
- **The law does not reflect the nature of 21st-century digital publication.** Without tackling the role of online intermediaries, the law encourages private censorship by bodies which are neither authors nor traditional publishers. The Bill must be revised to allow judicial oversight of threatened libel actions against online hosts and intermediaries, by requiring claimants to obtain a court order against such a secondary publisher where the original author or publisher of a statement cannot be identified or contacted.
- **The law allows trivial and vexatious claims.** The substantial harm test in the draft Bill does not raise the bar sufficiently high to prevent time-wasting and bullying claims by litigants who are not interested in justice. We recommend that this test should be considerably strengthened, to prevent vexatious use of the law to silence legitimate criticism. A high threshold should not prevent

claims from individuals whose psychological integrity has been violated by a libellous statement.

66. As Justice Minister Lord McNally has said, the law as it stands is “not fit for purpose”. There are other areas in the Bill where we wish to see improvements but we are particularly concerned that, without these changes, the Government’s stated ambition of turning English libel law from a “laughing stock” into an “international blueprint for reform” will fall flat.

**Are there any other issues relating to defamation that you would like to raise?**

67. These substantive legal reforms must be accompanied by changes to procedure – on which we will submit further evidence – and costs. The cost of defending a defamation action has a significant chilling effect on freedom of expression. Defendants are routinely left tens of thousands of pounds poorer after a libel action, even after a successful defence as in the cases of Dr Simon Singh and Dr Ben Goldacre/the *Guardian*; and it is not uncommon for even successful defendants to be left £100,000 out of pocket.

68. In our submission to the Government’s consultation on the Jackson review of costs in civil litigation we proposed a maximum recoverable uplift of 25% on Conditional Fee Agreements (CFAs), in an attempt to reduce the chilling effect of costs on defendants without preventing claimants from launching an action; we also argued that Part 36 offers ought to be incentivised for defendants against claimants; and that there should be no increase in damages for claimants who obtain a judgement no better than their Part 36 offer. Without the availability of CFAs for both claimants and defendants, alongside meaningful procedural reforms, including staged maximum recoverable costs, the Article 8 and 10 rights of all those without deep pockets may be infringed. An outline of our Jackson submission is available here: <http://tiny.cc/8070j>.

69. We would be happy to discuss our evidence with you at any point.

This submission has been prepared by the organisations leading the Libel Reform Campaign (English PEN, Index on Censorship and Sense About Science) and Dr Evan Harris, Parliamentary advisor to the Libel Reform Campaign.

On behalf of the Libel Reform Campaign

*May 2011*

**Appendix 1 – PCC Editors’ Code on public interest:**

1. The public interest includes, but is not confined to:
  - i) Detecting or exposing crime or serious impropriety.
  - ii) Protecting public health and safety.
  - iii) Preventing the public from being misled by an action or statement of an individual or organisation.

## Written Evidence, English PEN (EV 18)

English PEN is the founding centre of a worldwide fellowship of writers, promoting the freedom to read and the freedom to write. Together with Index on Censorship and Sense about Science, we lead the Libel Reform Campaign which has already made a joint submission to your committee, detailing recommendations on the clauses of the Government's draft Defamation Bill. You asked the Libel Reform Campaign to give additional evidence on the nature of the 'chilling effect' of our defamation laws. This additional submission provides qualitative evidence of how the libel chill operates in practice.

English PEN's membership is made up primarily of authors and publishers. Our libel law significantly affects these groups, who contribute in excess of £5 billion per annum to the UK economy and incalculable value in terms of cultural diplomacy abroad and creative vitality at home. It is crucial that a new defamation law alleviates this problem, or else the UK risks slipping into a literary silo, where books published around the world are not available in this country, and publishers choose to commission only 'safe' and uncontroversial subjects.

English PEN works with international writers who face both civil and criminal defamation actions for questioning rich and powerful interests in their home countries. What is of deep concern to us is that, in addition to the censorship they face in authoritarian regimes, these writers also receive writs issued at the High Court in London. This chill was recognised by the UN Human Rights Committee who condemned the silencing of writers from across the globe by our libel laws as a matter of international concern.

Beyond the impact on freedom of expression, there is also an economic impact. The Publishers' Association have estimated our archaic libel laws costs their members around 1% of their turnover. This affects small publishers most acutely. When we asked the Chief Executive of one small publishing house (who asked to remain anonymous) how he defends libel actions, his reply was simply "we don't." Unlike large media corporations with in-house lawyers, small publishers do not have the resources to fight legal actions. This means that any lawyer's letter which threatens action, even over trivial claims, is a complete and effective censor. This can only be solved by the twin-track approach of clearer defences and cheaper procedures.

Lisa Appignanesi, former President of English PEN, faced significant legal challenges with her book *Mad, Bad and Sad*. Her concerns over the chilling effect of our defamation laws galvanised English PEN to produce our joint report with Index on Censorship, *Free Speech Is Not For Sale*. Lisa told us:

[Literary] 'expression' is monitored and inevitably chilled. Contentious books don't get taken on. Others are dampened down. Lawyers always err on the side of caution.

In *Mad, Bad and Sad*, my two-hundred year history of the rise and rise of the mind-doctoring professions, I was asked to 'temper' my descriptions of parts of the pharmaceutical industry. What I had said was backed-up by other studies, but corporate sensitivities are great and even negative 'suggestions' can be provocative and considered libellous. We've seen how scientists regularly

have their articles refused by peer-reviewed journals, whose reviewers may have other than 'science's' interests in first view.

Estates too can be quick to censor or threaten the legal route. So publishers will advise cuts or different formulations.

However, even pre-publication caution does not guarantee publishers are immune from libel threats and they can end up expending significant resources in fighting trivial claims. In a letter to English PEN, Maddie Mogford, Legal Director at Little, Brown, explained how the current law is wholly unbalanced in favour of claimants:

"[Conditional Free Agreements] allow claimants to sue with little risk to themselves... This was our dilemma in the *Slave* case, where the claimants were on CFAs and lived in Sudan so there was no prospect of recovery of costs. CFAs are under review under a separate consultation, and if Jackson LJ's proposals are adopted, costs should stop being as onerous as success fees and insurance premiums will no longer be recoverable from defendants. The new costs regime should also deter the more speculative claimant hoping for a quick settlement due to the threat of his CFA.

The book Mogford refers to, *Slave*, was the account of a woman kept as a modern slave by a former Sudanese diplomat in London. Sale of the book was delayed for two years before the claimant withdrew the libel action, unduly censoring the author and publisher. The company was left significantly out of pocket, despite the account being found truthful and in retrospect in the public interest. The use of a CFA incentivised the claimant and his lawyers to take the case further than they should have done, but it was the substantive law that allowed the claim to proceed in the first instance. Clear defences of justification and public interest would have allowed a judge to stop proceedings much earlier – and the mandatory strike out of claims which are not 'serious and substantial' (see point 4 in the Libel Reform Campaign submission) would have stopped the censorship of this publication.

Under the current law, even *fiction* writers face uncertainty when writing about recent periods in history. The case of *Johnny Come Home*, a novel by Jake Arnott, is emblematic of the problem with the current law. In this case, a fictional character in Arnott's book ('Tony Rocco') coincidentally held the same name as the stage name of musician Frederick Were, who had a hit single in the 1960s. Although no malice was intended, and despite the fact that *Johnny Come Home* was quite obviously a work of fiction, Were sued for libel. Arnott and the publishers Hodder & Stoughton settled out of court, and the entire print-run of the book was pulped. The fact a novelist can unwittingly libel a person he had no knowledge of, in a fictional setting, is of deep concern. A 'serious and substantial harm' clause would set a sufficiently high bar to preclude such actions beginning.

The expression of opinion is an essential element in any kind of literature, particularly literary memoir. In 2009, the Whitbread Award-winning author Rachel Cusk published *The Last Supper: A Summer in Italy* about a trip she took with her husband and daughters. In an interview with Elle Magazine she described how her book was bowdlerised as a result of legal action:

I got sued for libel ... and they withdrew the book in England. So the American edition got lawyered to death, but it's a slightly butchered corpse, that one.

ELLE: Which character was angry?

Cusk: It was the English people in the hotel in the tennis chapter, and in fact the wider community. They were all apparently mad. I read something in the paper that they were all up in arms, but no one told me that.

ELLE: And what did you take out about them?

Cusk: Everything.

Rachel Cusk does not deny that she was critical, even rude, about the people she met. However, opinions such as these are crucial to literary freedom and insightful writing. If literary opinions cause offence then the sanction should be social, not legal – for it is not illegal to dislike other people. A broad possible defence of honest opinion (see LRC submission points 15 - 22) must be included in the Bill, otherwise the chill may continue to affect memoirists and political diarists, and our cultural and political discourse will be all the poorer for it.

When authors choose to write about the rich and famous the libel chill is particularly apparent. Andrew Morton (the biographer of Diana, Princess of Wales) has significant experience of this. His last two books, on the American actors Tom Cruise and Angelina Jolie, have not been published in Britain. In a statement to PEN, he told us:

To put this situation in context both books have been published in Vietnam, China, and Serbia, not places normally associated with liberal attitudes towards freedom of speech.

Before both books were published they underwent rigorous scrutiny from American lawyers with regard to accuracy and authenticity of evidence.

In spite of this care, both editorially and legally, no publisher in Britain would risk publication. Michael O'Mara Books, Harper Collins, and Hodder & Stoughton, among others, all decided against publication for fear of the possibility of expensive litigation. One publisher rejected the Angelina Jolie book out of hand based on their fear that 'Angelina Jolie might *think* about taking action.'

This is the practical demonstration of what is known as 'libel chill', the decision to shy away from publication because of the outrageous cost and difficulty of defending a libel suit, or even the notional prospect of one.

The practical results of Britain's libel laws and the interpretation of the privacy legislation mean that the art of biography or life writing, certainly of the living, is no longer practised in Britain. Ironically, biography is one of the few literary genres which is essentially Anglo-Saxon in origin, first made fashionable by Dr Johnson.

Worryingly, writers and publishers are second guessing whether an individual they wish to write about is litigious – in effect, self-censorship. During the Second Reading of Lord Lester's Private Members Bill in the House of Lords, on 9 July 2010, the historian Lord Bew, a member of the joint committee, outlined this impulse:

There is a great deficiency in the Oxford history of Ireland that I completed two years ago when it deals with a number of key living figures. I am well aware that by the normal standards of historical proof there are things that should have been said in that book that have not been said, for the same reason - that Oxford University Press was frankly concerned and it was better to avoid



any difficulty. In a sense, I feel that my readers are to some degree cheated. If one is writing the Oxford history of one's own country, one should have a substantial degree of freedom - certainly larger than that we currently have-to express the truth about controversial matters.

Lord Bew went on to raise the following point about the 30-year rule:

We are moving in a different culture with respect to release of public records as we move from a 30-year to a 20-year rule. That is going to create problems for our libel laws, because documents will come out about leading public figures that will contain embarrassing and controversial material. In the present state of our libel laws, comment on that will actually be inhibited.

Since the Government's move to a 20-year rule is intended to increase transparency and openness in our politics, it would be ironic indeed if defamation law was in turn used to suppress discussion of these documents. A clean and clear public interest defence is required to ensure that historians are able to freely discuss reports of inquiries (such as the Saville Inquiry, which Lord Bew cited) and government papers.

The author Michela Wrong, provides a stark example of self-censorship within the publishing industry. Her book *It's Our Turn To Eat* details corruption in Kenya. During the pre-publication process, she was surprised to receive advice suggesting that she remove critical references to European anti-poverty campaigners, but keep in critical references to Kenyans, because Europeans had more of a propensity to sue.

Defamation law is supposed to restrain irresponsible publishing. Instead, it is chilling responsible publishing. As I explained in oral evidence to the Joint Scrutiny Committee on 4 May,

It is not that they are *restraining* themselves from publishing something deeply unpleasant; they are simply avoiding getting into a possible confrontation with someone very threatening.

This fear stems from the uncertainty of the law, not just procedures and high costs.

The recommendations made in the Libel Reform Campaign submission, a 'serious and substantial harm' test (Clause 1), stronger public interest and honest opinion defences (Clause 2, 4), and preventing corporations from suing in defamation, would all serve to inject a degree of certainty around the law.

English PEN strongly believes in the right to reputation. The PEN International charter, endorsed by all our members, explicitly states the moral necessity for authors to be honest and responsible in what they write. However, as the examples we have given demonstrate, the effect of the existing laws, precedents and procedures seriously chills responsible writing, and literary freedom. The clauses presented in the Government's draft Defamation Bill acknowledge the breadth of the problem and that substantive changes are required. However, we do not believe that the measures offered by the draft Bill offer the clarity and certainty that is required for substantial reform. We urge the joint select committee to recommend to the Government to adopt the recommendations outlined in the Libel Reform Campaign

submission, and enact a bold new defamation law that is fit for purpose in the 21<sup>st</sup> century.

*June 2011*

## Written Evidence, Index on Censorship (EV 48)

*Index on Censorship is Britain's leading organisation promoting freedom of expression. It was founded as a magazine in 1972, when editor Michael Scammell and a group of writers, journalists and artists, led by the British poet Sir Stephen Spender, took to the page in defence of the basic human right of freedom of expression for writers in the Soviet Union and Warsaw Pact countries. Together with our partners in the Libel Reform Campaign we have made a joint submission to your committee, but the additional examples here aims to give greater detail about the chilling effect of our libel laws.*

*No one, not even advocates of the status quo such as Professor Mullis and Dr Scott, dispute that our libel laws have a chilling effect on publication of matters of scientific inquiry and public interest. Part of this chill arises from internet intermediaries who find themselves in the position of defending themselves against a libel claim, but who are not best placed to judge whether content is defamatory (as neither the author, nor a primary publisher who trades content for payment).*

*In this submission, we also explore how local authorities, and other public bodies, have taken to launching libel actions against bloggers and citizen critics giving strength to the government's contention that the Derbyshire judgement should be placed in statute. Our evidence also shows why this ought to be extended to corporations and other incorporated bodies.*

Finally, we outline how in practice the existing public interest defence case law (commonly cited as the 'Reynolds Defence') is of little practical use to NGOs and needs to be widened and strengthened. In our joint submission to the committee, we give our view as to how a public interest defence could be framed to protect NGOs.

### **The chilling effect on internet intermediaries**

*In our Libel Reform Campaign submission, under 'Consultation Issues', we argue that:*

Other intermediaries such as those who host user-generated content or blogs are forms of secondary publisher (some are the online version of bookshops, providing a platform but having no relationship at all to content), and do not have the information or resources to check the material against claims.

They should not be liable to the same degree as primary publishers such as authors or editors.

However currently they are especially vulnerable to vexatious threats from claimants, for whom they are easier targets than the authors who may be willing and able to defend the publication.

*The following are examples of why this is significant:*

### **Moveforward.com**

*MoveForward.com runs a series of online forums including ExpatForum.com, TotallyProperty.com, Property Community.com, and AustraliaForum.com. All provide a space for online discussion about emigration, international property and expatriate life. The owner Bob Sheth approached the Libel Reform Campaign after receiving a significant number of threatening letters regarding supposedly defamatory content all posted by third parties on his web forums. After investigating one letter, Sheth found that it had been written by a Masters student with no specific knowledge of English libel law. The letter instructed Sheth to:*

*"remove all comments, either positive or negative, in the name of <<name removed>> and we require your confirmation that you will not accept any further postings or comments, either positive or negative, in our name at any time in the future."*

Adding:

“With this letter you have been formally placed on notice and advised of this prohibition order.”

In another letter, in echoes of the way Carter-Ruck approached potentially defamatory material about MRI Overseas Property, particular umbrage was taken at one comment on a thread that stated:

“[the developers] have cut many corners and are delivering sub-standard apartments, which are not what we were promised at the point of sale.”

The letter threatened:

“This is an untrue, factually incorrect and misleading statement... please confirm by return that the entire thread will be removed and let us have your undertaking that it will not be published on your website in the future.”

Once again, libel lawyers instructed the deletion of an entire thread about a property company, even though in their legal letter they only point to a single user who has posted comments they object to. Asking for the removal of whole threads rather than individual posts is a much used request used to halt all discussion of a subject or company by claimants.

In another action involving Alpha Panareti Public Limited, their lawyers HBJ Gateley Wareing LLP provided Moveforward.com with their definition of defamation:

“These comments, and as such the threads generally bear a defamatory meaning in that they lower our client's reputation in the estimation of right-thinking members of society, explicitly refer to our client and has been published to the world at large.”

Due to the ability of legal firms to put forward a specific legal definition of defamation, to defendants who often know very little about the law, in our joint submission we strongly advise that the government codifies a statutory definition of defamation that protects free expression.

HBJ Gateley Wareing LLP also made clear that Moveforward.com was liable for damages, costs and an injunction, unless they took the following actions:

“It follows that it is our position that both the general defence of innocent dissemination under section 1 of the Defamation Act 1996 and the specific "mere conduit" defence provided for by the Directive will only be available to you in the event that the Threads are either suspended, removed immediately or equivalent action taken to render them inaccessible and invisible to third party internet users.”

Furthermore, many of the legal letters sent to the websites outlined above asked for the names of their companies to be added to a “banned list” of words or phrases that couldn't possibly be posted on any of the forums, through automatic censorship.

## **MRI Overseas Property**

*The problems that the MoveForward group of websites faced with MRI Overseas Properties was echoed by a series of individuals who contacted the Libel Reform Campaign about the firm. Most of the concerned were so chilled by libel threats from the firm that they refused to give their name (and many called from phone boxes) to avoid possible legal action. MRI Overseas Property was part of the MacAnthony Realty International (MRI) Group.*

*The individuals who contacted the campaign claimed they had been misled into making international property investments, and were threatened with legal action by*

*Carter-Ruck on behalf of MRI when they posted negative comments about the company online.*

*One of those affected, Tracy Carrington, was told by Carter-Ruck that MRI would claim £100,000 of damages from her for the damage caused by her online posts. Here the chilling effect is clear with the letter containing the coded warning: "Given the gravity of the situation, we would once again urge you to seek legal advice at the very earliest opportunity". Carrington had paid a £39,000 deposit on two properties in Bulgaria. She was told securing a mortgage on the outstanding balance wouldn't be a problem. But it was, and she lost her deposit; eventually debt collectors turned up at her UK home. There is no evidence that any of the threats made by Carter-Ruck to sue the critics of MRI have ever made it to Court.*

*The support group website for those who lost money dealing with MRI (<http://www.mri-sg.org/>) was closed down at one point and its webmasters threatened with libel action. The site is now hosted in the USA, so the webhosts can circumnavigate any potential liability due to the US SPEECH Act.*

One property forum was so concerned at the risk of a potential defamation action that after libel threats he instructed forum users not to post comments about MRI at all:

"All discussion of MacAnthony Realty International (MRI) is strictly forbidden in this forum. Posts that do not even mention the company by name, but refer to it in some other way, are also forbidden, and will be removed.

This unusual step is due to repeated libel threats by MacAnthony Realty International (MRI) against this forum on account of unfavourable comments made by some users."<sup>17</sup>

Another internet forum, which has asked to remain anonymous, received the following notice from Carter-Ruck:

"You continue to be responsible (and therefore legally liable) for the publication of defamatory and untrue statements about our client... and you remain liable regardless or not you in fact wrote these statements.

Carter-Ruck didn't ask for specific comments to be removed but:

"should these two threads not be removed from your website by close of business on <<date removed>>, we anticipate being instructed to issue proceedings for libel against you."<sup>18</sup>

One of the few individuals who contacted the campaign who has complained to the media and MPs publicly, Jan Bramwell, has received two notice letters from Carter-Ruck.

In March this year, the Office of Fair Trading opened an investigation into whether MRI and Carter-Ruck's practice of threatening defamation proceedings may infringe UK consumer protection legislation, including the Consumer Protection from Unfair Trading Regulations 2008 and the Enterprise Act 2002. The scope of the OFT's investigation will include both MRI and their lawyers Carter-Ruck. The OFT have not yet taken a view as to whether or not this practice infringes UK consumer protection legislation.

In 2010, the CEO Darragh MacAnthony ordered the voluntary liquidation of a UK subsidiary of his business MRI Overseas Property. When the *Guardian's* Digger column (9 April 2010) attempted to question MRI, they received a letter from Carter-Ruck.

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<sup>17</sup> <http://www.spanishpropertyinsight.com/forums/viewtopic.php?t=2602>

<sup>18</sup> Our emphasis on 'two threads'.

MRI Overseas Property is now subject to a fraud action in Spain. The *Daily Mail* reported on 4 June that “hundreds of Britons allegedly lost money estimated to amount to £13m.”

MacAnthony has written on his blog:

“I operated a company which did thousands and thousands of sales all around the world with many happy clients, but will forever be haunted by the few hundred for which it didn’t work out as planned.”

### **Councils use defamation laws to silence criticism**

*The Libel Reform Campaign backs the proposal in Lord Lester’s Defamation Bill that the Derbyshire judgement is placed in statute so that local authorities and public bodies cannot sue for defamation. Recently, Bedford Borough Council, South Tyneside Council and Carmarthenshire County Council have all used public money to fund defamation cases on behalf of employees – contrary to the spirit of the Derbyshire judgement.*

*The Local Authorities (Indemnities for Members and Officers) Order 2004 makes clear that councils can protect their members and officers if they are sued for defamation, but not if they wish to bring an action as a claimant.*

*Yet, as Wesley O’Brien, a solicitor at Bevan Brittan, points out in Local Government Lawyer, local authorities can fund a claim brought by an individual officer, and assist them if it can justify this expenditure:*

“As the law currently stands, a local authority can fund a claim brought by an individual officer and it can also assist an officer in defending such a claim, where it considers such public expenditure to be justified. The position is, however, different for members where a local authority is only entitled to fund a defence, but not a claim... The only condition is that the statements made must refer to and be defamatory of the individual concerned.”<sup>19</sup>

The following examples show how local authorities are funding actions brought by council officers to silence public criticism.

### **Bedford Borough Council**

*Bedford Borough Council spent over £400,000 pursuing a libel action on behalf of the chief executive (who lost on two counts, won on two), the council’s solicitor and the council’s employed lawyer (who lost all their claims) against a Conservative party election agent and a local newspaper. The election agent claimed maladministration after the borough council allowed a recount of the votes in the Brickhill ward election, without reference to the election agents. A local weekly free newspaper called Bedfordshire on Sunday repeated the election agent’s allegations.*

*These private actions were supported and paid for by Bedford Borough Council from the beginning. Councillors were allegedly told that as the three officers were criticised for actions undertaken in the course of their official duties, the council could face claims for dereliction of its duty of care if it did not agree to support them. The Council was not insured for the action and in the end the costs were taken from the Council’s reserves.*

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<sup>19</sup> 26 May 2011, Local Government Lawyer

([http://localgovernmentlawyer.co.uk/index.php?option=com\\_content&view=article&id=6693%3Ais-comment-free&catid=56%3A litigation-articles&q=&Itemid=24](http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=6693%3Ais-comment-free&catid=56%3A litigation-articles&q=&Itemid=24))

## **Carmarthenshire County Council**

*After a libel action between a Council planning officer and a local couple, Carmarthenshire County Council changed its constitution so that public money can now be used to bring defamation actions by Council staff or members. The libel action between Kerry and Jacqui Thompson from Llanwrda and the local authority's director of planning Eifion Bowen, arose from letters circulated by the couple which were never published in the wider media. The Thompsons apologised to Mr Bowen at a hearing in October 2007 when they were given 12 months to pay legal costs totalling £7,000.*

*The following year, Carmarthenshire County Council changed its constitution so public money could be used for libel actions; an FOI request revealed its total legal costs from external organisations (solicitors and counsel) rose from £364,369 to £711,832.<sup>20</sup>*

## **South Tyneside Council**

*South Tyneside council is currently proceeding with a libel action on behalf of its council leader Cllr. Iain Malcolm, fellow Labour councillor Ann Walsh and independent councillor David Potts, alongside borough regeneration boss Rick O'Farrell. Normally, defamation actions brought on behalf of councillors are not allowed under the Local Authorities (Indemnities for Members and Officers) Order 2004, and the Derbyshire principle, but as the first stage of the case is being pursued in California the council may be exempt.*

*The council managed to get an order from the Superior Court of California forcing Twitter to name an anonymous blogger ("Mr Monkey") who was a vocal critic of the authority. South Tyneside has refused to reveal its legal costs, but has said the figure would be less than £75,000.*

*Like the Bedford borough council case, a council spokesperson defended the action on the basis of a duty of care:*

*"The Council has a duty of care to its employees and, as this blog contains damaging claims about council officers, legal action is being taken to identify those responsible."*

The amount spent is under the threshold required for the decision to go to the council's cabinet for approval. If it did need to go the council's cabinet it would cause a serious conflict of interests as council leader Iain Malcolm is a plaintiff in the case, and as leader he selects the council's cabinet (which grants these councillors an additional allowance of £9,408.96).

Mark Harding, Head of Legal Services, has not responded to our questions on the case.

Independent councillors have alleged this defamation action is "an attempt to identify the whistleblowers who supplied information about Newcastle Airport". The whistleblowers made public the payment of £8.5m to two executive directors of Newcastle Airport (jointly owned by five councils including South Tyneside) during a £377m refinancing deal with the Royal Bank of Scotland. Cllr. Iain Malcolm was one of the five individuals on the remuneration

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<sup>20</sup> [http://www.whatdotheyknow.com/request/external\\_legal\\_costs#comment-15401](http://www.whatdotheyknow.com/request/external_legal_costs#comment-15401)



committee who approved the payments to the directors. According to the *Daily Mail*, “advice from a senior colleague urging them to think again was ignored”.<sup>21</sup>

## **Other public bodies and libel**

### **Durand Academy**

*A South London primary school is currently funding a libel action brought by current and former employees over three emails sent by the Chief Auditor of Lambeth Council. The school has ignored a freedom of information request made by investigative journalist Richard Wilson on behalf of Index on Censorship for details of how much it is spending on the court action — but Index on Censorship believes that the costs may already have run into six figures.*

*When Index’s journalist queried the fact that the school has paid £199,000 to a PR firm which is run by its Vice Chair of Governors, Kevin Craig, and whether there was a conflict of interest, he received this response from Craig:*

“I am very happy to answer your all questions on Monday morning.

If in the meantime you publish anything about me in any forum that damages me, my reputation, my company, or this wonderful school that i [sic] care deeply about, in any way then I of course won’t hesitate to take the strongest possible action.

That is not a threat by the way — I just want you to be assured of how seriously I take media enquiries...”

Craig copied the email to his company’s lawyers.

In 2010, Greg Martin the former head teacher of the school (now the school’s director of educational development) launched a successful libel action over allegations made about him by the father of a former trainee teacher to the General Teaching Council. Now, Greg Martin is involved in a new case alongside Durand’s current head, Mark McLaughlin, and former chair of governors, Jim Davies. They are suing Lambeth Council and its Chief Internal Auditor Mohammed Khan over three emails in which Mr Khan raised concerns about the management of the school.

A recent interim court ruling details the allegations that Mr Khan is said to have made:

That there are a number of serious concerns regarding the running of Durand School, which previous investigations have failed to put right and for which the Claimants as Head Teachers and Chairman of the Governors respectively are culpably responsible, in particular:

- (a) failing to implement proper training standards or provide proper support for newly qualified Teachers ["NQTs"] who start their careers at Durand,
- (b) unreasonably dismissing able teachers before completion of their induction year simply because they do not fit into the way the school works,
- (c) giving a false and/or misleading explanation to Lambeth Council, the body responsible for NQT Induction for the unacceptably high number of NQTs who leave before the completion of their induction,

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<sup>21</sup> <http://www.dailymail.co.uk/news/article-1394135/Cash-strapped-council-spending-250-000-public-money-U-S-courts-silence-Twitter-whistleblower-awful-lot-hide.html>



(d) wilfully breaching the school's obligations under employment law towards teaching staff, in that contracts of employment are not given to NQTs

(e) failing to comply with the Lambeth Borough Council issued following an audit in 2003 of the school's finances carried out by the Chief Internal Auditor that the governors and head teacher adhere to proper financial controls in the running of the schools and in particular that the governing body ensure complete and transparent separation of duties and activities between the school and its commercial partners. This has resulted in justifiable concern on the part of the local authority that there remains a lack of transparency in the arrangements between the school and the third party management company, G M G, and that the Second Claimant is being allowed to benefit improperly and/or unfairly from these arrangements to the detriment of the school.

That these concerns are so serious and so pressing that they warrant the involvement of the Department of Children Schools and Families in helping the local authority to resolve them”.

As the auditor of the local authority, it is clear that many of the concerns raised are clearly in the public interest. In turn, the claimants deny these allegations. The same ruling outlines that the Durand Academy — a state school supported largely by the taxpayer — is funding the libel action. Given that the main defendant, Lambeth Council, is also publicly funded, the taxpayer will lose out whoever wins the case.

The school is yet to respond to a freedom of information request made on 21 March, asking for details of payments to its lawyers Carter Ruck and PLMR for their services.

### **The public interest defence: the uncertainty and risk of injunction for NGOs**

*The evidence that follows represents the view of NGOs on the efficacy of the Reynolds defence. The NGOs surveyed asked us to anonymise their responses. Their responses indicate their concerns about the uncertainty of Reynolds and also the risks that they encounter in meeting the requirements of the defence. Many told us that with the burden of proof resting on them, pleading justification is almost prohibitive. The draft Defamation Bill places the existing public interest case law in statute, which we argue is insufficient.*

*NGO A told us: ‘In practice, smaller organisations with limited resources will find it very difficult to work out whether their publications fall within the concept of responsible journalism and testing the defence could prove ruinously expensive if they are unsuccessful... we have a reputation for robust research led publications and campaigning positions and so our methods fit quite well with the concept of “responsible journalism” but **the uncertainty of the defence means that we have to be circumspect about the issues we cover**’*

*NGO B told us: ‘One problem for us is that it is much harder for a campaigning organisation to obtain the view of a subject than it is for a media organisation. There may be practical difficulties with doing so. **One particular problem is the risk of being enjoined in advance of publication were we to make contact.** Whilst this has never happened we are alive to that risk and to the fact that it could result in a long term research and publication project being stymied at very short notice with wider detrimental campaign effects. Whilst such an injunction may, of course, have a beneficial campaign affect the increasing availability of ‘super injunctions’ reduces the possible benefit of that effect.’ (This should be read in the context of injunctions for privacy and now in defamation).*

*The NGO Global Witness informed us that they often carry out investigations in dangerous places, where local populations cannot freely express knowledge of corruption without fear of facing reprisals. 'In these situations, information from such vulnerable individuals means they cannot be relied upon to take the stand in the event of a court case due to risks to their lives and livelihoods.' Global Witness also told us that the cost of meeting the perceived requirements of a Reynolds defence was prohibitive. A recent report on the looting of state assets in Cambodia, involved writing detailed letters putting allegations to the subjects (with legal consultation) to 87 individuals. The letters were translated into three different languages and couriered. The total cost of staff time, legal advice and delivery overseas was £17,000. The organisation did not take the view that, in the absence of being able to corroborate serious allegations other than by reference to confidential sources, it would be seen to be "responsible" despite reporting on a matter of extreme public interest. One hypothetical example is an eye-witness report of an assault by a senior public official in a dictatorship. There may be many eye witnesses in a small village, but no-one willing to speak out.*

*NGO B also told us that they have dropped elements of reports because of libel risk. NGO A told us that they recently received libel claim threats following an article they published about a web marketing company and that they would not report further on that subject in the immediate future as a result.*

The evidence we have amassed over the course of our campaign suggests strongly that the public interest defence, as it stands, does not provide sufficient certainty for NGOs, despite the fact that their work is clearly in the public interest.

*The cost involved in meeting the requirements of the existing public interest defence is prohibitive. The practicalities of mounting such a defence are further complicated by the vulnerability of their sources. Publication of a report may also be placed at risk by the threat of an injunction which may follow from giving the subject of the report the right of reply, as may be required by a Reynolds defence.*

*Richard Rampton wrote in 2006 in the Guardian that in the seven years since Reynolds there had been 15 Reynolds defences in final decisions and only three had succeeded, two of which were in the 'narrow' reportage category. It is not surprising that Reynolds carries with it a legacy of uncertainty.*

## **Libel tourism and NGOs**

*NGO D, a leading and internationally respected NGO based in the UK, gave us evidence of a current case which provides a striking illustration of the chilling effect of libel tourism.*

*NGO D is part of a coalition of international NGOs working on a report on human rights abuse overseas. The report is calling for an investigation into whether compensation should be made for human rights abuse related to oil production. It is a report on a subject that is clearly in the public interest.*

*NGO D is the only British organisation in the coalition. It is so concerned at the risk of libel tourism, even though the report will not be published in this jurisdiction, that it is blocking publication of the report until the issue of liability is resolved. **'The willingness of British courts to countenance libel tourism led us to the conclusion that any legal action would doubtless be launched here, rather than in another European jurisdiction.'***

*'The costs we have incurred in trying to safeguard us and the rest of the coalition from litigation are considerable, and frankly have caused a great deal*

of surprise on the part of other members of the coalition who are based elsewhere in Europe and not subject to the same kind of libel laws.'

If NGO D is unable to come to an agreement about sharing liability with the rest of the coalition, then it is possible that the report may not be published.

With reference to the example above, and the case studies in our *Free Speech Is Not For Sale* report, we welcome the inclusion by the government of a clause to deal with 'libel tourism'.

Index on Censorship believes the uncertainty in the law as it stands has a chilling effect on freedom of expression, which will benefit from the draft Defamation Bill. However, we urge the joint select committee to build upon the draft - as the bill at present makes only minor codifications of the existing law and will not protect either the right to free expression or reputation. Furthermore, like our partners in the Libel Reform Campaign, we do not believe that the measures offered by the draft Bill offer the clarity and certainty that is required for substantial reform.

We hope that in light of the evidence above, the joint select committee will adopt our recommendations.

*June 2011*

## **Supplementary written evidence, The Libel Reform Campaign (EV 45)**

*Thank you for inviting us to give oral evidence to the Joint Committee on the Draft Defamation Bill in May. We have watched subsequent sessions with interest and wanted to respond to a significant issue raised in a subsequent session of the committee.*

*In their oral evidence on Wednesday 15 June, Secretary of State for Justice Ken Clarke and Minister of State Lord McNally, both said the draft defamation bill is simply codification of the existing common law. As the committee will know, all three main political parties promised to reform the libel law in their 2010 General Election manifestos and the Deputy Prime Minister repeated this promise last year.*

*The Conservative Party: "We will review and reform libel laws to protect freedom of speech, reduce costs and discourage libel tourism."*

*The Liberal Democrat Party: "We will protect free speech, investigative journalism and academic peer-reviewed publishing through reform of the English and Welsh libel laws - including by requiring corporations to show damage and prove malice or recklessness, and by providing a robust responsible journalism defence."*

*The Labour Party: "To encourage freedom of speech and access to information, we will bring forward new legislation on libel to protect the right of defendants to speak freely."*

*Nick Clegg, Deputy Prime Minister, in the Guardian, 15<sup>th</sup> March 2011: "The coalition government has published a bill that will transform England's libel laws. These are the reforms the Liberal Democrats fought hard for in opposition... These reforms will create libel laws that will be a foundation for free speech, instead of an international embarrassment."*

*As the public interest defence in the draft Defamation Bill is merely the codification of the existing common law, as is the substantial harm test; it does not fulfil these promises. We thank the committee for highlighting this issue in its questions, and hope that your scrutiny of the bill will hold the government to the promises they made to the electorate.*

*We would be happy to discuss this further if we can be of further assistance.*

*June 2011*

## Oral Evidence, 4 May 2011, Q 41–59

Evidence Session II

Members present:

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
Rehman Chisti MP  
Dr Julian Huppert MP  
David Lammy MP  
Lord Bew  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witnesses: **Jonathan Heawood, Jo Glanville, Tracey Brown** and **Dr Evan Harris**  
[Libel Reform Campaign].

**Q41 The Chairman:** On behalf of the Committee, I thank all of you for being willing to come this morning and for giving us your time. We have maybe a couple of minutes short of an hour, because we have two sets of evidence to collect before we finish at 11.30. Let me start by asking whether any of you have any general comments that you would like to make by way of introduction. We all have details of who you are and so on, so we do not need autobiographical comment, but if there is any substantive comment that any of you would like to make before colleagues start asking questions, please take the opportunity now.

**Jonathan Heawood:** On behalf of the group, I thought we would just say a few words to explain the Libel Reform Campaign and its background. English PEN, Index on Censorship and Sense About Science are all charities, either wholly or partly charitable, so we exist for the public benefit for the understanding of science, human rights and literature. There are different reasons in each case why we have come into the campaign, which we will very briefly outline. The campaign as a whole has behind it another 60 or so organisations, including very distinguished groups such as the Royal College of GPs, NGOs such as Amnesty, parenting networks such as Mumsnet and consumer organisations such as Which?. I think the point that we would like to stress is that it is a very broad-based coalition of stakeholders. We are not here to represent the media. In many cases, we disagree with the media on some of the reforms that are proposed.

That is what we wanted to stress in opening. English PEN is here because of our affiliates around the world who have been affected by English libel law, either directly or indirectly—directly through libel tourism or indirectly because of the pernicious effect of bad English law, which plays out through common law, through the Commonwealth or through its influence on other jurisdictions that look to this jurisdiction as an exemplary one, but which is giving a very bad example at the moment. That is why PEN is here. I leave it to the others to explain themselves.

**Jo Glanville:** As well as representing Index on Censorship in the Libel Reform Campaign, I also edit Index on Censorship's magazine. The organisation was founded 40 years ago by Stephen Spender to be the voice of writers, in a sense. For me, libel is not just an abstract issue that Index is campaigning on; it is a weekly concern. In as much as I publish writers from countries like Mexico or Russia,

journalists who might regularly face injury or even death, I sometimes find myself in the very difficult position of saying, “I am sorry, I can’t publish that because of our libel laws”. It is a very practical concern for me as well.

**Tracey Brown:** As you know, Sense About Science works with over 5,000 scientists and many civic groups from media to midwives, patients and policymakers. We have spent the last decade getting scientists into public debates to respond to things like silly things celebrities say about cancer or the promotion of sugar pills to treat HIV. It may surprise you that an organisation such as ours with no free speech background is part of the Libel Reform Campaign. It surprises many people that there is a libel chill in science. 10% of cases in the High Court involve science and medicine. Scientific journals are unable to publish the results of their investigations into research misconduct for fear of libel action. Libel threats are stopping scientific and medical reports and articles. In a survey of GPs last year, 80% said that libel laws are inhibiting their discussion about medical treatments. It is a shock to a lot of people to think that making judgments about the kind of treatments that we use in our health service is based on something that is short of the whole picture because people cannot publish the full story. That libel chill has been even more so since the high-profile cases of Simon Singh, the writer, Ben Goldacre the science writer and cardiologist Peter Wilmshurst. We ourselves have been on the receiving end of attempts to gag us, as have other bodies writing about evidence, such as the Consumers’ Association.

**Dr Evan Harris:** I have had a long-standing interest in science and in free speech. That is why I got involved in this. The only point that I wanted to add was that not only do large numbers of the public agree with the approach that we have taken, already described in the Libel Reform Campaign, but all three parties agreed before the last election to the extent that they made specific commitments in their manifestoes. This Bill and your scrutiny represent a real opportunity for Parliament to ensure that those commitments are delivered and that there is real, effective reform of the law. I think that is what the public generally will be hoping is the outcome of the process at the end.

**Q42 Lord Marks of Henley-on-Thames:** I have three questions. The first is directed principally to Tracey Brown and Evan Harris. The qualified privilege that is proposed to be extended to conferences seems to me to call for some sort of definition of what conferences should be protected and how. Otherwise you could have occasions masquerading as conferences that really do not deserve the qualified privilege and where qualified privilege could be taken advantage of. I have a similar question about peer-reviewed articles, for which Evan Harris has particularly called for some qualified privilege. My questions are of definition and entitlement. I wonder if you could address those.

**Dr Evan Harris:** There is a strong case for both. The logic of the qualified privilege defence and the need to ensure that there is clearer protection for scientific discourse requires that, absent malice, there should be clear freedom to talk in this way about matters that are clearly, by definition, in the public interest, because they are being discussed in scientific conferences or published in a peer-review journal. I do not think that is contentious.

It has generally been the case that the schedule of qualified privilege, as you will be aware, is not rich in definitions. Public meetings, for example, are not defined. That has the scope for much more of what you might call being too vague and people using it to masquerade. My understanding is that that has not been an issue in legal cases. It has not been a contentious matter. Leaving the law in that sort of form has

not caused debate around the margins of what the definition is, but has served to protect the right of the public to know about what is being said in the circumstances set out in the Schedule. What we are arguing and what the Government is proposing in respect of conferences is very clearly a part of the Schedule where there would be a right of reply as part of that proposition. That is exactly what we should have in scientific discourse. There should be an argument of ideas. In the Singh case, it was said in another context that that is really what should happen. We should have more discussion, more papers and more conferences, not more legal cases and more suits.

**Tracey Brown:** I do not have much to add to that. Obviously, we would need to look at the definition as set out, but the nature of the occasion of communicating research results suggests that it qualifies for inclusion in the Schedule.

**Q43 Lord Marks of Henley-on-Thames:** My second question concerns procedure. The Lester Bill originally called for an early strikeout procedure. The Government's proposed Bill does not. It says that we can rely on existing procedures to strike out and for summary judgment. I would like everybody's reaction to that. The second and related point on procedure is this. Our next witnesses have been arguing that the reforms are unnecessary and we really need a procedural overhaul with a two-tier system, to which different substantive law would also apply and the Reynolds defence would only be applicable to the higher tier for more serious cases. I wonder whether those approaches are mutually exclusive. Might there be a case for a two-track system and early strikeout procedures alongside the substantive reforms, particularly for the defences that are proposed in the Government's Bill.

**Dr Evan Harris:** Compared to Lord Lester's Bill, we strongly believe, and will be submitting detailed evidence to you in due course, as others will, that the current provisions in Clause 1 are not good enough to represent a clear advance on the existing situation that one can obtain from the courts. There are several reasons that I could go into if you wish me to. One of them is that, unlike Lord Lester's construction, it does not provide for mandatory strikeout when the threshold has not been passed. That does not give the certainty that defendants would need to ensure that they were confident that they could fight off what would otherwise be considered to be weak, vexatious, trivial or bullying claims. There are other reasons why we think Clause 1 can be improved.

On your second point, we are aware of the proposals for a twin-track approach from Dr Scott and Professor Mullis. First, it is not procedural. They are proposing specific changes to strikeout clauses of action in respect of damages in some cases. Some of the things that they talk about are valuable. In our written evidence we will identify, for example, where there should not be a right to claim damages by corporations—we will go on to argue that on further questions, if you ask us—but there should be an opportunity for corporations to correct the record by obtaining a declaration of falsity. There is no public interest in things that cannot be shown to be true remaining on the record if it is felt to be damaging to someone's reputation. There are points in there that we are not hostile to, but we think the framework in the Bill is the right one to proceed. I think most of the people who are calling for reform would agree with that proposition.

**Jonathan Heawood:** You may want to come back to this later, but on early resolution, at PEN and Index we are looking in detail at ways in which alternative dispute resolution could also be used alongside the court process. Again, we are very interested in Professor Mullis and Dr Scott's proposals, but I certainly do not think, as Evan has said, that you can do that without also reforming the substantive

law. There are failings on both sides. The process and procedures are too slow and too costly. We all know of the cost problem, which is not within the terms of this Bill, but the Committee must not be left under the impression that if the substantive law is reformed, the cost problem is also dealt with. The cost problem has to be dealt with alongside the statutory reforms. We are not in a position to publish our findings yet, but we are certainly interested in whether there might be some room for compulsory mediation at an early stage in the process. We are concerned about claimants' Article 8 rights. We are concerned about their need to resolve very serious grievances, but we are not sure whether a lengthy, protracted High Court confrontational win or lose process is always the best way to do that.

**Tracey Brown:** If I could add something briefly on the substantive changes that we are particularly exercised about. We very much welcome the Bill as a framework, as Dr Harris has said. We think the work that has been done by the Ministry of Justice and Lord Lester has been excellent in its recognition of the problems that face citizens. Moving into a debate on that terrain, it is a framework that we can build on. We would draw the Committee's attention to four crucial areas that we think need to be addressed, whatever procedural development is introduced. The first, as Evan has indicated, is substantial harm. The second is the public interest defence, which we feel needs considerably more work. The third and fourth are the areas that have not been proposed as part of the draft Bill so far, which are online publication on the internet and the possibility of corporations being able to sue. Those are the four areas in the substantial law that we think need to be addressed if we are going to take this historic opportunity for Parliament to speak on the issue.

**Q44 The Chairman:** Could I just clarify one thing? I thought I heard Mr Heawood say that cost issues were not included in this Bill, with the implication that the Committee therefore could not address that. Is that the message that you were trying to give us, just for clarification?

**Jonathan Heawood:** If the Committee would like to send a very strong message to the Government that costs have to be addressed and substantive reforms will not be worth much unless costs are also addressed, we would certainly welcome that. We are not sure whether the costs issues can or should be addressed within the terms of the Defamation Bill. It may be that accompanying secondary measures need to be taken. But we strongly urge you to look at costs.

**Q45 The Chairman:** Thank you. If they were not to be addressed in the Defamation Bill, where would you expect them to be addressed?

**Jonathan Heawood:** The previous Government attempted to put through a Statutory Instrument to reduce the uplift on conditional fee agreements, just ahead of the election. I know that in their response to the Jackson review, the Government are preparing to make proposals along similar lines.

**Dr Evan Harris:** Some of the steps that might be taken to control costs also go to access to justice. To make a good argument, you need to know what the statutory scheme is and what the law is before one can determine the best way to guarantee fairness in terms of access to justice on both sides, particularly for people of limited means. We also recognise that some of the proposals in the Bill, such as the presumption against jury trial, will aid case management to such an extent that it will reduce complexity. If you can get sufficient early strikeout, again you are, by definition, reducing costs.

**The Chairman:** Forgive me, Lord Marks, I just wanted clarification so that the Committee understood precisely what Mr Heawood was saying. Back to you.



**Q46 Lord Marks of Henley-on-Thames:** That is very helpful, Lord Chairman. My approach to this is that the Committee is entitled to make such recommendations as it wishes about procedure. I regard it as a very important part of this, and I think Mr Heawood does as well. I was seeking to tease out whether you had a view on the two-tier approach that has been advocated. Lord Lester said in his evidence to us that the existing court procedures could be effectively used without much amendment. There may be a strong argument for a tribunal or for saying that there should be a County Court or fast-track tier for smaller cases. I would like to know your views on that.

**Jonathan Heawood:** We are certainly very sympathetic to the argument for the use of County Courts. In the public spending environment, the proposals to set up a tribunal may not get very far. There are many ways in which County Courts can be used at an early stage in the process without ruling out the ability of either party to go to the High Court if they feel that that is where they need the case to be heard.

**Tracey Brown:** From both the claimant's side and the defendant's side, one of the things that we have been very aware of is that when people get things wrong, they just need to deal with it quickly. The system that we have at the moment is not supportive of dealing with things quickly. They escalate disputes to a very expensive and protracted level. It is not just a question of moving actions to the County Courts, but looking also at other ways of resolving those. As Jonathan has mentioned, Index on Censorship and English PEN are investigating alternative dispute resolution, but also the possibilities included in that are things like a declaration of falsity or other means by which people can get an earlier resolution of their problem without going through the entire process.

**Q47 Lord Marks of Henley-on-Thames:** Thank you both. My third and final question is about corporations. We heard from Lord Lester, who takes the view that corporations have human rights, and therefore it is not right for their right to sue to be limited. We have heard from Dr Harris that he takes the view that corporations should not be entitled to claim for damages. The question that we would all like to hear answered is why companies that can suffer identifiable financial losses because of lost sales due to some sort of defamation of their products should not be able to recover in respect of those losses.

**Jonathan Heawood:** Without arguing with Anthony Lester, I am not sure that all companies have all human rights. I am not sure that companies are protected under the prohibition on torture or the prohibition on slavery, for instance. Media companies benefit from Article 10 rights to the extent that the public benefit from the free circulation of information and ideas. I am not sure that companies benefit from Article 8 rights. They do not have psychological integrity or privacy to protect. They do, of course, have the right to redress. I do not think that we have said at any point that companies should not have the right to redress if there has been significant financial loss, but they do have many routes to that, and libel may simply not be the appropriate place for them to go. I will say more about some of the other options, but I should note that in the case of very small companies, such as A Lester Ltd, which Lord Lester mentioned, which is clearly identifiable with a single individual, that individual should of course have the right to sue in the normal way.

**Dr Evan Harris:** That is right. As Jonathan has explained, there is a principled basis why one is able to have a different approach to the different remedies available. Where someone has feelings and there is damage, it is not unreasonable that they should have a different approach from those of people who have suffered

harm to their reputation outside of feelings, and, indeed, real losses. I think there is broad agreement that what is required under the convention is that companies have redress. We have identified at least four ways in which they can have redress, including damages. They can use malicious falsehood. Many of the damaging claims against companies are made by rival companies with an improper motive where they do not honestly believe what they are saying. That can be run and that is the appropriate forum for it.

Secondly, if a company is alleged to be fraudulently run, clearly the Finance Director can, and sometimes does, take out a libel action. We would not cut across that. Thirdly they can obtain declarations of falsity, for example as part of a malicious falsehood action, or even when they are not able to show malice but they can demonstrate falsity, so that the record can be corrected. Large companies, which can suffer large damage, are more than capable of advertising the fact that they have been vindicated in that way. Finally, there are new business practice regulations—we will send you details of a lot of this in our written submission—that prevent companies, short of malice, carrying out practices that damage other companies, which could otherwise have come under libel.

I recognise that there is remedy, but the huge benefit of saying that companies cannot sue for libel is that it removes a large amount of the chill that exists from many of the vexatious and bullying claims—again, we can give you examples—that are often made against scientists by corporations as a means of preventing other people from saying what has been said, suspending it for months if not years and defending their reputation, short of really being able to show that they have been libelled. The inequality of arms is frequently, but not always, in existence when corporations are sued. There are real public policy benefits in restricting their course of action, while still providing them with remedy.

**Tracey Brown:** In addition to the legal routes that Evan has outlined, we also happen to be one of the few jurisdictions in which there is not the option for companies to use the anti-competitive practices law. There is a possibility that that will be introduced in the next year. The other point to remember is that big companies have at their disposal many other routes for garnering public opinion, including large public relations departments and other ways in which they can communicate, which are not available to the individual citizen who may be defamed.

The other thing I would draw the Committee's attention to is that when people talk about corporate losses as a result of unfair criticisms, they often think of share price, which is not a recoverable loss because that affects individual shareholders, not the company concerned. That is a bit of a blind alley discussion. That generally is the only discernable difference to a company's performance—and it is usually only a very temporary one—as a result of criticism. On the bottom line it is very hard to distinguish any kind of damage as a result of run-of-the-mill criticisms in the press or among citizen discussion.

**Q48 Sir Peter Bottomley:** Can I come back to science? Some of you may have heard me talk about Richard Doll and Bradford Hill who discovered that tobacco has a great impact on people's lungs and hearts. They went on to do the same thing with asbestos. I am doubtful about the suggestion that for peer-reviewed publications and international conferences where there is an agreed line, a level of protection is needed. Where does one move from speculation, raising this in public and someone saying that they have a commercial interest that is being challenged? When does one start thinking that things might become actionable and how do you stop them? We have heard that the chilling effect is there. Would it be possible to include in a

supplementary note some illustrative examples, with or without names, where editors have been chilled from doing something that they regard as otherwise proper?

**Tracey Brown:** Certainly, we have a dossier. Since the publicity around the libel issue and the libel reform campaign, we have become something of a lighthouse for all sorts of people on the receiving end of threats. We have recorded all of those and would be happy to make that available to the Committee and otherwise, as necessary. I believe the medical and scientific journals are interested in putting forward their views and would be willing to talk to you about the ways they are affected. Again, we can provide more information about that.

On the broader point, the question becomes whether it is okay for people to raise a question or an alarm which then turns out to be false. The problem is that that is how scientific knowledge advances. People put up a thesis and somebody else knocks it down. People put forward the results of their experiment and somebody else completely rubbishes the way in which that experiment was designed. It is not a discussion that advances with concern about individual reputation, but with a desire to get to the truth. That is not very far away from how, as a society, we get to the truth of any matter. People often put up a one-sided point and then we work out how to get to a more truthful account. We have to recognise that messiness in debate and accept that there will be times when the debate is one-sided or unfair. That is the nature of living in a free society.

We also have to recognise the importance of making it possible to be a whistleblower. We have to accept that even if nine out of 10 times somebody raising a question about the particular course of treatment for a disease turns out to be wrong, isn't it so important that the one time in 10 that they turn out to be right, they were able to raise the question? I think we would all rather live in a society in which the questions about thalidomide got raised rather than waiting another 10 years and doing a whole load more experiments for fear that we might be wrong. There has to be an open discussion to get to the truth of the matter. Along the way that may be unfair to some people at some times, but that is the price of free debate.

**Dr Evan Harris:** I think you have raised the key test for libel reform. You captured it in the nub of your question. It is hard to think of a greater public interest than the exposure of a potential health risk to proper debate. We have a three-pronged approach. Removing the ability of companies to sue will mean that criticisms of products that are not made maliciously or with improper motive cannot be dealt with in libel. If companies feel that it is wrong, they can get a statement by the court on the fact that it is wrong, but they cannot sue in libel.

Secondly, criticism of scientists implied because people do not like their techniques should be free from libel if one goes through the steps of publishing in a peer-review journal or it is a report of a scientific conference. Failing that, in addition, as I have said in my submission, comment and honest opinion on something that is thus privileged is also protected under the structure by making it privileged in those terms. Finally, the public interest defence must exist in better than its current form so that the bottom line is that even if you do not qualify because an individual is suing you and you have not based your opinion on a privileged matter and you turn out to be talking about something that you cannot show to be correct—science is full of doubt—then as long as you are being responsible, as scientists generally are, you still have the right to a defence. That is why our submission to you will have those three protections for science. I think there is broad political agreement that those are required.

**Q49 Sir Peter Bottomley:** Can I ask one other question very briefly? If someone makes a claim against an individual, at what stage should they be required to state what the real problem is and what is the minimum that would put it right?

**Tracey Brown:** Are you saying that a claimant needs to specify the nature of their dispute?

**Sir Peter Bottomley:** Indeed. I can think of an example from my own case, but I cannot translate it to science so easily.

**Tracey Brown:** That is really common in science. People receive a letter threatening legal action. Quite often it is not a good legal letter, but individuals without recourse to great media law departments have no basis on which to defend themselves. Quite often the claimant does not specify exactly why the article is wrong.

If you speak to the editors of journals that have online debate, such as the British Medical Journal, which has a rapid response which is pre-moderated, but it does draw some complaints, they will tell you that quite often they will put up a notice to say that something is the subject of legal dispute and will go back to the person and ask them to specify what exactly they are taking issue with, and then there are months when they do not get any kind of response to that. I put this to a leading claimant lawyer, who said that it was a bit like when you go to buy a house; you do not want to tell them how much money you have to spend. I was rather surprised by that. The idea of the law is to be quite specific about the damage that somebody has experienced and to try to get that rectified. It is a rather strange approach, but for people who want to frighten off critics it is very effective.

**Q50 The Chairman:** Before I go to Dr Huppert, can I ask Dr Harris a question for clarification again? One of your three points was exemption on the basis of peer review and conference. If you could only have one, which one would you prefer?

**Dr Evan Harris:** They cannot be mutually exclusive, because one is a publication and the other is the proceedings of a conference.

**The Chairman:** Excuse me, but they can be mutually exclusive. I have done it.

**Dr Evan Harris:** I meant that they are mutually exclusive. I am sorry. It is hard to overlap. My personal view is that peer-review publication is the main mode by which scientists put out their products. That is much more likely to more easily have the right of reply that is inherent in Part 2 of the Schedule. Most journals allow someone to respond. In order to benefit from this, they would have to.

**The Chairman:** Do any of the rest of you want to disagree with that?

**Q51 Dr Huppert:** Before I ask my questions, I will declare a few interests for the record. I am an officer of the All-Party Parliamentary Group of Libel Reform. I am also involved with the Libel Reform Campaign, particularly Sense About Science, and I know Evan Harris well. I hope that is clear.

There are two questions that I would like to find out a bit more about. One is about libel tourism. The only thing that the draft Bill does on this is that there is only limited action against people who are not domiciled here. It would not protect somebody who is domiciled here, even if there is a very small amount of publication here. What are your thoughts on how the law to deal with libel tourism ought to be written?

**Jo Glanville:** I think we are happy. We recognise that that is how the law stands and it is not really going to be possible to make it broader than that, so we are very happy with the form in which libel tourism is addressed in the Bill. We know that there continues to be a lot of disagreement about the extent to which libel tourism is a problem. If we look back at the course of the libel campaign, the recognition of libel

tourism as a problem was one of the key starting guns for recognising that there was a major problem to be addressed in this country and our libel laws had become an international embarrassment. The United States was passing laws to protect its citizens against us. We are very glad to see it addressed in the Bill and we are happy about the manner in which it is addressed in the Bill.

**Dr Evan Harris:** I think Dr Huppert's question goes further than Clause 7. I absolutely agree with what Jo has said in respect of Clause 7. We think it deals satisfactorily with the problem of a non-EU domiciled defendant, such as the Rachel Ehrenfeld case, where they are being sued in this country on the basis of minor publication in this country, regardless of where the claimant comes from—but often it is also from abroad.

But we believe that something is missing from Clause 1, which was there in Lord Lester's Bill. I think you raised it with him last week and he is going to write to you. He had a provision that said that, "No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm [we would say serious and substantial] to the claimant's reputation having regard to the extent of publication elsewhere." That is required to protect EU-domiciled defendants from being sued in this country when either the reputation is mainly abroad or, more likely, the publication is global and there is very little publication in this country, such that there is no net damage, having regard to publication abroad. That is a critical defence, which Lord Lester was absolutely right to put in and should be retained. I think—I hope—that it was not put in because of oversight, on the basis that it was felt to be covered by Clause 7.

**Q52 Dr Huppert:** Just to check that I understand you, you were referring to Clause 13(2) of his Bill. If Clause 1 of the new Bill said something like, "is likely to cause substantial harm to the reputation in England and Wales of the claimant", that would capture what you are saying. We are about libel that affects in this country, not libel that affects people elsewhere.

**Dr Evan Harris:** You would have to qualify it by saying that it should have regard to the extent of publication elsewhere, because it could cause harm here, but if 99% of the harm is elsewhere, then it is inappropriate in the scheme of things to have the case heard here. There is a more appropriate place to hear it. You cannot rely on Clause 7 because of the Brussels and Lugano conventions. We think Lord Lester was right.

**Q53 Dr Huppert:** The other issue I wish to raise is to do with online publications. What is your take on how things currently are, particularly how they sit in the draft Bill? Does that go far enough? What else would you like to see?

**Jo Glanville:** We are delighted with the single publication rule, which is long overdue, but obviously there is a great deal more work to be done on online publication. That whole part of the Bill is still subject to consultation.

The first thing to say is that if this is going to be a truly modernising Bill that is fit for the 21st century, it is critical that libel online is addressed in a form that protects freedom of speech while also providing redress for those who are defamed. As I think everyone knows, the internet is now the front line for freedom of speech. At the moment, the situation means that there is a lack of a satisfactory legal process. Online we are effectively seeing what many people call the privatisation of censorship. I am sure you are aware that there are many different forms in which material is hosted and published online. Any ISP, web host or intermediary who faces

the threat of legal action will take down the material. They do not have the resources or the expertise. They are not primary publishers. The primary publisher that we are all used to in the non-virtual, real world will have commissioned the material or will have some kind of editorial role or some input and responsibility for the material that has been published. This is what has to be addressed.

Of the solutions that are offered in the consultation, we feel that the one that might work best is where the claimant would be required to obtain a court order for the removal of allegedly defamatory material. We have outlined in detail how we think that process would work, and we can submit that. In the first instance, they would have to demonstrate that substantial harm had been caused, as will be outlined in the new Bill. They would have to make an attempt to contact the writer of the material. Only then should they approach the intermediary. If it gets to a point where the court judges that the intermediary is liable, then the procedure for notice of takedown should kick in. At the moment that is the first stage.

If we have the Bill passed with all these new defences and a more robust defence for freedom of speech, if this is not addressed properly in the online world we will have two different universes of publishing—one where there are good new defences and one where it is a bit of a Wild West, where anyone can make a threat and an ISP will take down the material because they do not want to be held liable. In brief, that is our view.

There seems to be concern about all the different hosts of material online, whether it is intermediaries or a discussion board or a web host. That can be dealt with in a straightforward way in defining them as not being primary publishers, therefore they do not have that traditional responsibility of editorial commissioning.

**Q54 Lord Morris of Aberavon:** May I follow up the question on peer review and international conferences? Is Schedule 1, Part 1 sufficiently widely drawn to ensure the increase of knowledge, which Dr Evan Harris was adumbrating on, and transparency? Why is it limited to international conferences? Have I missed something? Are conferences that are not international covered elsewhere?

**Dr Evan Harris:** There are two separate proposals in the legislation. One is by the Government to expand the statutory privilege list covering international conferences. We agree with that. I do not believe that is contentious. Lord Lester proposed it and I have not heard anyone argue that it should not be updated to deal with the modern world of international conferences.

The proposition for scientific conferences and my proposition on peer review would belong in the Part 2 of the Schedule. You only gain qualified privilege where you are, of course, not acting maliciously and where there is a right of reply in an appropriate form. Your question referred to Part 1, but we are focused for science on Part 2. Part 2 is designed for science because of the right of reply. That is the nature of the way that scientific debate works.

**Q55 Lord Morris of Aberavon:** Are Parts 1 and 2 sufficiently widely drawn?

**Dr Evan Harris:** I am arguing in my submission that it ought to be drawn more widely to include peer reviewed publications. Other than that, we would say that the broadly similar propositions that the Government and Lord Lester have made are appropriate.

**Q56 The Chairman:** Is there sufficient evidence, in your view, that libel tourism is a real problem that cannot be addressed by existing procedures?

**Jo Glanville:** There is evidence. Whether there are a huge number of cases is another matter. One of the things that worried us particularly when the Select Committee on Culture, Media and Sport was doing its inquiry into privacy and libel was that evidence was submitted by a number of American publications, including newspapers, that they were having to get their lawyers to read copy with a worry about ending up in a libel court here. That was one of the most worrying developments, which showed the impact of the fear of libel tourism on publishers overseas. It is an issue where the chilling effect is clearly in evidence. We cannot give evidence of a huge number of libel tourism cases, but there are enough significant cases to show that it is a problem.

**Dr Evan Harris:** It is like an iceberg or a pyramid analogy. I understand why you ask the question, but you cannot base it on the number of cases that finally go to trial. If you look at the cases that are settled, defendants are winning most of them, because it is only the good ones that defendants have the confidence to take to trial. Many cases are settled well before they reach the court. The biggest problem is that of unjustified self-censorship and chill, because of the fear of well resourced, deep-pocketed claimants, many of whom would fall into the category of libel tourist—but our approach is not specific to libel tourism. That prevents free expression. The cases that have emerged are very serious because they affect NGOs in particular.

**Tracey Brown:** I should like to add a couple of points. First, I think Dr Harris meant to say that defendants are losing most of the cases, not winning them, when it is out of court.

**Sir Peter Bottomley:** Accepting is a better word, I think.

**Tracey Brown:** As you all know, the way that the common law works is that we read and understand our liabilities and responsibilities and rights through a small number of cases, and then we implement those in the way that we work and what we publish. What is going on across the world is that people only need to see a couple of cases, or even to be threatened, in order to alter their behaviour. It is not just American newspapers. We see it, for example, in a big medical database that is published in Germany, which uses one lawyer to advise for the whole of its global publication, and then has to employ a separate set of lawyers in order to have publication in the UK, because our laws are viewed as much more dangerous territory. It affects things on a daily basis, whether it is newspapers or publishing in foreign languages, with the decision that people make about what they publish and whether to allow circulation in our country.

**Jo Glanville:** I should like to make one point. When we were doing research for this campaign, as Tracey has said, we contacted a huge number of organisations. We specifically asked NGOs to give us their evidence on the impact of libel law on their work. One well known international NGO that I cannot name because it asked for the information to remain confidential told us that it was part of a coalition of NGOs who were in the process of publishing a human rights report. They were so worried about libel tourism that the publication of the report had been held up and one of the NGOs was threatening an injunction to stop its publication because they were so worried about the possibility of libel action.

**Q57 The Chairman:** We have heard you corporately use the phrase “chilling effect” on a number of occasions this morning. In case you are tempted to think from my question that I do not know what a chilling effect is, I do know what it is and I do understand the concept of a chilling effect. If you are driving along a road at 50mph when the sign says 30mph, the sign has a chilling effect on your behaviour. Chilling effect is not necessarily, as has been implied by your comments, a purely negative

thing. How would you differentiate between self-censorship and appropriate self-discipline?

**Jonathan Heawood:** Can I try to make a stab at that? I think there is a difference between the deterrent of seeing a sign saying 30mph and the chilling effect. The chilling effect is taken to mean people censoring themselves unnecessarily in a case where they think that they are in the right but they are not confident that the law will support that. I think you are hearing from the publishers association in a few weeks. They have produced evidence on a number of publishers who have refused work from authors for fear of libel suits. A third avoided publication of particular subjects. If they are doing that, not to do with the nature of the allegation but there are certain subjects, certain companies and certain individuals that publishers or newspaper editors simply will not touch, that suggests a chilling effect. It is not that they are restraining themselves from publishing something deeply unpleasant; they are simply avoiding getting into a possible confrontation with someone very threatening.

**Q58 Sir Peter Bottomley:** We are learning from this that there are undesirable, unjustified chilling effects. Incidentally, speed limits only work if you are driving only 5mph above the limit; they do not work if you are going at 20mph above. We all know that taking on the scientologists used to be pretty troublesome; taking on Robert Maxwell could take you to poverty.

If somebody says something that is untrue, damaging and not privileged—that is my common man’s guide to defamation actions—is it easy to say to the person who has written, said or published it, “Don’t do it again without justification or I will sue” rather than saying, “I will take action on what you have done as a first occasion”?

**Tracey Brown:** Should it be easier? Obviously, it would be desirable to get quick resolution. Quick and just is obviously what everybody wants in this situation. Jonathan Heawood has referred to some work looking at alternatives or early-stage developments where we could perhaps see some incentivisation of getting people to resolve things quickly by making a correction or a declaration. A declaration in court of falsity would deter future republication of the same point, because you would quite straightforwardly have the basis to launch a legal action should that occur.

**Jonathan Heawood:** If something has been published and is substantially harmful, given that things that are published nowadays are almost always on the internet and are there for anyone to see, it would be an odd response for a potential claimant not to wish to sue in the first instance. Is that not what you meant? Sorry.

**Q59 The Chairman:** One of the things that I have to do is to keep an eye on the clock. There are occasionally questions that it would be good to have the answer of witnesses on the record. So my final question, with Sir Peter’s indulgence, is to ask you whether Clauses 3 and 4 deliver the clearer and stronger defences that you have been calling for in relation to truth and honest opinion. If you are tempted to say no, what specific changes should be made?

**Dr Evan Harris:** We do not believe that there is much scope for doing more than putting the existing justification common law offence into statute. Clause 3 does that. In our written submission we will set out some concerns that we have about the way it does it. For example, going into the detail now, it does not provide for what Lord Lester had in his Bill—I think Lord Lester would stick with the view that his Bill was better—that where there is a single defamatory imputation, it should be possible for the defendant to show a meaning that is close to it, where the gap is not sufficient to be substantially harmful. That is one example.



Secondly, there are concerns—they are only concerns—that renaming it truth might lose something in justification that is not in truth, because the defence currently is about substantial truth, not the whole truth and nothing but the truth. Nevertheless, on 3 there is not a huge amount of scope for controversy.

In respect of honest opinion, Jonathan may want to add to this. The key thing is that since Lord Lester's Bill, there has been a leading case—the well known *Spiller v Joseph*—that sought to set out more clearly in case law what the provisions are. The importance is that the statutory version of that does not add complexity to what has always been seen to be a complex defence, which has recently had some more clarity put on to it. We are not convinced—this is not from a free speech perspective, which shows how balanced and reasonable we are—that condition 3 is sufficiently clear. You will get further written submissions from us and, no doubt, views from distinguished lawyers on whether that fully captures it. I think the Ministry of Justice accept that it is a moot point whether they have got that right.

**Jonathan Heawood:** To expand on that briefly, the double use of public interest in Parts 2 and 4 risks confusion. We are strongly in favour of clarity wherever possible. We will come back to this in our submission, but we might suggest that the public interest is not referred to in the honest opinion defence. We are trying to establish that it should be legitimate to hold an honestly held opinion on a matter that is in the public domain, not a matter that happens between a patient and doctor or between partners in a domestic situation.

**Tracey Brown:** Dr Harris has said that in Clauses 3 and 4 we are seeing the codification of the existing law. We are much more exercised about Clause 2, in terms of making a difference and getting the clearer, stronger defences that you referred to. As drafted, Clause 2 is not acceptable and is not enough. It does not take us forward from the existing case law, which we have already seen does not provide an effective public interest defence. We would like to see the public interest being introduced as the first consideration and then, once through that gateway, where the publication is on a matter of public interest, it would be for the claimant to show that the publication was malicious or reckless. If there was to be a responsibility, it would be a lesser test for them to show that the defendant had been irresponsible, perhaps with reference to a similar list and with reference overall to the nature and context of that publication. That defence is going to make a difference to the impact that libel law is having on citizens, in the way that we have described.

**The Chairman:** On behalf of all my colleagues, I thank each of you very much indeed for coming. We appreciate it.

## Professor Alastair Mullis and Dr Andrew Scott

### Written Evidence, Professor Alastair Mullis and Dr Andrew Scott<sup>\*</sup> (EV 06)

1. As academic lawyers specialising in media law and regulation, we have taken a keen interest in the libel reform debate. In January 2010, we published a critique of the report produced by Index on Censorship and English PEN,<sup>22</sup> and in July of that year offered a view on Lord Lester's reform Bill.<sup>23</sup> We agreed with the authors of both these works that there is clearly potential for misuse of libel law to preclude investigative journalism, to stifle scientific and medical debate, to undermine the important work of human rights organisations and other NGOs, and to invite the strategic legal tourist from abroad. Our basic complaint, however, has been that libel reform campaign offers a partial account of the libel regime; that it over-emphasises freedom of expression to the virtual exclusion of other important values. In consequence, it has been focused in large measure upon revising the substantive law of libel. This orientation has carried through to the Draft Defamation Bill.
2. Our view is that this focus on revising the substantive law of libel is misdirected. The primary problems in this area concern access to justice. They are born of the complexity of procedures, the weight of costs, and the rigidity of available remedies. We do think, however, that there are some changes to the substantive law that remain desirable. We believe that thanks largely to Index on Censorship, English PEN, Sense About Science, Lord Lester and their fellow travellers there is now an historic opportunity to reframe the law of libel so as properly to value and balance personal and social interests in expression, reputation and access to justice. We are concerned that the Draft Defamation Bill does not achieve that goal. Indeed, when the Draft Bill is viewed in the light of the proposed reform of the costs regime as it applies to libel, the prospects for access to justice and protection of reputation look bleak for most claimants.
3. In the short note that follows we merely outline our thinking on the Draft Defamation Bill in the expectation that important points will be discussed further in the oral evidence session. We do so by way of short responses to the questions outlined in the Joint Committee's call for evidence. Our views on the Draft Bill now out for consultation will be elaborated further in a response to the Ministry of Justice and in an academic paper to be published in the *Journal of Media Law* in the summer.<sup>24</sup> We precede this discussion with comments on the 'overarching issues' set out for discussion in the Joint Committee's call for evidence, and in

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<sup>22</sup> Mullis and Scott (2009) Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation. *Communications Law*, 14(6), 173-183. A version of this paper had earlier been circulated widely by the Lawyers for Media Standards grouping. The paper was not, however, 'commissioned' by that group, as has been suggested elsewhere.

<sup>23</sup> Mullis and Scott (2010) Lord Lester's Defamation Bill: a distorted view of the public interest? *Inform*, 7 July. A more developed version of this paper was subsequently published as (2011) Lord Lester's Defamation Bill 2010: a distorted view of the public interest? *Communications Law*, 16(1), 6-19.

<sup>24</sup> One of us has already published initial thoughts on the draft Bill – see: Mullis (2011) 'The Government's Defamation Bill: Insufficiently radical'. *Inform*, 18 and 19 March.

that context also offer a précis of our own thinking on the appropriate shape of future reform to the libel regime.

### **Overarching Issues and 'Reframing Libel'**

Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?

Will the draft Bill and Consultation proposals adequately address the problems that are associated with the current law and practise of defamation? If not, what additional changes should be made?

Are there any other issues relating to defamation that you would like to raise?

4. It is our view that the substantive law of libel has already undergone a rebalancing better to reflect the importance of freedom of expression over the past two decades,<sup>25</sup> and that in essence it now represents an appropriate compromise between all relevant interests. The Government's Draft Bill would appear also to tend to this view given that it restates rather than reforms most of the central tenets of the common law defences. We would agree that there are some fringe areas in which the need for further revision can be debated (see comments below on specific proposals in the Draft Bill and consultation).
5. We do not feel that the proposals currently on the table adequately address the problems associated with the current law and practice of defamation. We consider that the primary problems in this area concern access to justice for both defendants and claimants, such that – variously - rights to freedom of expression and interests in reputation cannot be vindicated, and the social importance of the accuracy of reputations and the receipt of information on matters of public concern is not fully valued. These problems are born of the complexity of procedures, the weight of costs, and the rigidity of available remedies. In our view, given effect, the provisions in the Draft Bill will do only a little to ameliorate these concerns. More broadly, the proposed reform of the costs regime as it applies to libel will return defamation to being the preserve of wealthy claimants. The behaviour of such claimants and of media organisation defendants can be expected to deteriorate further when faced with 'small' adversaries.
6. Our own thinking on libel reform has been motivated by frustrations such as those outlined above, but also by our attempt to understand the emerging Strasbourg and domestic jurisprudence on the protection of reputation under the Article 8 right to respect for private life. In the period before and for some years after the passing of the Human Rights Act 1998, the approach of courts to the need to balance expression and reputation interests focused almost exclusively on the question of whether existing rules of law were compliant with Article 10. The importance of reputation was not ignored, but freedom of expression was

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<sup>25</sup> The most obvious changes in libel law have come in relation to the curtailment of damages and the development of *Reynolds* 'public interest' privilege (*Reynolds v Times Newspapers* [2001] AC 127; *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44). Others include the development of the *Jameel* abuse of process jurisdiction, the 'reportage' defence, the revitalisation of the 'fair comment' defence, the findings that various types of body do not have the capacity to sue (*Derbyshire CC v Times Newspapers* [1993] AC 534 (local and central government bodies); *Goldsmith v Bhoyrul* [1998] QB 459 (political parties)), and the enactment of the offer of amends and the summary disposal procedures (Defamation Act 1996).

regarded as the 'trump card'. Reputation interests were considered only as a possible limitation on the right to freedom of expression where this could be demonstrated to be necessary in a democratic society. This approach is no longer tenable.

7. Since 2004, the Strasbourg and domestic courts have become progressively more pronounced in recognising that reputation falls to be protected under the Article 8 right to respect for private life.<sup>26</sup> They have recognised a Convention right to the protection of reputation. Hence, to the extent that it was thought that freedom of expression would always be the more important right, this is no longer the case. Today, at least in respect of most defamation claims, the court is required instead to weigh the competing interests of the claimants under Article 8 and the defendants under Article 10. In all cases, societal interests in the protection of individuals' reputations will also be in play.
8. Yet, while this jurisprudential innovation is now embedded at both the European and domestic levels, it is not clear that a full or coherent explanation underpinning it has been articulated by the courts. In our view, given that the Strasbourg court had previously drawn on the concepts of human dignity and autonomy to expand its coverage to encompass a person's physical and psychological integrity, the idea that reputation should be protected under Article 8 is entirely justifiable. Informed by the social psychology literature on reputation, we take the view that the expansion of Article 8 to cover reputation is an appropriate – indeed, a necessary - development. It is in significant measure the perceived level of esteem that we think others hold for us that affects our judgments of self-worth. It is reasonable for an individual to perceive that a libelous publication might affect his or her reputation. Hence, it is not difficult to appreciate why this might impact upon an individual's sense of self-esteem and on his or her capacity to engage in society. In light of this, it is perfectly reasonable to contemplate a Convention right to reputation (albeit one which might be invoked only where the perceived harm reaches a sufficient level of seriousness). It is also easy to understand why libel law should correct for harms to self-esteem caused by false statements.
9. We consider that the design of any libel regime must properly triangulate the rights and interests of claimants, defendants and the wider public. In our research, we have returned to first principles and re-evaluated fundamental aspects of libel law. We offer a fresh analysis of the purposes of the law which culminates in innovative proposals regarding its substance and its processes. Our thinking has been informed by, first, philosophical understandings of democracy and the public sphere and in particular the role of freedom of speech and of the media therein, and secondly, the social psychology of reputation.

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<sup>26</sup> See, for example, the following Strasbourg decisions: *Chauvy v France* (2005) 40 EHRR 610, at [70]; *Radio France v France* (2005) 40 EHRR 29, at [31]; *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 200, at [91]; *White v Sweden* (2008) 46 EHRR 3; *Lindon, Otchakovsky-Laurens and July v France* (2008) EHRR 35; *Pfeifer v Austria* (2009) 48 EHRR 175; *Karako v Hungary* [2009] ECHR 712; *Rukaj v Greece* (decision of January 2010); *Petrencu v Moldova* (decision of 30 March 2010); *Saaristo v Finland* (decision of 12 October 2010, at [61]); *A v Norway* (decision 9 April, 2009). For English cases, see: *Guardian News and Media Ltd* [2010] UKSC 1; *Clift v Slough* [2009] EWHC 2375; *Flood v Times Newspapers* [2009] EWHC 2375; *Brady v Norman* [2010] EWHC 1215; *Ronaldo v Telegraph Media Group Ltd* [2010] EWHC 2710.

10. Ultimately, we recommend a coherent set of significant substantive and procedural reforms that if enacted would enhance access to justice, simplify processes and reduce costs for the vast majority of libel actions. In essence, our proposal involves the recommendation of a two-track libel regime.
11. The first track in this new regime would comprise a much-simplified process. This could be administered by the High Court, but the function might instead be allocated to the Tribunals Service, or even an appropriately designed self- or statutory media regulator. The overwhelming majority of cases would be addressed solely by this route. Determination of the meaning of imputations would be much simplified by adopting the meaning(s) inferred by the claimant subject to a test of reasonableness.<sup>27</sup> The single meaning rule would be withdrawn. Truth and honest comment would remain as the primary defences, while in appropriate cases the defendant would also be able to rely on absolute, traditional or statutory qualified privilege. The rationale underpinning the *Reynolds* public interest defence would disappear in respect of track one. Damages would only be available for psychological harms protected under Article 8 ECHR. The degree of harm would be allocated within one of three bands of award depending on the level of seriousness.<sup>28</sup> The top band for exceptionally serious Article 8 harm would be capped at £30,000. Vindication would not be obtained by way of damages, but rather through an appropriate – and mandated - discursive remedy. Normally, this would be either a correction or retraction, although apologies could be mandated and declarations of falsity made where the claimant proved falsity. Rights of reply could be allied with any of the other remedies as deemed appropriate by the court. The remedy in damages for intangible harm to reputation would be withdrawn. Special damages for provable loss would be unavailable in this track. Recoverable costs would be limited.<sup>29</sup> The approaches to substantive questions suggested here would very significantly reduce the complexity and cost associated with particular cases. Hence, it would reduce the chilling effect of the law on publication, and markedly enhance access to justice for defendants and claimants.
12. The second track would be limited to aspects of the most serious and/or most damaging libels. Part of such cases would be referred out to this track only where the defendant wished to argue that the case raised a matter of real public interest, where the claimant sought special damages for provable loss or punitive damages, or where psychological harms protected under Article 8 are severe so that the track one procedure would be manifestly inappropriate to deal with the case. Those aspects of cases referred out to track two would continue to be heard in the High Court. Where proven by the claimant, special and punitive damages would be recoverable. Uncapped damages would be available for Article 8 psychological harm (although a *de facto* cap would remain by pegging to

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<sup>27</sup> A useful parallel can be seen in the way in which workplace harassment on grounds of age, religion, sexual orientation, or other 'relevant protected characteristic' is considered under s 26 of the Equality Act 2010. A further rule based on the existence of alternative reasonable meanings would be available in mitigation of damages and / or limitation of discursive remedies. This would be similar to 'contextual truth' or s.5 of the Defamation Act 1952 but would not require justification of the alternative meaning.

<sup>28</sup> Here the parallel is with the determination of damages for injury to feelings in the context of employment law - see *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871.

<sup>29</sup> As a manifestation of the overriding objective of the Civil Procedure Rules (rule 1).

non-pecuniary damages recoverable for physical injury). A *Reynolds*-style public interest defence would be available in track two. Where the defendant relies on *Reynolds*, however, proper recognition of the underlying principles of freedom of expression and the importance of reputation require that the defendant provide either a right of reply or a notice of correction with due prominence. Each party would carry their own costs with regard to those aspects of disputes referred out to track two.

13. We envisage that a key benefit of adoption of the above scheme would be to provide significant incentives for complaints to be settled quickly between the parties without recourse to the formal legal regime. We recognise that the releasing of media defendants in most cases from the risk of very significant legal costs and damages may encourage 'game-playing' by some organisations. In our view, the blunt constraint currently afforded by high costs are adequately substituted by obliged dedication of space to accommodate discursive remedies and the loss of credibility that would go along with such repeated emphasis on poor quality journalism. We do not shy from the fact that these remedies themselves involve interference with defendants' Article 10 rights 'not to speak'. We also note that discursive remedies afforded quickly are often the primary outcome that claimants seek.

### **The Draft Defamation Bill and Consultation**

14. Accepting that we would prefer to see a somewhat different focus for libel reform, we would have no objection to the implementation of a number of the proposals in the Draft Bill and would broadly support their adoption. The following critique is offered in light of that general orientation. As an introductory comment, we note that a number of clauses attempt to codify the existing law. Thus, clause 1 on substantial harm, clause 2 on publication on a matter of public interest, and clause 3 on truth are each aimed merely at restating clearly the existing law. The associated commentary makes clear that there is no intention in the Draft Bill to effect significant change in these respects. That accepted, codification often carries risks and unintended consequences. Particularly where the pre-existing common law is expressly repealed, it may lead to protracted litigation over whether previously settled rules remain applicable. It is questionable whether statutory restatement in these areas is worth the candle irrespective of the political expediency of such action.

Clause 1: definition of defamation; a "substantial harm" test

Should there be a statutory definition of "defamation"? If so, what should it be? What are your views on the clarity and potential impact of the "substantial harm" test, including its relationship to other elements of the current law such as the presumption of damage in libel claims?

15. In our view, the existing common law tests on the meaning of defamation are clear. Hence, there would be no particular value in a statutory definition. We note that few cases turn on the question of defamatory meaning, and those that have done so historically would likely today be struck out as being trivial or as not involving a real and substantial tort.

16. As to the cl 1 substantial harm test, we view it as essentially a restatement of the existing common law *Jameel* jurisdiction. We think there is some value in stating that the burden is on the claimant to demonstrate the likelihood of substantial harm. Given the 'light-touch' nature of the exercise, we would not see this as interfering with the presumption of damage. There is a risk that defendants will seek to challenge every libel claim on this basis with the result that "mini trials" may always be required at the outset of every action.<sup>30</sup> This may be swept up with the Ministry of Justice suggestion of a new procedure for early rulings on this and other issues.

#### Clause 2: Responsible publication in the public interest

Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not, what changes should be made? Should the meaning of "public interest" be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?

17. In general terms, and subject to the above caveat regarding codification of the common law, we have few objections to the cl 2 codification of the *Reynolds* privilege. Some points can be made however. First, by referring in cl 2(2)(a) to the 'nature of the publication' the drafters attempt to make clear that different standards of responsibility may apply depending on the type of publication involved. Thus, a higher standard may be expected of a national newspaper than, say, a garret-room blogger. This may be the position under the common law, but there is as yet no authority to that effect. Secondly, it is possible to quibble over the (non-) inclusion of an explicit reference to relevant codes of practice, but in our view the courts could be expected to adopt such a practice where relevant in any event. Thirdly, the commentary to the Bill states that clause 2(2) is intended to cover statements of fact and opinion. In *Reynolds*, Lords Nicholls and Hobhouse stated that the expression of opinion was to be protected, if at all, by fair comment. In our view, such a division between clear statements of fact and comments is sensible and should be retained.

18. We consider the defence provided for in clause 2 to be a distinct improvement on that contained in Lord Lester's Bill. Clause 1 of the earlier Bill omitted reference in the matters to be considered in determining whether a publication was responsible to the source of the story, whether the article contained the gist of the claimant's side of the story, the status of the information, and the tone of the article. The effect was, arguably, to privilege vituperative comment based on erroneous facts that did not include any explanation offered by the claimant. The Draft Bill rows back from this approach, although sources (and their reliability) are still not expressly mentioned. That possible concern apart, the consequence of these changes is that the new provision is essentially a statutory restatement of

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<sup>30</sup> This was the very risk that Tugendhat J warned against in *Cairns v Modi* [2010] EWHC 2859: "the jurisdiction recognised in *Jameel* has proved very useful. It has been applied in a number of different circumstances in various judgments in this court. But it must not be seen as an additional hurdle which claimants must overcome, increasing the complexity and cost of litigation, instead of reducing it" (at [44]).

the common law. As such, we do not imagine that it will address the perceived problems of uncertainty currently associated with *Reynolds*.<sup>31</sup>

19. Clause 2(3) of the Draft Bill seeks to codify the existing law on reportage, albeit that it does so in narrower terms than those suggested in Lord Lester's Bill. Rather than codification, in our view this rule should have been abolished.

20. As regards the possibility of defining the 'public interest', we agree with the Ministry of Justice that this would be a Sisyphean task 'fraught with difficulty' if undertaken in the abstract. Hence, this is an exercise best left to incremental development by the courts.

#### Clause 3: Truth

What are your views on the proposed changes to the defence of justification? In particular, would it be appropriate to reverse the burden of proof in relation to individuals or companies?

21. The main impact of cl 3 is to change the name of the defence. In most other respects, it appears that the intention of the drafters is that the new statutory defence should restate the existing law. We revert to our previous comment regarding the risks of codification.

22. As regards the burden of proof, as things stand we see no justification for such a move with regard to any category of claimant.<sup>32</sup>

#### Clause 4: Honest opinion

What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened? Is its relationship to the responsible publication defence both clear and appropriate?

23. Notwithstanding that the commentary to the Draft Bill indicates that this provision is intended only to simplify and clarify the law, the provision seems to be a quite radical departure from the current law and as such deserves careful attention. While the new statutory defence maintains the broad structure of the existing law, it converts what has always been a defence with both subjective and objective elements into a wholly objective defence (save for the malice issue). The defendant would no longer have to show that he was actually aware of fact(s) that would have justified an honest person holding the opinion, but rather only that an honest person could have held the opinion on the basis of 'a fact which existed at the time the statement complained of was published'. In effect, the Bill provides a defence for a naked opinion. Moreover, there appears to be no need for the defendant to prove, as the Supreme Court recently required in *Spiller v Joseph*,<sup>33</sup>

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<sup>31</sup> It should be noted that under our 'Reframing Libel' scheme discussed above, the *Reynolds* defence would likely become relevant only as a means of absolving defendants of significant liability in damages for extreme Article 8 harm or special damages. We consider that this is a more appropriate role for the privilege. As things stand, the claimant has no interest in the question of whether the defendant acted responsibly and the public remains misinformed as to the truth of the contested statements.

<sup>32</sup> It should be noted that under our 'Reframing Libel' scheme discussed above, we suggest that the remedy of a court-mandated apology should be available only where falsity can be proven by the claimant to the satisfaction of the court.

<sup>33</sup> [2010] UKSC 53.



that the comment must explicitly or implicitly indicate the facts on which it is based. All that is required is that a fact must have existed at the time the statement was published which would have justified an honest man in holding the opinion. This is to go too far in favour of freedom of expression. Furthermore, by permitting a defendant to base the defence not on facts but on a privileged statement, the Draft Bill potentially would exculpate a person who expresses a defamatory opinion based on another defamatory opinion, neither of which need be based on true facts. In our view, the conceptual basis for the defence of fair comment is already obscure; the Draft Bill makes it fantastical.

#### Clause 5: Privilege

Are the proposals to extend the defences of absolute and qualified privilege appropriate and sufficient? Is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege within the draft Bill (in the light of recent coverage of super-injunctions); or should this be addressed by the (forthcoming) draft Parliamentary Privilege Bill?

24. In our view, the revisions to the various statutory privileges provided for by cl 5 amount to justifiable modernisation.<sup>34</sup> We consider that the only obviously new statutory privilege – that in cl 5(7) on reports of proceedings of a ‘scientific or academic conference’ - is a natural extension of the existing common law protection for the proceedings themselves.

25. We do not consider that a Defamation Bill is the appropriate place to legislate on the broader run of Parliamentary privilege.

#### Clause 6: Single publication rule

Do you agree with replacing the multiple publication rule with a single publication rule, including the “materially different” test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired?

26. While the application of the multiple publication rule to the online context generates some injustice and social detriment by creating perpetual liability, we have are concerned at the blanket effect of the clause as drafted. We recognise the problems created, but do not accept that the case for abandonment of the existing rule has been made out. Torts flow from harms caused. At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed. Indeed, secondary publication after the elapse of time may arguably, perhaps counter-intuitively, be more damaging than much initial publication. Often, only those with a particular interest in a subject or individual will be motivated to access the material at the later point in time, so that any impact on reputation may be especially poignant. In terms of damage to reputation, what often matters is *who* is reading material at a given time. On occasion, the new rule will frustrate justice. Such occasions may be infrequent and they may be covered by the discretion of the court to set aside the limitation period for action under s 32A of the Limitation

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<sup>34</sup> With regard to the 'Reframing Libel' proposals set out above, it may be that the public policy justifications for (some of) these privileges would melt away as we think does that underpinning the *Reynolds* privilege should our prescriptions be followed. We have not undertaken the necessary consideration of the ramifications of our proposals in this regard to date.

Act 1980 (see cl 6(6)). At present, however, this is done only in exceptional circumstances, and it may not be reasonable to expect that judges will use this power to address the potential problems we envisage. Ultimately, to our minds, it is inappropriate to address one admitted problem by pretending that another does not exist.

27. We consider that reform of some nature is necessary to prevent *Loutchansky*-style litigation from exercising a chilling effect on the maintaining of online archives, and propose - in preference to cl 6 - the retention of the multiple publication rule and the introduction of a new defence of 'non-culpable republication'. That defence would be available to an archivist after the elapse of one year after the 'first publication' of the story in question. To avail of the defence, the archivist would be required to append a notice to the archived online article (or, perhaps, in the case of a hard-copy archive to a register of notices relating to archived articles). We would suggest that such a notice should indicate that a challenge to the accuracy of the original story had been made under the new statutory defence.<sup>35</sup> Should the publisher in fact be persuaded of the inaccuracy of the original article on the approach of the prospective claimant, he or she may choose instead to amend the archived article or to attach a correcting notice. Importantly, the archivist-publisher could choose not to append a notice on request of a prospective claimant. This would allow him or her to assert the accuracy of the original piece, and to retain the option of fighting an action where it was deemed desirable or necessary to do so. Presumably this would happen only where the archivist-publisher fully believed themselves able to rebut a libel claim.
28. The advantages of the non-culpable republication approach in the context of archiving are numerous. The integrity of the archive as a facet of the historical record is maintained, while future users of the archive are left in no doubt that further investigation is necessary before statements made therein can be simply adopted.<sup>36</sup> The force of the alleged libel would thereby be mitigated. Moreover, any inclusion in the notice of the competing perspective of the person whose reputation had been impugned would often add to the discursive value of the original piece. Evidently, this solution ties in neatly with the emphasis on discursive remedies for libel that we emphasise above. In contrast, we consider that cl 6 does not allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing rights to reputation. The single publication rule envisaged by the Draft Bill would automatically absolve the author of an impugned archive statement of any responsibility for its making after the requisite limitation period following first publication. This is not appropriate. Not every author of a defamatory statement - or every archivist of online content - is deserving of exoneration from liability.

#### Clause 7: Jurisdiction - "Libel tourism"

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<sup>35</sup> By way of a specimen, we might suggest the following: "A challenge to the accuracy of the following article has been made by [X] under section [x] of the Defamation Act 2011. Specifically, it is asserted that [1, 2 and 3]. To preserve the integrity of the original article no direct amendment thereto has been made".

<sup>36</sup> As things stand with cl 6, a second person who merely repeats the time-protected statement becomes potentially liable if it is defamatory. Given the manner in which 'networked journalism' and 'cut and paste mashing and glomming' proceed online, this seems to us likely to spark a bonfire of the (relative) innocents.

Is "Libel tourism" a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach?

29. As demonstrated by the research undertaken by the Ministry of Justice Libel Working Group, 'libel tourism' as a curial phenomenon barely exists. The notion that British courts have ever been 'flooded' by foreign libel litigants is just one of the fallacies that has abounded in media representations of the libel regime. That said, we believe that the reported 'chilling effect' of English libel law on decisions taken by foreign publishers does exist (see the Index on Censorship / English PEN report), although we suggest that only a subset of such instances should give rise to any concern. On the converse side, there are some individuals who possess reputations in multiple jurisdictions. To establish a rule that assumes there will always be a single most appropriate place to sue seems to us to be simply wrong in principle. More generally, we do not understand why the British legislature should be any the more concerned about the situation faced by foreign publishers relative to those located in the UK or Europe. We would suggest that if English libel law is reformed so as properly to balance all relevant interests, the perception that the 'extra-territorial' effect of that law is unjust will fall away.<sup>37</sup> This is, in short, not the main parade.

Clause 8: Jury trial

Do you agree that the existing presumption in favour of trial by jury should be removed? Should there be statutory (or other) factors to determine when a jury trial is appropriate?

30. Reversing the presumption in favour of jury trial recognises the current position in practice. The right to jury trial may lead the parties to engage in protracted interim disputes, and thus to raise costs even where no trial ultimately occurs. In our view, this is more a feature of the 'single meaning rule' and the failure to determine meaning at an early stage of proceedings than of the existence of the jury per se. We are not blind to the constitutional desirability of a role for juries in libel proceedings, but we consider that on balance the institution contributes significantly to the complexity and therefore the cost of the regime. It may be preferable for cl 8 simply to repeal the right to jury trial.

#### **Postscript**

31. We would like to reiterate our thanks to the Joint Committee for allowing us the opportunity to comment on the Draft Bill and to set out our wider thinking. We will be happy to elaborate on any of these themes in the oral evidence session, and / or by way of further written submission.

*April 2011*

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<sup>37</sup> Enforced vigorously, the existing jurisdictional rules may be adequate to address egregious cases of forum-shopping. Clause 1 of the Draft Bill may also have a significant effect in this regard. Manifestly, we consider that more broadly-based reform is necessary to address the libel tourism phenomenon, but we see it only as one symptom of a broader malaise.

## Oral Evidence, 4 May 2011, Q 60–89

Witnesses: **Professor Alastair Mullis** [Head of Law School, University of East Anglia] and **Dr Andrew Scott** [Media Law Lecturer, London School of Economics].

**Q60 The Chairman:** Thank you very much for coming and thank you for your submission which was helpful to have before this session. I shall start by giving you an opportunity to make any general comments on the Bill that has been drafted or on the issues on which the Government wish us to help with the consultation before possibly drawing up additional clauses for the Government's consideration. Is there anything that either of you would like to say?

**Dr Scott:** First, we'd like to return your thanks for inviting us along today. We are arrogant enough to believe that we have something important to say on the subject matter of this morning's discussion. We are gratified that you have taken the time to listen to us and to probe our thinking. That said, I think we have been invited along, in part at least, to offer the case against reform and, if you allow, I would like to take some time to recast our roles somewhat. As we have already heard this morning, there is a good measure of common cause between ourselves and the libel reformers; we do not disagree across the piece. We disagree often in terms of strategy as opposed to outcomes. We consider that the Ministry of Justice, the Government, this Committee, and Parliament more broadly does have a historic opportunity in the coming months to address the fundamental problems which blight our libel regime. We think that this opportunity has arisen for Parliament in large measure because of the tenacity and the perseverance of people like Jonathan Heawood, Jo Glanville, Tracey Brown, Evan Harris, Index on Censorship, Sense About Science, English PEN, Lord Lester and others. However, we do feel that because it has been for such groups, and at least in some measure for the mainstream media, to set the political framework within which the Bill has been developed and because they tend to emphasise speakers' interests, publishers' interests, freedom of speech and downplay the wider interests in a libel context—personal interests in reputations, the societal importance of reputation, the other side of freedom of expression, which is the right to receive accurate information and for the truth to be out in the public domain—collectively, we are now at risk of squandering this opportunity to effect coherent reform. We think that the profound success of the Libel Reform Campaign has been to illustrate, as we have heard at length this morning, the over-broad chilling effect. I certainly emphasise the point that you made, Lord Chairman, about the perfect acceptability of the chilling of undisciplined speech, as you put it. We would strongly suggest that the chilling effect is a problem only where it is unwarranted and chills accurate and truthful information that should be in the public domain. Their profound success has been that no one today can credibly contest the idea that there is an unwarranted chilling effect, which is created by our law of libel. For us that must be addressed. It does affect the work of journalists, particularly investigative journalists. It does impact on scientists and on the important work of NGOs and others across society. The chilling effect must be addressed somehow.

However, we think that the profound mistake of the Libel Reform Campaign—we appreciate that they are more broad than I am going to suggest in its critique—is that they insist that there is some imbalance, in some large measure, in the substantive law of libel, which is to blame for the problems that we perceive and that

henceforth it is the substantive law of libel that has to be revised. We think that the key problem, the profound problem is cost and the problem that that creates in terms of access to justice, not just for defendants when faced with inappropriate, bullying, abusive libel actions, but also, and perhaps more profoundly so, for claimants who might well have had their reputations unfairly traduced, and find they have no access to justice by which to vindicate their reputations. This is outside the framework of the Bill, but I suggest that the proposals that are afoot, in terms of addressing the cost regime as it will apply to libel, will exacerbate this issue to the nth degree. There will be no access to justice for any claimant who does not have personal wealth or is not endowed with wealth, corporations or the like.

In terms of recasting our role, we will not be offering the case against reform. However, we will proffer the case against this reform or perhaps this reform only. In our view, the Bill—I am speaking generally at the moment—is oriented towards restating and, in a number of respects, expanding on the relevance of the responsibility of publishers, perhaps the absence of maliciousness on behalf of publishers or the absence of recklessness on behalf of publishers. We think that that focus and that tendency in the Bill is inappropriate and likely to create unfairness. Ultimately, the claimant does not care whether the publisher of the false statement has been responsible or not malicious or not reckless. What the claimant knows is that what has been published is false and perhaps that his or her reputation is lying dead on the carpet. Similarly, it seems to us important to recognise that the fact that the publisher was responsible in getting the facts wrong seems unimportant whenever the audience is left, as is often the case at present, misled by what has been published and that that misleading information which has been aired in the public domain will often be on matters of profound public concern.

The libel law, as it is at present, the libel law that we envisage being expanded if this Bill is given effect, will be a law that does not emphasise truth; does not tally with the notion of the facts are sacred; it will move us away from an emphasis on truth which we think is deleterious. Obviously, we are very happy to comment on the detailed provisions in the Bill and we will be very interested in your questions on them. We think that if the Bill is to be the only game in town—and we profoundly hope that it won't be—it is very important that its provisions are as strong as possible in terms of reflecting the broad range of interests at stake in a libel context.

As the Committee has alluded to already, we have been developing an alternative scheme of reform that we think better triangulates the rights and interests of claimants, defendants and the wider public. We also think—we have spent the last several months testing this—that our scheme would have the crucial merit of very significantly reducing the cost of the libel regime. Indeed, we would suggest, we imagine, we would expect that it would give parties a very strong push towards dealing with actions out with the law, so the tendency to go to court would, in large measure, be resolved because of the clarity of the scheme that we offer. We think that addresses what we conceive to be the fundamental problem here which is access to justice for both parties. Certainly, if there is an opportunity to expand upon our thinking today we would be very much obliged for the opportunity to do that.

**Q61 The Chairman:** Thank you. Perhaps I can ask two questions for clarification and then I shall ask Lord Bew to take up the questioning. You said that you were not going to be coming out against reform but just this particular thing. Are we free to assume from that that when you come out against this particular thing you will not just be coming out negatively, but suggesting constructive alternatives to that of which you do not approve?

**Dr Scott:** Our plan is not to be curmudgeonly about this. We think reform is important and we are not adamantly opposed to the Bill as it stands. We think there is very much of value in there. There are reforms being effected through the Bill that we think are necessary and desirable. However, in many respects we think it goes too far.

**Q62 The Chairman:** My second point of clarification is that you talked about “our scheme”. Should we assume from that that you have an alternative draft Bill for our consideration?

**Professor Mullis:** I do not think you can assume that, no. We worked out the broad structure of what a Bill would look like and the things that would go into it, but we have not drafted a Bill.

**Q63 Lord Bew:** Thank you very much, Professor Mullis and Dr Scott, for providing your papers. Your position is evolving. Since I first heard you speak over the past year, I can see changes to positions. I am a great believer in keeping us up to date about the way in which your thinking is evolving. I want to turn to an absolutely central question which seems to me to define your position as against others who are sceptical of the ideas in Lord Lester’s Bill. One of the defining features of your position is a concern about personal reputation. Other people who are sceptical or have reservations about the approach of Lord Lester and others, indeed the government Bill, refer to the importance of personal reputation and it is common in other places: the Bible, Shakespeare or a Canadian judge—I think Lord Hoffmann quoted a Canadian judge—an individual’s reputation is not to be treated as a regrettable, but unavoidable roadkill on the highway of public controversy. However, in your case you seem to start from an attempt to deepen this. You refer to work in social psychology literature; you refer to the work of the German philosopher Habermas. Does that mean that you think you can produce some theory of defamation that would be a proper guide?

**Dr Scott:** On the last point, I am not sure that I, at least, am extremely arrogant as an individual; I am not sure I am so arrogant as to suggest I offer you a general theory of defamation. However, what we have done is seek to understand what the defamation is about and what it is there for and what libel law seeks to achieve. Our thinking was partly in response to a publication originally made in November 2009 by Index on Censorship and English PEN, where we were being critical of what they had to offer—we thought we were constructive but we were certainly critical and we were not putting anything positive on the table ourselves. We did something similar with Lord Lester’s Bill. We were keen to move forward from that. Our role is not to sit and scream from the sidelines; we felt it was important for us to offer an alternative. Meanwhile, we also had in the background a jurisprudential development taking place in Strasbourg which subsequently reinforced at the domestic level which is the notion that Article 8, the right to respect one’s private and family life, has been deemed to cover reputation. Our quandary was how can private life, or a provision in the Convention that covers private life possibly cover something which is quintessentially a public thing? We then turned to social psychological literature and there we found that a very strong component of one’s self-esteem is understood in the socio-psychology canon to be based on one’s perception of how others esteem you—not the esteem that they in fact hold for you, but your perception of the esteem that they hold for you. That would speak to your sense of autonomy and your sense of psychological integrity. If libel impacts directly on your sense of psychological integrity, our thinking is then that naturally falls within Article 8 as it has

been developed over time by the Strasbourg Court, which has included not just physical invasions of privacy but also invasions of one's psychological integrity. With our alternative scheme we then took that intuition and saw where it led. The Habermas component is to emphasise the importance of openness and discourse in public speech. So things came together to lead us where we went and, gratifyingly, we found that with the changes that these intuitions suggest we could offer a system which would very substantially reduce the cost of the libel law system, by changing, not the fundamental rules of libel law, not what defences are available, but rather the way in which the libel process operates in certain subsidiary rules—the simple meaning rule, for example, which had been the way that libel has been done but which need not be in order that the purposes of libel are in terms of the defence of reputation while respecting freedom of speech and perhaps promoting it are addressed.

**Q64 Lord Bew:** That is where your thinking culminates; your academic literature leads you to that conclusion. Perhaps I could ask you a question which I am sure you will recognise, unfairly or not, that within academe in which you work, there is a sense that there is an unwarranted or unjustifiable chilling effect around certain types of scientific congress, not just peer review journals, not just in the field of science, in history and political science and so on. I am sure you are well aware that a lot of your colleagues are edgy about this. Could you tell me why it is that you do not appear to be quite in the same place? You may be entirely right not to be in the same place. I would like to have a sense of your thinking on this matter.

**Professor Mullis:** I think we would concede that a number of scientists and academics may feel chilled but to us the chill comes from the cost to which they are likely to be put in defending a libel claim rather than the reality of libel law. If you look at libel law, in general it seems that in a number of ways it protects academic speech very strongly. If you look at the question of meaning, that takes context into account. If you look at the question of what is defamatory, that takes context into account; in fact, scientific discussion is a relevant factor in determining whether or not a matter is defamatory. As we have seen in the Singh case, the question of whether a statement is a fact or a comment depends on the context. There is also a very strong argument that conferences and peer review journals are already protected by qualified privilege, so the law already does that. There is a case called *Vassiliev v Frank Cass*, a decision of Mr Justice Eddie, in which he said that the publication of a peer review journal was protected by common interest privilege. It seems to me that there is a very strong case. If publication in peer review journals is protected, then it seems to me that the same argument would apply in respect of conferences. There are also a number of statutory privileges. Again, all this comes down to the fact that libel costs too much. It is not the rules themselves; I think the rules currently accommodate the right to reputation and freedom of expression quite well.

**Q65 Lord Bew:** I have one or two other questions. I could understand that you are opposed to replacing the multiple publication with a single publication but I am not clear in my mind about the resolution that you propose to deal with this differently and how it would work in practice. Perhaps you could explain how to deal with the difficulty. Why are you unhappy with what is in the Bill and can you give further explanation of the solution that you offer?

**Dr Scott:** Starting with the first point, what internet lawyers will tell you is that they are unhappy or nervous whenever laws apply differently to different contexts, so ideally the law should be applied in an equivalent fashion to different areas, unless

there is an identifiable reason for treating contexts differently. In terms of online publication, there is a reason for treating the scenario differently because publication online is perpetual. Once something is up there, it stays up there and is readily available through things like Google and so on. That means that this is a problem that must be addressed in terms of preserving historical archives, so we do not resile from the identification of the problem to which single publication law is deemed to be the solution. We recognise that perpetual liability can arise, given the nature of how internet publication takes place. Our concern would be that repeated, ongoing publication online, if false, also poses problems for reputation on an ongoing perpetual basis. The problems are not just free speech problems but are potentially problems for one's reputation, if something is accessed after a year. I think that is rather given away in the Bill because a distinction is drawn between publication by the original publisher on the one hand, and then a secondary publisher on the other hand. The second publisher is still open to be sued if they publish exactly the same statement, what that tells us is that the statement remains defamatory. If a statement remains defamatory it is still potentially damaging if accessed. So there is a potential injustice which is created by this rule. That is my concern. The question is whether it is a significant problem and the Bill takes the view that, after one year, the significance of the problem is likely to dissipate. That is an empirical question. However, I imagine that there will be certain circumstances in which the fact that something is still available after a year will still give rise to problems that we would want to address, such as you lose your job and you are looking for a new one and someone Googles your name and finds some allegation on which you have never taken action. It can move from one country to another and all of a sudden something that you did not or could not take action against, in your own jurisdiction, now becomes important and you find you can act, but it is still damaging your reputation. You can act and you may wish to act. It might be that you fall in love with a prince and all of a sudden your past becomes important and things can be dredged up from the web about your past, which would be damaging to you today. That problem is potentially, not often but potentially, going to be significant. Our alternative solution, admitting the problem on the publishing side of the equation, is what we describe in the rather ungracious phrase as non-culpable republication. There we are emphasising the idea that where there is a concern, and where Article 8 reputation rights demand that someone has an opportunity to vindicate their rights, we need a different resolution. The resolution should not be, "I am going to sue you; you must take the material down". Given the importance of the historical archive, the resolution should be with the publisher who decides whether they wish to defend the statement as it stands if they feel they can justify it. They actively decide that, or appends a notice to the publication online indicating that a challenge has been made under the relevant provision in whatever statute we are talking about and sets out what the contested points are so that anyone coming to that publication in future will see that what has been published cannot simply be taken on trust.

**The Chairman:** Before I bring in Mr Lammy, Dr Huppert would like to ask one question for clarification.

**Q66** Dr Huppert: You said, if I understood you correctly, that academic conferences and peer review publications were already protected under qualified privilege. I realise that is debatable. Presumably if that is the case, you would be entirely relaxed with making that statutory so that that was very clear for everyone. Have I understood you correctly and is that right?



**Professor Mullis:** Yes, I think it is reasonably clear that they are protected. Essentially, what we are talking about would be a common interest privilege. It may well be difficult to put it into statutory form, but if one could put it into statutory form in a clear and concise way, then I would have no particular objection to it.

**Q67** Mr Lammy: On the point you were making previously in relation to reputation, in the real world on the internet there is a lot on blog sites on groups that frankly affects one's reputation. One does not have to look very far to see quite a lot said about current super-injunctions and the individuals involved. What is the practical effect of what you are suggesting?

**Dr Scott:** In terms of the non-culpable republication defence?

**Mr Lammy:** Yes.

**Dr Scott:** There we are addressing a scenario when something is published online and remains online. If something is put online and is damaging in the short term, then you can sue in the short term. What we are describing in the medium term after a year is a situation where the original publisher can evade liability by adding additional information in the public domain.

**Q68** Mr Lammy: Because of your academic bent, I was asking a practical question about the effect of that in a world in which there are many publications and some of them are not what one would concede to be straightforward in the old world, as it were.

**Dr Scott:** I think the truth of the matter is that, accepting the points about scientists and other individuals making public spirited comments being at risk of being sued, in practical terms the people who are sued in libel law are by and large the media. In the future I imagine that by and large it will remain the media so the people who would adopt the sort of defence I am describing would be the media who maintain archives of previous publications online. The question about the small publications that are made is one about whether anyone would be bothered to sue in the first place. Sometimes people are bothered to sue and they will continue to be able to do so.

**Q69** Mr Lammy: On the substantial harm test, you were quite clear that you think that this goes too far and that, if you like, there is a danger of pre-litigation because of the nature of that test raising the bar. Can you say a little more about that?

**Professor Mullis:** In terms of the substance of the test itself, I am not sure we would have particular difficulties requiring claims to be struck out where they are trivial, so under the existing Bill, there is the Jameel jurisdiction which enables the court to strike out a case where it is not worth the candle. To what extent does Clause 1 change that? I think there is an argument that substantial harm sets the barrier a little higher than the existing law. No doubt that is something that would have to be worked out in the courts in due course. I suppose one of the things that struck us as a concern was that essentially in every case this is something that would give rise to debate; it would become a hurdle that would have to be crossed in every case, which of itself would give rise to increased complexity and increased costs rather than any sense of keeping out trivial claims. We do not really think that in practice it is likely to exclude many more claims than are currently excluded. What we think is a danger is that it will actually add to expense and to the complexity of procedures rather than reducing them.

**Dr Scott:** Can I answer that with just one further point? If that issue were to be wrapped up in a more general early resolution procedure, such as suggested in the consultation attached to the Bill, the sorts of concerns that Alastair was alluding to there would dissolve.

**Q70 Mr Lammy:** Do you recognise some of the concern out there about the relationship of the powerful in this debate? You have framed very helpfully your view about an over-emphasis on the role of the media as against reputation and your reliance on Habermas I thought was interesting. Can you say more about the corporate ability to stop things that are being said? You have very strong views and I think there is a sense out there that the balance may not be quite right.

**Dr Scott:** I am going to go round the houses a little bit on this, but there are two points to be made about corporations and the corporate involvement in libel. One of them was made earlier and that is the idea that corporations, through their interests and reputation can exploit libel law and most particularly they exploit the fact that they, in contrast to their opponents, will always have deep pockets. I think I am right in saying that corporations can write off the cost of legal action against tax, for example. So it is no great problem for corporations to bring a legal action. That is a problem. We perceive that the cost issue is the key problem. If addressed, then the strength that that affords, the unequal bargaining power that that affords this particular type of party to a legal action will dissipate. I am not saying it will dissolve entirely because they will always maintain relative wealth.

**Q71 Mr Lammy:** Do you have a solution in relation to that cost issue?

**Dr Scott:** I think our general solution would ameliorate the cost problem very substantially. Perhaps I can add a further point because I think it is important. The second scenario in which the corporation is in a position of unequal bargaining power is the much more normal situation which is that of the multinational media corporation defendant facing an action brought by a relatively under-resourced claimant. The bullying goes both ways. A question was asked earlier about how far alternative dispute resolution mechanisms can work here. The fact is that media at present, as the dominant party in most actions, does not need to involve itself in mediation or in an alternative dispute resolution. They can just ignore complaints that are brought to them and they do. That is a significant problem that should not be overlooked. More generally, there is a danger of picking pieces out of our broader scheme and trying to offer you an answer on narrow questions. In our scheme we suggest that because corporations do not have Article 8 rights—at least not these type of Article 8 rights—they should not be able to sue for any damages awarded for Article 8 harm, harm to psychological integrity. Our wider scheme prevents anyone from recovering damages for vindication to demonstrate that they were wronged, but also for intangible harm, actual harm which cannot be measured.

**Professor Mullis:** Presumed damage to their reputation. In a sense, what we are left with is giving some form of discursive remedy by way of vindication.

**Dr Scott:** Unless a corporation is able to point to the specific losses that were suffered on account of statements that have been made, and as we heard earlier that is an incredibly difficult thing to do and it is also something that corporations are loath to do because it will involve them in presenting evidence to a public forum that they might prefer is not presented there.

**Q72 The Chairman:** Perhaps I can ask for clarification. Should we assume from what you said earlier that you would prefer that corporation or company costs should not be able to be written off against tax?

**Dr Scott:** Obviously, corporations engage in all sorts of litigation every day of the week. It is important that this is recognised as an operating cost and that it is

treated as such in financial accounting. I was making the point that it is a fact that corporations are able—

**Q73 The Chairman:** You were making the point that it is a fact in the broader context of the fact that this gave the corporations an unfair advantage. I wonder whether you would take the logic of that through to its possible end point, which was to do away with one of the advantages.

**Professor Mullis:** I suppose one might say in the context of libel claims that this is not a tax advantage that they should be entitled to rely on, but I think in relation to some other types of claims you might well consider it as a legitimate business expense.

**Dr Scott:** More generally, if they weren't able to write it off against tax, it is not going to make that much of an impact.

**Q74 Mr Chishti:** Turning to Clause 8 and jury trials, am I right in thinking that you support the removal of the presumption for jury trials in defamation cases?

**Professor Mullis:** There are some good arguments in favour of jury trials, but by and large our position would be that the potential for a jury trial adds considerably to the cost and complexity of the procedure. Therefore, our view would be that we should abolish jury trials completely; we should not simply reverse the presumption but we should simply abolish them entirely.

**Q75 Mr Chishti:** So rather than say that there are exceptional cases where there may be jury trials, you would say completely get rid of jury trials?

**Professor Mullis:** Yes.

**Dr Scott:** We would recognise that there are constitutional reasons for maintaining a jury, but we would say that for policy reasons we would be happy to forgo that choice.

**Professor Mullis:** If this reform is about reducing complexity and costs, then one of the real drivers for cost in the current system is the potential for a jury trial, even though jury trials are almost as rare as hen's teeth these days. I think the last jury trial was something like 600-odd days ago. If jury trials have that impact on complexity and costs, as a matter of policy I think we should probably get rid of them.

**Q76 Mr Chishti:** I have a final question on that. Do you not think that in the whole legal framework, removing jury trials here could then lead to the assertion that in complex fraud cases they should be removed because it would cost a lot of money and that is the slippery slope in terms of jury trials which are fundamental to our legal system?

**Professor Mullis:** I am never persuaded by slippery-slope arguments. I think each case has to be taken on its individual facts and we are essentially talking about jury trials in libel cases.

**Lord Morris of Aberavon:** How do you justify your remark that the potential of jury trials increases costs because they do not happen? I am worried about the potential. How do you justify that point?

**Dr Scott:** The fact of the matter is that if you have a jury trial, the question over the meaning of a statement is left to a jury, so it is decided at the end point. While we are fencing around the prior stages of the litigation, what we have is people developing an argument, based on meanings that ultimately the jury will not choose. If you did not have to do that, all of those attendant costs disappear. If you know the

meaning on day one, then you focus on that meaning and you are not worrying about vindicating other meanings that will not be the focus of our attention at the outset.

**Q77 Dr Huppert:** I have two fairly brief points. Right at the beginning, Dr Scott, you raised concerns about responsibility. If there was a false statement, it did not matter whether it came out responsibly or not. Would you agree that there is the flip side where someone who has been entirely responsible ought to be entitled to some form of defence? What are needed are completely alternative remedies, rather than anything going through the libel process, such as a statement saying, "Yes, we did this properly, but it turns out it was wrong". Is that right?

**Dr Scott:** What has been discussed this morning in passing is the idea that we have a two-track libel regime. That is no longer quite what we are proposing. What we are talking about is a single track from which you can refer out to deal with a significant and complex issues. Under our scheme a Reynolds-type of defence would be available as a reference out. We imagine that it would tend to be used only when the counter argument was being used that there are special damages in play. More generally, we would not see a role for Reynolds, but we would see alternative means being brought into play in order to address the public interests that you are describing. The problem with Reynolds is that it places an emphasis on something other than the truth. In many respects it is a concession to the fact that our system is over-costly in the first place. It would be preferable to offer a discursive remedy in lieu of that, but I think there is a role for Reynolds in regard not to liability but rather to remedies. So Reynolds should be available, not to exculpate a defendant but to have them avoid swingeing damages.

**Q78 Dr Huppert:** Perhaps I can understand your position on the issue of online and the role of ISPs and organisations such as Mumsnet and Facebook which have contacted me. Where do you stand?

**Professor Mullis:** It seems to me that the law has developed quite considerably over the past several years in the way in which it deals with publications online. By and large, I think the position that we have got to is about right. Essentially if you are simply providing the pipes by which a communication is made, or you are Google, you are not treated as a publisher in common law at all, so no liability would arise. For those people who host information, I am sure you are aware that they can rely on the defence in the EU e-commerce directive. In that case there would be no liability until the unlawful act is drawn to their attention.

**Q79 Dr Huppert:** I understand from them that they are uncomfortable. They are Mumsnet and Facebook. Others have said publicly that they are concerned and perhaps we should talk to them to find out. I do not understand why you would disagree with them if they are concerned.

**Professor Mullis:** They may be concerned, but essentially they are providing a mechanism by which people can libel other people. If I put a large notice board across the other side of Parliament Square and say that I am hiring it out for anyone to say whatever they like about MPs and Members of the House of Lords, it seems to me that in those circumstances I should be under some responsibility if it is drawn to my attention that someone is abusing that situation. I cannot see any particular way in which the internet is significantly different from the example of other non-internet publications.

**Q80 Dr Huppert:** If a church has railings where people can put up posters, do you think the church in that context would be responsible for the content?

**Professor Mullis:** Once they are aware of the publication. It seems to me to be entirely reasonable in those circumstances for them to have to decide: "Do we leave it up there?" They are perfectly entitled to leave it up, but it seems to me that once they leave it there, they should potentially incur liability as a publisher.

**Q81 Lord Marks of Henley-on-Thames:** I have a supplementary question. I want to pursue the issue of the libel offence because at the moment I have not understood how you can draw a distinction between smaller cases and larger cases, or one type of case and another, as to whether there should, in principle, be a defence of responsible publication in the public interest which many would think has been the single most important advance in common law over the past decade.

**Dr Scott:** I do not think we are making a distinction between small cases and large cases at all. We are talking about standard cases versus cases in which there are some unique, unusual features. The sorts of unique unusual features we might talk about that would justify reference out to track 2, as we call it where Reynolds would be available, are things like the argument that there are special damages in play; the argument that the harm caused to the psychological integrity of the claimant has been so severe that it needs to be addressed by damages at a very high level; and perhaps an argument that the defendant is somehow abusing a position of power, thinking there of public authority abuse of power. Outside of those areas you would be unlikely to want to use the Reynolds defence. That is predicated on the idea that the system itself is not so costly as to require you to be absolved of liability for doing something which may, or may not, ultimately prove to be beneficial to society at large. We are saying that the quid pro quo for the loss of Reynolds is a drastically reduced cost to the overall libel regime.

**Q82 Lord Marks of Henley-on-Thames:** I am sorry to press you, but I still do not understand the issue of principle. It is not a question of using Reynolds because it is a costly case; surely, if the responsible publication defence means anything at all, it involves assessing that there is, in the interests of free speech, a right to responsible publication in the public interest, even if it turns out that there may be problems in proving truth.

**Dr Scott:** We would say that in that context you make the publication, which subsequently proves not to be true or unprovably is true. In that scenario, it is a part of responsible publication to offer fuller information, so what we suggest is not that you have to have an apology in that scenario, but rather that you have to expand upon what you have written. So you have written X and it is not true although you have been responsible or we cannot prove it to be true, notwithstanding the fact that we are being responsible. In that scenario, we suggest, given the importance of reputation, that the publisher should go the extra mile and clarify, correct retract, while expanding on what they were actually meaning to say or accepting that they cannot prove: "We said X but we now accept that we cannot prove it". The comment itself remains in the public domain. What we suggest though is that the claimant cannot get an apology or a declaration of falsity unless they themselves can actively prove falsity. So it is a means by which the statement can be made without very substantial financial repercussions for the publisher, but while requiring the publisher to ensure that fairness is done to the claimant.

**Q83 The Chairman:** I would like to conclude with a few questions, if I may. Following up on this two-track proposal, what evidence do you have that people would opt for a tribunal when they still have the right to go to court, when the courts would have more power and therefore, perhaps, more chilling effect?

**Professor Alastair Mullis:** I suppose at the moment we have not finally fixed on where each of these tracks would be. Clearly, track 2 would be dealt with by the High Court. Do we have concrete evidence to show that people would like to go down track 1 if it is dealt with in a libel tribunal? No, we do not, but it seems to us to be intuitively correct that if, as a claimant, you can get your reputation vindicated quickly and relatively cheaply and you can get the truth out there, as it were, without having to go through the full expense of High Court proceedings, that is the way you will go.

**Q84 The Chairman:** I absolutely understand the intuition. I have a sense that, by the time we are done, people are going to be expecting whatever we say to have a fairly obvious evidential base. If we succeed in that, it will strengthen whatever this Committee recommends to the Government. That is the reason for asking whether you think you can go beyond intuition.

**Professor Alastair Mullis:** There is certainly some anecdotal evidence to that effect. Schillings publish on what claimants want. One of the things that a number of claimants talked about was a quick and cheap resolution and a setting right of the story. Presumably Schillings would be happy to disclose that to the Committee, although I do not want to speak on their behalf, but it is only anecdotal evidence.

**Q85 The Chairman:** Can I pick up something that Dr Scott said some time ago, if only to prove that I was listening? You made a comment to the effect that part of the problem with the media was that frequently, if you complained, and even if the complaint was well justified, there was a sense of ignoring it and life just moved on, and so on. Would that be better addressed if the Press Complaints Commission was statutorily entitled to become involved in these sorts of issues?

**Dr Andrew Scott:** Taking a step back from the immediacy of the question, what we have today is a situation where libel laws are a substitute. The possibility of a nuclear libel action costing several hundred thousand pounds is a substitute for effective regulation of the press. That could be through self-regulation of the Press or it could be regulation through statutory means. Personally, I would have the same sorts of reservations about statutory regulation of the press as have been expressed often in the Houses of Parliament. When we originally published our paper, we suggested that the PCC, or some equivalent media self-regulator, could be a forum in which most libel actions could be dealt with. We appreciate that that does not cover the gamut of libel actions, and that is a reservation about that suggestion. But certainly if the PCC was offering a stronger alternative and was perceived to be offering a stronger alternative, that would be a desirable opportunity for most claimants, I am sure.

**Q86 The Chairman:** Can I now take you to the internet. You will gather than I am picking up a number of points that have been made. I do not pretend to be an expert. The word is used almost with the connotation that it is uniform and homogenous, which of course it is not. If you want to take exception to something that an online national newspaper has said, that is one set of circumstances. You have providers, which is another set of circumstances. Then you have things like Facebook, and so on, which I guess you might argue was a third set of circumstances. If you will

humour me and accept that those are three different components to a single entity, which is the most important for this Committee to address, in your view?

**Dr Andrew Scott:** I think it is difficult to say that one is more or less important than the others. Ultimately, the types of actions that you might see arising in the different contexts will be different. Each of those experiences will be important for people who are suffering them. Personally, I think that the media must be controlled by libel, given the absence of effective alternative means of regulation, but that is not to say that I would ever suggest that libels perpetuated on social networking sites are not important; they clearly are important.

The difference in approach that Alastair was describing earlier on under the current law depends on the degree to which the site or the ISP has a measure of editorial control. I would want to go further than Alastair did earlier. I would want to recognise the point that was made earlier about the privatisation of justice in this regard. It is a powerful point that the Committee should be very conscious of. Quite how you frame the law to address those different scenarios is a difficult exercise. It may be that there is some role for something like the non-culpable republication defence for ISPs who find themselves in a grey area, where they are being pressed to take down something over which they have little editorial influence, but really feel that they should not do that because they respect the free speech of the person who has put the material up there in the first place. If they were able to put a notice on it and absolve themselves of potential culpability, that might be a desirable halfway house, which is different from what is currently available from the law. As to your immediate question, I would not want to be the one who directs you towards one type of publisher rather than another.

**Professor Alastair Mullis:** I am not sure that I wholly agree with everything. Andrew and I do not always agree on everything. It seems to me that, in terms of the motives, there is still a serious danger even if you put that notice up, that significant harm will be caused to the claimant, because readers of that will say, "Oh well, the claimant would say that, wouldn't he?". If you are going to deal with the internet, you need to think about it as a whole. You need to consider the different types of publication, broadly speaking, that are communicated by those people who publish through the internet. There are different types of publication and you cannot ignore that. The EU commerce directive recognises this difference. It talks about the difference between the ISS or internet service provider or whatever acting as a mere conduit, acting as a host and caching the information. The liability in those circumstances is different.

**Q87 The Chairman:** Can I take you into an area that we have not touched on so far? I have been intrigued that in the few weeks that it has been known that I am chairing this Committee, a number of people, as all of us would recognise, have taken the opportunity to express their views. That is very helpful. Within those views, there has, to my mind, been an element of confusion between privacy on the one hand and defamation on the other. Can you help me, never mind them, and tell the Committee how much overlap exists in your view between privacy and defamation?

**Dr Andrew Scott:** There are two areas of overlap. One area that arises in practice is that if you publish something false about my private life, then conceivably I might seek to sue either in privacy or in libel. In practical terms, I would tend to sue in privacy, because by adopting that route I am much more likely to be able to obtain an injunction. This is the area of false privacy, where we have overlapping coverage. There is then the interplay between Article 8's protection of privacy and reputation, which we described earlier—the idea that reputation falls within privacy. Now what is

happening in that context, is that where courts accept that Article 8 does protect reputation, they are seeing themselves bound to review the way in which existing rules of libel balance the interests at stake. Where formerly they could talk about the trump card, Article 10.1 right to freedom of expression, that could be set aside but only when the setting aside was necessary in a democratic society, which is a much higher hurdle. Today they are not presuming that either privacy/reputation or free speech should automatically prevail, all other things being equal.

**Q88 The Chairman:** Do the two of you approve of that or disapprove of it, or are you neutral?

**Professor Alastair Mullis:** Certainly on the latter point, it seems to me that the European Court of Human Rights and the English courts have got it absolutely right. Where a libel touches on one's personal integrity, it seems to me that Article 8 is engaged. Where Article 8 is engaged, there is a balancing act required with Article 10. On the first point, I have some difficulty with different tests being applied on the question of whether an injunction should be issued depending on whether you sue in defamation or privacy, but Andrew's position might be different on that.

**Dr Andrew Scott:** I do not want to speak to that specifically. On whether we are neutral, I think the way in which this idea has been developed by Mr Justice Tugendhat, in particular, in the domestic courts allows us to understand why certain categories of case should be treated differently. There may well be a difference between business libels on the one hand versus libels that affect somebody's personality. Similarly, it allows us to understand the Thornton threshold of seriousness test. If we are talking about is a libel that affects somebody's Article 8 right, as we have been told by the courts in the privacy context, the interference with privacy has to be not just nugatory interference, but something significant in order to justify the claim being brought. That is important. That is an Article 8 justification for the substantial harm test, which makes it more powerful.

**Professor Alastair Mullis:** There is a similar point in relation to corporate clients.

**Q89 The Chairman:** Final question: is libel tourism real? Is it important? Does it need to be addressed?

**Dr Andrew Scott:** You asked for evidence earlier. I think the evidence demonstrates that it is not a real phenomenon in terms of cases that come to court or, in many respects, cases that reach the stage of a writ being issued.

**Professor Alastair Mullis:** But we would be the first to accept when NGOs and others say that they do receive letters. I guess that in terms of legislating on this, I would like to see what sort of letters they are. I would like to get a little more evidence about what the threats are in practice.

**Dr Andrew Scott:** But in principle, yes, the phenomenon exists and it has to be dealt with.

**Professor Alastair Mullis:** The Bill deals with it reasonably well.

**The Chairman:** We made a commitment when we started that we would try to keep to time. On behalf of all the Committee, I thank each one of you very much indeed.



**Reynolds Porter Chamberlain, Finers Stephens Innocent, David Price Solicitors and Advocates and Media Law Association  
Oral Evidence, 9 May 2011, Q 90–121**

Evidence Session III

Members present:

Lord Mawhinney (Chairman)  
Peter Bottomley MP  
Chris Evans MP  
Dr Julian Huppert MP  
Mr David Lammy MP  
Stephen Phillips MP  
Lord Bew  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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**Examination of Witnesses**

Witnesses: **Keith Mathieson**, [Partner, Reynolds Porter Chamberlain], **Mark Stephens**, [Partner, Finers Stephens Innocent], **David Price**, [Solicitor Advocate, David Price Solicitors and Advocates], and **Marcus Partington**, [Chair, Media Lawyers Association and Deputy Secretary/Group Legal Director Trinity Mirror Plc].

**Q90 The Chairman:** First of all, on behalf of the Committee, thank you for being willing to come today. I do need to say one or two things before the formal bit commences. The first is that I do not know about the House of Commons but the House of Lords is expecting one and maybe two votes during the afternoon, in which case I will have to suspend the sitting. You are invited to stay here and have a drink of water or something and we will come back as quickly as possible, but you understand the nature of this place and we do not control voting.

The second thing to say is that we have agreed that we may spread the questioning, because there are four of you and there is only just over an hour and if everybody tries to get in on the questions we are not going to make a lot of progress. Equally, if all of you feel the need to answer every single question we are not going to make an awful lot of progress either. So it would be helpful if, as far as it was possible, one of you would answer and then if somebody disagrees or strongly agrees and wants to say something that is fine but four substantive answers every time might mean that we do not get as much value from you as we hope to achieve.

**Mark Stephens:** We have apprehended that and I think between us we hope that there will be perhaps one or two answers to a question.

**The Chairman:** Thank you. That is extremely helpful. We have just over an hour but there may be a bit of an adjustment if there is a vote. Thank you again for coming and I am going to ask Mr Phillips if he would like to start.

**Q91 Stephen Phillips:** Gentlemen, you will have seen the Government's proposals in the draft Bill. You will all be aware of the work that Lord Lester did and some of you may have perhaps even read the evidence that he gave to this Committee in its first session. I would like to begin—possibly this is a question for each of you to answer—by asking what your general views are of the Government's proposals, whether in fact you think there are any existing problems with the existing law on defamation and whether you believe that the proposals that the Government has forthcoming are such that they will resolve any problems that you are able to identify.

**Marcus Partington:** I am happy to go first. Thank you for the invitation to speak. The Media Lawyers Association think that the draft Defamation Bill is generally a good start but that much more needs to be done in terms of robust and proactive case and costs management if any legislative changes are going to be effective. It is the fear of the costs and the fear of the law in that order that dominates defamation law today and it is that that must be changed. The Bill begins the work but more needs to be done outside the Bill. The Media Lawyers Association is therefore encouraged that the Government wishes to consult on new procedures for defamation cases and it is right that they might find their way into the Bill or become law at the same time. Without those changes we feel that the current legislative proposals will not in reality be effective in protecting freedom of speech; which is the stated aim in the coalition agreement.

**David Price:** I should say I am not a member of the Media Lawyers Association. I am a solicitor advocate in private practice. I built up my own practice acting primarily for the claimants, so I have seen how things work from the claimant's point of view, and now I tend to act mainly for the defendants but not exclusively for the defendants, a variety of defendants, newspapers and ordinary people.

In answer to your questions, I think it is a step in the right direction. We know the existing problems and more work needs to be done. I think the Bill does not go far enough in protecting the freedom of expression and I do not think it cures the complexities of substantive law and could give rise to further complexities, albeit a step in the right direction. I will have some specific points to make on the provisions. I think also one has to deal with costs. It is a bit difficult for me because I have made my money from this state of affairs and I am not sure that anybody who does that can be the most objective judge of what should be done but it is obvious that the costs are wholly disproportionate and must act as a fetter on freedom of expression.

**Keith Mathieson:** Can I start by telling the Committee what I see as the three principal problems with defamation law at the moment? First, there is the question of costs; second, there is the issue of jury trial; and, third, there is a comparative lack of early and effective case management. It seems to me that if those three issues could be effectively tackled, the remedies that I would suggest are: first abolishing jury trial altogether, not just reversing the presumption, although that is obviously helpful; second, imposing serious control on legal costs; and, third, I would impose a fairly radical case management regime—in my own ideal world, that would consist of specialist, experienced High Court judges dealing with all libel cases from an early stage, including cost management.

Turning to the Bill and whether it addresses those three problems: jury trial it does. I do not think it goes quite far enough but I very much welcome the fact that the Bill will in effect abolish jury trial, I hope, in the vast majority of cases. The reason I welcome that is that until you abolish juries you cannot have an effective early determination of meaning. Costs are dealt with elsewhere. Case management is up for consultation.

**The Chairman:** I am afraid that we have a division in the House of Lords so the meeting is suspended until we are back, but could I encourage colleagues to get back within 10 minutes if at all possible? Excuse us. The reason that we cannot continue in our absence is the Committee is only quorate if there are number of representatives from both Houses and by definition one House is going to be unrepresented.

*The Committee suspended for a Division in the House of Lords.*

**The Chairman:** As you were saying before you were so rudely interrupted—I apologise for encouraging you to get to the end of the paragraph.

**Keith Mathieson:** I rather thought you had lost interest. I think I had effectively finished and, as Mr Price has pointed out, in fact I am arguing in favour of a case that is in the Bill, which is the abolition of juries, so I will pass to Mark Stephens.

**Mark Stephens:** I am not a member of the Media Lawyers Association either. I am an independent practitioner. I mainly act for defendants and the international media. I also act for NGOs and charities in this country. Many of the impacts of the Bill apply to that sector and you may find comments on that helpful.

I think that one of the things that concerns me is the absence of dealing with the presumption of falsity. Every statement is presumed to be false if it lowers you in the estimation of a right thinking chap, and that seems to me to be a problem. Also I am concerned at the way in which the substantial harm test is framed. It seems to me that that leaves far too much latitude for someone who was hostile to define it out of existence.

As for meaning, I think that there is a need to have an early definition of meaning. I think that will have a number of onward impacts in terms of cost. If you define early on what the article actually means to reasonable people then you get to argue about the specific meaning that the article bears. At that point it may be that the defendant says, “I’m sorry, that’s not a meaning I intended and therefore we’re going to give up” or it may be that the parties can have an argument about a very narrow issue, which is going to again reduce costs.

I think it is also fair to say that I am not in favour of the abolition of jury trial. I think it is absolutely essential, particularly in the case of politicians and high profile individuals, perhaps public officials, but certainly more broadly. I think that the jury has served us incredibly well and I think if we have a narrow issue on meaning the cost does not have to be that much more. Apart from that, I am not going to repeat the other issues.

**Q92 The Chairman:** Mr Partington, just for clarification, you said on a few occasions that changes need to be made. Could I tease out from you something slightly more specific about the specific sort of changes you had in mind?

**Marcus Partington:** You mean in terms of the Bill?

**The Chairman:** Yes.

**Marcus Partington:** I think the substantial test in Clause 1 is good but unless there is clear guidance given by Parliament that will lead to satellite litigation, far too often at disproportionate cost. So there needs to be a procedure whereby the test of substantiality can be dealt with. On Clause 2 I think it is important that once something is in the public interest then you need to look at the reasonable belief of the journalist. So it needs to look at what they reasonably believed and the focus needs to be on those two factors: whether it was in the public interest for the

information to be communicated to the public and the reasonable belief of the journalist. The tests need to be less rigorously put in place than they have been. It has generally been felt that the 10 Reynolds tests have been individual hurdles, that you have to step over each of them, and there must, again, be clear guidance from Parliament that it is not necessary to pass through all those tests. That guidance has been given by the higher courts but still there is a feeling that unless as a defendant you can tick all those boxes it is a defence that you cannot use.

In terms of the clause on honest opinion, I do not think 4(3) is necessary. It says that condition 2 is that the opinion is on a matter of public interest. I think that should be deleted from the Bill. I think that 4(2) should be modified to be wider than just how it is expressed at the moment.

**Q93 Lord Marks of Henley-on-Thames:** I have questions on case management and your proposals for it. First of all, Mr Mathieson, I am bound to say it surprised me that you suggested that case management should always be dealt with by a specialist High Court judge, because in my experience as a lawyer hearings before High Court judges attract greater costs and more complex preparation than hearings before a specialist at perhaps a lower level. I wonder whether that is an important part of your view or whether you think that a dedicated Master or District Judge or dedicated County Court judge could act as an early resolution expert for all libel hearings. It may be that you could do that in two tiers.

The other question I would like you to address is there was a suggestion in Lord Lester's Bill that early resolution would include a compulsory strikeout procedure for cases that did not meet the substantial harm test. In the Government proposals it is suggested that the existing remedies of application for strikeout and the relevant test involved and summary judgement for the defendant, if it is that way, would meet the need. If we are going to have an early resolution procedure with a view to getting rid of cases that have no merit or are likely but not necessarily bound to fail, decided by a judge, I query whether that ought not to be at a lower level.

I wonder what else you would bring into the early resolution procedure. This is really the third question. We talked about the substantial harm test but is it the case that you think that a number of the defences should be looked at at that stage as well?

**Keith Mathieson:** Let me deal first of all with the case management issue and whether we should have specialist judges. Yes, we should have specialist judges and if that means only one or two and those judges have to be below the level of High Court judge I am perfectly happy with that. What I want is a specialist with experience, partly so that we can get predictability and reliability in the judgements that we get. That is not easy to achieve in the system we have at present where some applications are dealt with by Masters and some are dealt with by a variety of different judges and one is often saying, "Well, I wonder what this particular judge will make of this particular application". It would be quite good to have a reasonable predictability about what will happen.

But what I would be seeking to achieve in my ideal world would be for a judge to take cases by the scruff of the neck at a fairly early stage rather than allow to happen what happens at the moment, which is that cases can go for several months with both parties incurring quite significant costs before the court gets hold of them. I would envisage the early resolution procedure dealing with meaning so that the parties know the ground that they are fighting on. I would envisage as part of that deciding whether the words are fact or comment so that we can reduce the scope of unnecessary defences. Very often one goes a considerable distance running alternative defences of justification and fair comment.

Yes, it would deal with the substantial harm test. I suspect we will come on to talk about the merits of that substantial harm test in a second so I will not say any more about that at the moment.

**Marcus Partington:** I would like to agree with that. In answer to your question, I think it should be a specialist judge. Yes, there should be a compulsory strikeout if it does not pass the substantial harm test. I echo what Keith has said that what is necessary is a complete refocusing of the judiciary. The judiciary at the moment have just been deciding a legal issue. They have to become case managers, so they have to take the case, as Keith said, by the scruff of the neck, "What is this about? What is the claim? How is that claim made out? What is the defence?" They have to cap the costs so the case focuses on the legal issues, not on an argument about how much money is being spent on the case. The court needs to be proactive in saying which arguments are going to be allowed to be run and for how long those arguments are going to be run in court. For example, the European Court of Human Rights has hearings where you are allowed to make oral submissions for 30 minutes and that is the sort of thing I think we should look at to make cases about the issues of law not, as they rapidly become, issues of how much money has been spent on the case.

**Mark Stephens:** The claimants who come to see you as a lawyer are looking for an early and speedy remedy. At the moment they do not get it. The process does not allow it and it seems to me that we need to inject some form of compulsory early mediation into this, because if someone can get an apology, some kind of vindication or some kind of settlement at a very early stage in the process costs will not be incurred but also they will have the outcome that they want because their reputation will be reinstated very quickly.

**David Price:** I would just say I think you have to be very careful if you are dealing with procedure. This Bill does not seem to deal with procedure. If you are going to take on procedure you have to be extremely careful otherwise you will end up creating more costs, more levels of interim applications, and this sort of pie in the sky idea that we are all going to go in front of a judge and he is going to bang our heads together. It is an adversarial process and I think you have to bear that in mind. You cannot take away that part of the process and any change in procedure has to be very carefully considered.

**Q94 The Chairman:** As a matter of clarification, Mr Price, Mr Partington has just referred to the European Court with a 30-minute time limit. The US Supreme Court, if my memory works, is 45 minutes. By saying you should not mess with procedure, are you disagreeing with Mr Partington?

**David Price:** I am not saying you should not mess with procedure; I am saying you should be very careful before you mess with procedure. Do I agree with Mr Partington that we should have cut-off periods? I do not know, it all depends on the nature of the case. The European Court of Human Rights is a reviewing court; it is not dealing with matters of evidence. We are dealing with important issues here. If a court is to retain its reputation as a reliable indicator of what is true or what is false there have to be procedures for dealing with those cases where a decision has to be made about truth or falsity. A lot of the things we are talking about are not connected with evidence. I quite agree that things like meaning and fact and comment can be decided really quickly. I do not see why they cannot be decided by top quality specialist judges, as we have at the moment, without the costs being massive, because you can just pitch up, show the article, have a quick argument. We do have these arguments all the time in relation to whether the article is capable of bearing a

particular meaning, and those things are dealt with extremely quickly and cheaply even in front of specialist judges.

**Q95 The Chairman:** What I think we are being told is on the one hand we have specialists, on the other hand we have extremely high costs.

**David Price:** Why do you have the high costs?

**The Chairman:** That is my question to you. Why is it, if we have specialists, are the costs as high as they are? Put your finger on what is not working in the system that causes that.

**Marcus Partington:** No one is controlling the costs. The judges are not controlling costs when they are dealing with the issue, because costs are left to the end of the case to be dealt with by cost judges. What I am advocating is that the costs are brought forward and that they are focused on at the same time by the same person who is managing the whole case.

**Mark Stephens:** There is a question here that goes to truth. If you are pleading truth in a case the cost of that is increasingly high. If someone comes to me and says, "How much is that going to cost to defend?" I am going to be saying somewhere between £500,000 and £1 million. The reason for that is that the cost of bringing witnesses in is a real issue. The cases are invariably international, witnesses invariably have to come from abroad, invariably they have some kind of expertise and a lot of translation involved. One of the ways around that is to perhaps look at comment. At the moment we do not have comment and if I were in your shoes I would ask the judge to say, "Is this comment or isn't it?" If it is comment then it is absolutely protected as free speech and it is a proper defence. I would agree with my colleagues here who say that Clause 4(3) could quite happily be excised. I think if someone is saying a comment and it is an honestly held opinion that is the end of it.

**Q96 Dr Huppert:** If I could ask about issues around corporations and other non-natural persons. There has been some discussion about whether they should be allowed to seek remedies through libel or something like other remedies: malicious falsehood, tort or declarations and various things like that. What is your opinion on how that ought to work?

**Mark Stephens:** I should declare the interest that I represented and advised the McLibel pair. I took their case to the European Court of Human Rights and I advised them for 11 years with the now DPP, Keir Starmer, behind the scenes on a pro bono basis, so I have seen what corporations can do.

Corporations also have an incredible chilling effect in relation to NGOs, where NGOs very often write long and detailed reports, they spend an awful lot of money going to country very often, finding out about it. The companies invariably find out that they are being investigated and put their lawyers on them in London in order to try and chill down coverage or perhaps to find sources. So there is a real problem in relation to corporations and the way in which they use the libel laws, I would say abusively, in order to try and chill down coverage and criticism.

I have, as a consequence of my interest in this area, followed the reform in Australia, which you will be aware of, and I think it is clear that the Australian model is working. There have been no examples of injustice that I am aware of to corporations and they have put what one of your number, I think, described as an arbitrary limit. The essence of it was that a small family-held company where the company and the owner are basically interchangeable should have the right to sue for libel because it is effectively a personal reputation but in relation to a larger corporation then they should not. If there is a particular issue about the management

or there is an allegation of fraud in relation to an individual that will affix to an individual within the company and they can bring the proceedings if they wish and get vindication if appropriate.

**Q97 Dr Huppert:** So you would be satisfied that there are sufficient alternative routes?

**Mark Stephens:** There are more than sufficient alternative routes and if they suffer financial loss they would be more than able to recover that through the malicious falsehood route and as a result of that take matters forward.

**Keith Mathieson:** I would give a rather different response, which is that I do not personally see all that many cases being brought against media clients by corporations. There are some and at a pre-publication stage one certainly has to consider the possibility of companies suing for libel but in practice it is individuals who form the majority of libel claimants. Having put that issue in proportion as I see it—obviously we have slightly different experiences, slightly different practices—I think the issue can be dealt with quite simply by applying the substantial harm test with a rather more critical approach in relation to corporations than in relation to individuals.

I think that while I am no great defender of the existing presumption of damage in defamation cases it seems to me that it is more understandable to have that presumption with individuals who have feelings and personal reputations than it is for corporations. I have certainly come across a number of cases in which the claims being brought by corporations have seemed pretty bogus, to be honest. There has usually been a bit of an agenda, a bit of a pretext to achieve something rather than to seek genuine vindication for something truly damaging. So I do not think you should rule out libel actions by corporations but I think when you are looking at the substantial harm test you should look closely at whether it is really proportionate to permit an action by a corporation to proceed.

**David Price:** That would make it far worse. I act for some newspapers. I think, Keith, your practice is mainly acting for the national media. I act for individuals, I act for NGOs, individuals who could just go online to make some criticism of a company and they get threatened with a libel action. They do not want to be told, “We’re going to go to court, we’re going to have an argument about proportionality. If you lose it will cost you X amount”; they want certainty. It is the uncertainty and “likely to cause” and “may do” that provides all the problems or a lot of the problems, and one has to ask if there is a reason not to have certainty. I cannot see any reason why a company should not have to prove financial loss because that is the loss it has caused them. They do not have any injury to feeling so if they have suffered financial loss that should be the test, which is a straightforward test to apply.

**Keith Mathieson:** To clarify, I would agree that a corporation should have to show either actual financial loss or a likelihood that financial loss will be caused, because it has no other form of reputation other than its commercial reputation. Having said that, there are still charities, for example. I do not see why a charity should not be permitted to complain about something that may cut off their ability to raise funds.

**Mark Stephens:** I have to say that this is absolutely critical to the NGO and charity sector. When NGOs and charities are given money to go out and do the work they do, they are not doing it for commercial gain, they are doing it for the public good and to inform society, and David Price is absolutely correct that they want certainty. I have experienced situations where corporations have gone to funders of NGOs saying, “You should not be funding this NGO because they are writing reports

critical or they have a campaign that they are waging against us". That has held up funding for about eight months while an investigation took place. The investigation vindicated the NGO and the report was published but it meant that the people within that charity had to take effectively a pay cut for the duration of the period, because as we all know NGOs have a very narrow band of solvency. I think that they just do not have the costs to employ lawyers to decide whether substantial harm or likelihood of harm is there. They need certainty.

**Q98 Dr Huppert:** If I can briefly ask about the issues to do with publication online. We have had some discussion about that. It is in the consultation document. There was a draft in Lord Lester's Bill. Do you have any thoughts or experience of how one could operate a system like that fairly and efficiently?

**Mark Stephens:** I represented Mumsnet in their case and I think that there is a real issue here that we have to grapple with and the Bill dodges round. I would focus in particular on the position of internet service providers and people who host bulletin boards and user-generated content. What I would say is that internet service providers, people who host those bulletin boards, should not have liability. The beef, if you have one, is with the person who has posted, the polluter pays principle if you want. Therefore, I would say that you either limit the responsibility to the user who generated the comment, because the person who is hosting it has no knowledge of whether or not it is true or false, but my experience is that you can believe in the innate good sense of crowds.

The user-generated comment, if you look at a long thread—and I looked at many, many threads through the Mumsnet case, so you were dealing with hormonal mums late at night who were coming online as they were woken up, tired—you found that you would have someone come online and say, "Have you heard about this baby book?" and someone else would say, "Yes, this is a fabulous baby book. It saved my husband's and my life". Another one would come on and say, "No, it's a terrible book, it gives you awful advice". As a result you were able to make up your own mind. The opinions at some level were on the extremes on occasion but the majority of opinions clustered around the middle. I think you can trust them and you can give them an indemnity and immunity.

**Q99 The Chairman:** In his draft Bill Lord Lester proposed a defence for internet service providers who take down defamatory material within 14 days. What do you think about that as a suggestion and in your case, Mr Stephens, how does that fit into what you have just said, if at all?

**David Price:** I have some experience of this in relation to a case in the European Court of Human Rights. My view is that if you are given the defence to take it down then just take it down and then you have the freedom of expression issues about just merely making a threat results in the ISP taking it down. I think in practice what happens is if the ISP does take it down then the ISP does not get sued and there is an existing defence anyway for an ISP. The question is the nature of that defence, because essentially the defence is lost once you are put on notice that the allegation is defamatory, so not necessarily untrue, merely defamatory, so the tendency would always be to take it down. The question arises whether there should be a higher hurdle to impose liability and I think I am in favour of that and it should be something along the lines of the ISP should know or have strong grounds to believe that the allegation is false, not merely that it is defamatory.

**Marcus Partington:** I think there is the possibility of a midway course, in which obviously we have to look at the difference between somebody like an internet



service provider who is just a conduit for something and the person who is publishing it. I think too often the internet service provider is attacked because they will, as David says, just take it down without there being an analysis of whether the information is correct or defensible by the primary publisher. I wonder if there is a midway course, which is that, provided the internet service provider appends a note saying that this is subject to legal complaint and the legal complaint is being directed to the original publisher, that should give the internet service provider a defence pending the resolution of the dispute between the primary publisher and the claimant.

**Q100 Stephen Phillips:** I wanted to ask Mr Price a very specific question arising from one of his answers. If one had a situation where there was a defence for an ISP to leave something online unless they had substantial or significant grounds for believing it to be false, there are two questions. How on earth in the majority of cases would the ISP form a view as to whether or not what was written was true or false? That is question 1. Question 2, since I anticipate the answer to that question is it would be very difficult to form a view as to whether or not it is true or false, is it not exactly the same as having a situation where the ISP is simply asked to take something down and does so automatically, not least because it will not want to spend the money working out whether something that has been posted is true or false?

**David Price:** Let me just try and get that in order. They have a defence unless they know it is false or have strong grounds to believe it is false, something along those lines. Will they take it down? Some may take it down just because one can never exclude the possibility of litigation, but it would embolden some people and you have to try and strike a balance here because also you have to think about the claimant's position, bearing in mind how reliant everyone is on the internet these days. In practice it would require a claimant to come forward and say, "This is untrue for these reasons. I can show you this, that and the other. Here it is" and at that point the ISP would have to make a judgement. Sorry, the first question was—

**Q101 Stephen Phillips:** One can really encapsulate it in this further question arising out that. The ISP is simply not going to bother; it is just going to take it down?

**David Price:** I do not know. It would certainly give a lot more protection because it would be quite hard for a claimant to show that an ISP knew that something was false. It is much more difficult for a claimant to show that an ISP knows something is false as opposed to knowing it to be defamatory. You know something is defamatory just by looking at it. But what else do you do? Do you just allow it online for ever without any remedy for the claimant for somebody who may be anonymous?

**Mark Stephens:** No, because you can always find out who the anonymous poster is, just as you can with the people who are breaking the super-injunctions today. Their electronic fingerprints are indelibly all over them for ever. The answer to your question is yes, the information is taken down. Currently the process is that if you get in touch with an internet service provider, the internet service provider rings up their customer and says, "We're going to take this down unless you pay our legal fees", which means it is invariably taken down.

**Q102 Chris Evans:** What I am concerned with is whether 14 days is too late? By the time it is put up there and it is taken down it has been twittered, it has been put on Facebook, everything; is 14 days too late? It has been repeated by that point. Do

you think it should be something like three or four days, or do you think that is unmanageable?

**David Price:** Well, they would just take it down straightaway, wouldn't they, and then they would review the situation and maybe put it back. Freedom of expression cannot exist without disseminators. People have targeted disseminators for centuries, the printing presses, all these people, it is just being done in a different way. There is nothing specifically, I think, in the Bill to deal with what is in the Section 1 defence. Am I right on that? Yes. I feel perhaps I should not say anything because I am not really prepared, but I think you do have to be careful with it because you have to protect disseminators to protect freedom of expression. On the other hand, the internet is such a powerful weapon and such a powerful way of destroying someone's reputation.

**Mark Stephens:** I think that can be overplayed. The internet has the ability to allow information to be placed there about someone but also for someone to respond and you can respond in real time. So the suggestion that you can traduce and destroy a person's reputation is just not true because it does not happen. People come forward and say, "No, that's not true". It is an engaged conversation between lots and lots of people so it is a perfectly safe place for people to have that kind of conversation.

**Q103 Sir Peter Bottomley:** Based on things in my experience that I can draw lessons from, I want to ask about the far end of costs. This is built on a case where I had a week and a half in the High Court, with George Carman against me, and then the proprietor of the newspaper said, "I am going to appeal against the judge's summing-up" and I would have absolutely no way of funding a rerun of the case let alone arguments about whether it should be allowed to appeal or not. Is there some easy way you think under the present regulations or the proposed ones or potential ones where that kind of Goliath against David needs a stronger justification than just whatever it was?

**Keith Mathieson:** It is fair to say that there are very few libel trials taking place at all and I think the last libel case that took place before a jury was about 18 months ago. The grand set pieces involving George Carman or his successors are pretty much a thing of history. That is not to say that we can relax and think that costs are not a major concern. As I said when I gave my first answer, they are one of the major problems with libel litigation. Having said that, libel litigation is not unique. Costs in litigation generally are a problem and that is why Lord Justice Jackson has looked into it and made his proposals.

**Q104 Sir Peter Bottomley:** So that is no?

**Keith Mathieson:** Well, I cannot quite remember what your question was.

**Q105 Sir Peter Bottomley:** How do you stop someone with a bag full of money saying, "I do not like the result, I am going to take it to appeal" knowing that the person against cannot afford to run again?

**Keith Mathieson:** You have CFAs to deal with that. If Lord Justice Jackson's proposals in relation to CFAs are implemented then—

**The Chairman:** Forgive me for interrupting but I think for the record it would be helpful if you told everybody what a CFA was.

**Keith Mathieson:** I am sorry. It is a conditional fee agreement, which is a no-win no-fee arrangement whereby claimants can bring libel actions and they only have to pay their own lawyer's fees if they win the case. If they lose the case they do not

pay their own lawyer's fees but they may potentially be liable for the other side's fees, which is still a problem. You have something called after the event insurance to deal with that issue.

**Mark Stephens:** There is nothing that you can do about your problem, Sir Peter. It is in the hands of the judiciary. They have to give permission to appeal. If there is a valid point they will grant it and if there is not they will not. They are getting more robust though, so you can be reassured about that.

**Marcus Partington:** The Media Lawyers Association supports compulsory cost capping in all Article 10 cases, which would involve the judge putting a stop to that or at least analysing it. The problem is that when cost capping was introduced a practice direction was introduced whereby cost capping was only to be made in exceptional cases, so every time that you try and cost cap a case—and there is a case called *Peacock v MGN* where there was an attempt at cost capping—the judge says it is not exceptional. If you changed that and made cost capping compulsory then I think the court could take a hold of that and put a stop to what you are talking about.

**Q106 Sir Peter Bottomley:** Can I come back and talk about the individual rather than the corporation? I interrupt myself to say, as I said last week, when Richard Doll and Bradford Hill showed the supposed association between tobacco and lung and heart disease and then showed the association between asbestos and lung diseases they could not prove it. Could you now stop a corporation saying, “This is very damaging to us”, which it clearly is going to be, because you do not have a scientific consensus?

**David Price:** You need to beef up the comment defence. That is really important and I think there are a few problems with the—

**Keith Mathieson:** You would also have, I think, a responsible publication defence in a situation such as that. I think that the responsible publication defence in the Bill would cover the very situation that you have in mind.

**Marcus Partington:** It does require an acknowledgement that sometimes there is a difference between things being true and being able to prove it is true, and obviously that is the defence Keith is referring to. As long as that is construed liberally then that should protect that situation.

**David Price:** But also provided you can show the basic facts. You are drawing an inference as to something on the basis of certain facts. I think the comment defence should make clear, and I think it is in the notes, that an inference of fact, in other words that which is provably true or false, should be treated as a comment if it is recognisable as a comment.

**Q107 The Chairman:** Should that be only if what is published is peer reviewed?

**David Price:** No, generally. If an allegation is recognisable as comment because you have drawn an inference from certain facts then you should not have to prove it to be true. I think that should be made clear. There has been a recent decision, today in fact, where the judge has accepted an allegation capable of being proved can be regarded as a comment. The comment defence is really important because it is an easy defence once you have a comment or should be an easy defence once the statement is opinion. So I think you should get rid of public interest, not that that would affect the case you are giving, and I think you should also get rid of malice. Why have malice to rebut honest comment? What you could have in that situation is hours and hours arguing about the methodology and the honesty of the author, and what purpose does it serve to have that malice in there?

**Q108 Sir Peter Bottomley:** Can I bring two separate things in? One is judges and meaning. The best example of judges and meaning was Lord Hutton who said “sexed up” can have a strong meaning and a weak meaning and he chose the strong one and got everything completely wrong—I comment. Can we trust them?

**David Price:** The judge is always wonderful when he is on your side and always appalling when he is against you. The wisdom of Solomon; someone has to make a decision. Juries get things wrong, don't you? Mistakes will get made. Hopefully there will be an appeal process. In the Simon Singh case, for example, even though probably there should not have been an appeal the Court of Appeal did take it and overturned the decision below.

**Keith Mathieson:** At least if you have judges making decisions on meaning you have a reasoned decision. If you have juries, as at present, at least in theory, making decisions on meaning you never know why they have, in fact you do not often even know what meaning they have adopted.

**Q109 Sir Peter Bottomley:** My last thing again goes back to something that I experienced. I woke up one morning to get eight media requests in 20 minute. So I rang the editor whose paper had produced a story and said, “What do you mean?” He told me what he meant and I said, “Why didn't you say so?” “Oh, does it read differently?” I said, “Yes”. “What should I do about it?” I said, “If you tell the Press Association what you actually mean I'm not bothered”, but he would not. Before you start going for a claim, to issue a claim, to serve the claim, how can one have a virtually no-cost way of getting people who are prepared to say, “This is what I think it means” and they say, “That's not what we intended” and just get that out in the open before it has a week and a half of repetition?

**Mark Stephens:** I think the only way to do that is to have an early determination of meaning, so have a judge sit there and say, “This is what it means” after he has heard two advocates make their pitch. At that point you can have a resolution, as I said in my opening remarks, hopefully that will focus in on that one particular issue and resolve it.

**Q110 Lord Bew:** Mr Partington, earlier you used a phrase that stuck in my mind, the reasonable belief of a journalist, which obviously you put a lot of weight on. Could you perhaps give me some background? For example, is it your view that if there is an unacceptable chill factor at the moment it affects more investigative journalism than it does big celebrity headline-type journalism? Is that true? Perhaps if you could answer that question and then I would like to follow up, if I may.

**Marcus Partington:** On reasonable belief, I think there is a provision in the Data Protection Act that is based on a defence under Section 32 about information that journalists hold and, I may be wrong, Section 55. The problem is that with the Reynolds tests you have a judge coming at it in a very cold light of day way and saying, “Oh well, what did the journalist do? Why didn't he or she do that? Wouldn't it have been wise to make that telephone call? Shouldn't you have done that?” There is not enough reality given to the situation about the speed and how journalists work. That is why it is very important that it is not an objective test based on what the judge thinks but an attempt to consider it from the point of view of the reasonable belief of the journalist. Does that answer your question?

**Q111 Lord Bew:** Could I follow this up? You have again referred to Reynolds and the difficulties of the operation of Reynolds, at least from the journalistic point of view.

There is a counter-argument about that, as I am sure you are well aware, but I understand and you earlier referred to the difficulties that you felt operated in that context. Is there any mileage, or is it simply too complicated, to see if you can in some way deepen Reynolds by referring to issues of confidentiality of journalists' sources and having language like that in the Bill, or is this simply too complex a matter?

**Marcus Partington:** Given the statutory protection that exists for journalistic sources under the Contempt of Court Act and provisions in things like the Press Complaints Commission Code of Practice I do not think that is necessary.

**Mark Stephens:** Can I just add something? I think that there is in the Bill some difficulty in relation to the intention to codify Reynolds in the sense of it not addressing the evolution of rolling news and the way in which stories now evolve. We are all familiar with 24-hour news television but also we should bear in mind online news, both in terms of the newspaper but also something like Bloomberg, which will take a story and it will constantly update that information. The state of knowledge of a journalist will change over a period of time and it is very difficult to crystallise a particular time when it is appropriate to look at it, particularly with the benefit of hindsight. So I think we do need to look at and factor in as one of the issues the rolling news, what the journalist knew at the particular time, what was reasonable at a particular time. For that I think you also look at the back end: what did they do afterwards? When there was a complaint was that complaint noted to the readers, so was there another story put out saying, "We've received a complaint about this" or "there's an inaccuracy"? Those are questions that I think go to the question of responsibility of the journalism and inform the responsibility of the journalism.

**Q112 The Chairman:** Gentlemen, can I ask you about something that none of you have yet mentioned? Mr Stephens mentioned the word *en passant*. We have had some evidence previously given to us that one of the things that might be wrong with the Government's draft Bill is that it does not concentrate on truth enough. None of you have mentioned truth. Where do you think truth comes into this debate?

**David Price:** I think the burden of proof should be reversed. I think that the claimant should have to prove the allegations are false. I have never had a meritorious claimant case where a claimant has not been in a position to do so. I think the reason it was not in the Bill was something about the difficulty of proving a negative. I do not understand why. It should not be difficult to prove a negative. So I would recommend that. There is not a lot one can say about truth, because if you can prove something to be true it is going to be a defence to a libel claim, but truth in itself does not provide a sufficient protection to freedom of expression. So all the things that are being debated are where an allegation may be untrue but there still has to be protection and that is the difficult area.

**Q113 The Chairman:** Truth does not provide—say that again?

**David Price:** Truth does not provide sufficient protection to freedom of expression, otherwise none of you people when you are in Parliament could get up and say anything because you would have to prove it to be true. You need absolute privilege and to a greater or lesser extent people need to have some protection other than the ability to prove something to be true in order to function, in order for freedom of expression to work. That has been there for centuries in the defence of privilege.

**Marcus Partington:** I think it would be beneficial to put Section 5(3) from Lord Lester's Bill into the Government Bill, which is, "The defence of justification does not fail only because a particular meaning alleged by the claimant is not shown as being

substantially true if that meaning would not materially injure the claimant's reputation having regard to the truth of what the defendant has shown to be substantially true." So the focus is on whether what you have not proved is actually damaging to the reputation of the claimant and I think that would be beneficial.

**Mark Stephens:** I would agree with Mr Partington's point on substantial truth, which is adopted from Lord Lester, but I think one has to look at the cases. One of the reasons that truth is not being argued out in trials any more is the expense and I think that that is part of the reason that we do it. I think that it is also fair to say that there are not many responsible journalism cases that are successful—in fact, I am not sure if any are successful—without a plea of truth attached to them. You may not be able to surmount the burden of proving absolutely everything true, as opposed to substantially true, but the jury accepts that it was responsible journalism.

**Q114 Baroness Hayter of Kentish Town:** Did I understand, and I think I probably didn't, David Price to say that if you say I have committed adultery I have to prove that I did not commit adultery?

**David Price:** Yes.

**Q115 Baroness Hayter of Kentish Town:** How?

**David Price:** You go in the witness box and say, "I have not committed adultery", and then what does the defendant do?

**Q116 Baroness Hayter of Kentish Town:** I have to go to the witness box and do that as soon as you put it in the paper? I just want to be absolutely clear that is what you are saying.

**David Price:** Yes, absolutely.

**The Chairman:** I think we are now clear.

**Q117 Stephen Phillips:** I want to ask as a matter of principle, deploying that as a specific example, why should it be as a matter of principle for the claimant—and I will not use Baroness Hayter as an example—against whom an untrue allegation of adultery has been printed to have that burden rather than for, on this hypothesis, the newspaper with all the vast resources at its back to show that the allegation is in fact true? It seems as a matter of principle to be wholly wrong.

**David Price:** If you are talking about principle I think you have to strip away the resources of the parties. I cannot really speak about specific cases but I can give you lots of cases where I am acting for defendants with a very wealthy individual and who is covert about his arrangements where it is very difficult to prove.

**Stephen Phillips:** Let's assume equality of arms then.

**David Price:** I will deal with your specific point. It is a chicken and egg situation. The purpose of a defamation claim is to provide compensation to a claimant, to require a defendant to pay money to a claimant, and to be vindicated through that process. So why should it not be a requirement to make that claimant who is bringing that claim show that the allegation is untrue? I think in practice all these fears are exaggerated. If there is no evidence this person has been adulterous then the newspaper is going to settle the claim because it is going to look ridiculous to go into court. I am not going to go into court on behalf of a newspaper, put the claimant in the witness box who says, "I haven't been adulterous" and I say, "Oh, you

have” and the judge says, “Where is your evidence?” No newspaper is going to go on that basis. The reality of it is that if there is no evidence the newspaper will have to settle, but it is important that freedom of expression should be seen, I think, as the primary right for departures to be justified from that.

**Marcus Partington:** Can I just comment on that? I disagree with David and I do not think the burden should not be on the defendant, but I think it is important to remember the realities of the situation, which is it is very difficult to prove the truth of something sometimes and, for reasons that people can think about themselves, this is an area of the law that unfortunately attracts claimants who perjure themselves. Tommy Sheridan, Jonathan Aitken and Jeffrey Archer are three examples of libel plaintiffs who then went to prison for perjury. So it is very difficult sometimes to prove something and you are also dealing with an area of the law that unfortunately attracts claimants who are prepared to perjure themselves.

**Stephen Phillips:** But that argument will only take you so far.

**Q118 Sir Peter Bottomley:** Let’s pretend a Minister is told by a journalist in front of two tape recorders, “We know you have taken children from a children’s home in your constituency to Brighton for a sex party and we’ve got photographs. What have you got to say?” to which the answer is probably, “It is not true, I did not do it, I shall sue”. Were they to go ahead and print obviously you can go up and stand in the witness box and say, “I made this claim, it is not true” but that is not proving a truth, it is making a declaration.

**Mark Stephens:** I think what happens is that the burden of proof shifts to the other side and I think we can learn the lesson from the comparative analysis. If you go to continental Europe the burden is on the claimant where it should be ordinarily. If you go to the United States the burden is on the claimant and I do not think, when we say we go to court in France or Belgium or wherever else we go, we get any lesser quality of justice than we would in this country. It is an anachronism of the Commonwealth system, or our own system, that has had this historical anomaly in it. There is no reason not to change it.

**Q119 The Chairman:** I would like, in the last few minutes, to ask a different subject and I would be interested, Mr Partington, in your views and it is alleged to me that Mr Mathieson may have a comment to make as well. You are a member of the Master of the Rolls Committee, which is addressing super-injunctions.

**Marcus Partington:** I am.

**The Chairman:** I do not—repeat, not—wish you to tell us anything about what you are doing in the committee; my question is a different one. My question is in what way, if at all, might a defamation bill address any aspect of super-injunctions?

**Marcus Partington:** Traditionally there has been a division between defamation and privacy.

**The Chairman:** I know that.

**Marcus Partington:** That is breaking down. In 2005 the Court of Appeal said it had not broken down but even so there have been recent moves to break it down, with reputation, although it was not part of the European Convention of Human Rights, now being seen in certain circumstances as being a right that is protected by Article 8. When the time comes, if it comes, that it is possible to get pre-publication injunctions in libel, then what you are alluding to will happen, that it could need to be dealt with by the Defamation Bill. I do not think we are at that stage yet and many people, me included, think that there should be a difference and the position as

articulated by the Court of Appeal in 2005 should remain and you should not be able to get a pre-publication injunction in defamation. I think one of the great problems is that it has become far too easy to get injunctions and Parliament's intention, when Section 12 of the Human Rights Act was passed, has not been adhered to by the courts. A scrutiny of the debate in the House of Commons on 2 July 1998 when that clause was introduced will show that if you analyse it the courts have really not adhered to the clear guidance. Parliament made it clear that they were giving the courts clear guidance, which has not been adhered to.

**Mark Stephens:** I would add one thing. I am not going to break any super-injunctions but I would make this Committee aware that we have now had our first super-injunction in relation to a libel case, which has been wrapped in a privacy super-injunction. That worries me because libel is supposed to be about public vindication in the court and the court has chosen to wrap it in an injunction.

**Q120 The Chairman:** That was partly why I asked the question that I did, because it could be interpreted that that decision means that this Committee has at some level some interest in the question of super-injunctions and I was giving all of you the opportunity to say no, and I do not hear any of you saying no.

**Mark Stephens:** No. You have now.

**Q121 The Chairman:** One final question, which you will understand would create an element of bother in here if it creates less bother outside of here. It is alleged, says he being very careful not to get into the area of breaching super-injunctions, in one or two newspapers that one or two super-injunctions may have affected the ability of Members of Parliament to make a comment, either inside this building or outside this building, and may even have had the effect of inhibiting—not to go more strongly—the ability of a Member of Parliament to talk to his or her constituent about anything that is important to that constituent. Do any of the four of you have any comment that might usefully guide this Committee were it to give some thought to producing a more modern expression of what has historically been the case in relation to Members of Parliament in this country going back over many years?

**Marcus Partington:** I think it would be useful if Parliament decided what the position was about parliamentary proceedings, the reporting of parliamentary proceedings and the behaviour of MPs in circumstances where there are court orders.

**Mark Stephens:** I think that it is of enormous concern that Members of Parliament should be inhibited in any way from talking to their constituents. I have had somebody the subject of a super-injunction who could not talk to their doctor because of the terms of the super-injunction, and that seems to me to be a matter of enormous concern as well, in the same way as you would not be allowed to talk to a lawyer. There are any number of these super-injunctions that relate to sexual incontinence and we do not need to go there but there are many more that relate to matters of public health and public concern—for example, Trafigura and the people in the Ivory Coast who had a clear public interest and a right to know information that might affect their health. If that was chosen to be raised in the House, I think it should be.

**The Chairman:** On behalf of the Committee, I thank all four of you for giving the time and the thought and the amount of work that clearly went into preparation. We are very grateful. Thank you very much indeed.



**Carter-Ruck, Schillings Solicitors, Jones and Walker Solicitors and Charles Russell LLP**

**Written Evidence, Schillings (EV 49)**

*I must apologise for the lateness of this response, which I hope will still be of some assistance. Rod Christie-Miller asked me to reply to you, after he relayed his views to me.*

*Taking your questions in turn:*

1. We welcome the approach reflected in this question. In our experience, defamation claimants bring proceedings fundamentally in order to vindicate their reputations, as opposed to trying to make money. Damages are an important aspect of obtaining vindication as they signal that the claimant has been wronged. But the symbolic value is frequently more important than the material element.

We are strongly in favour of remedies that will help bring about adequate vindication for the victims of defamatory publications. In particular, we support the idea of mandatory remedies, such as declarations of falsity and publications of summary judgments, and consensual discursive remedies, such as apologies and rights of reply. If the quid pro quo of discursive remedies being ordered would be lower damages awards, this is certainly something to consider, provided claimants would not be left out of pocket for bringing proceedings. Damages are frequently used to bridge the gap between what a claimant recovers in legal costs and what they had to lay out. The need for this may be reduced with the new costs provisions which are being piloted at the moment.

We have seen how these remedies work extremely well in other jurisdictions such as in Germany. In that jurisdiction, apologies are often commensurate in terms of prominence with the article complained of, which we would submit is far more satisfactory. If it would assist to hear how this works in practice, we would be happy to put you in touch with a similar law firm to us in Germany.

2. We do believe the current system provides adequate protection to internet service providers, hosts etc. Moreover, we would be very concerned about the introduction of a 14 day period for the notice and takedown procedure as suggested by Lord Lester in Annex C of the Consultation Paper. The speed at which material proliferates across the internet makes this time scale inappropriate as a fixed test. Rather, a flexible test as to what is a reasonable time to respond to a claimant's complaint, depending on the circumstances of the case, should be applied.
3. In relation to the potential introduction of a codified substantial harm test, if the proposal is intended, as the consultation paper suggests, simply to reduce the potential for trivial and unfounded claims succeeding, then it is unclear what this adds to the current common law position. In *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) Tugendhat J found that whatever definition of defamatory was adopted "*it must include a qualification or threshold of seriousness, so as to exclude trivial claims.*" Furthermore, the

jurisdiction in *Jameel v Dow Jones* [2005] QB 946 provides the court with discretion to strike out trivial or frivolous claims as an abuse of process (at least 10 were struck out last year and several more challenges were made using the law of abuse). Primary legislation is therefore not required since a sufficient mechanism already exists at common law to allow defendants to defeat trivial claims.

The “substantial harm” test is included, presumably for presentational reasons, at Clause 1. There is a danger that this would be seen as an additional, preliminary test to be satisfied in all claims. For similar reasons there is also a danger that defendants would seek to mount “clause 1” challenges for tactical reasons, in order to deter claimants from continuing. Despite the stated aims of the Draft Defamation Bill of certainty, clarity and costs-reduction, there is evidence, as Tugendhat J recognised in *Cairns v Modi* [2010] EWHC 2859 (QB), that such provisions lead to costs-inflating interlocutory skirmishes; hence his concern that the discretion to strike out trivial or frivolous claims “*must not be seen as an additional hurdle which claimants must overcome, increasing the complexity and cost of litigation, instead of reducing it*”. Exactly that happened with the introduction in 1994 of the judicial power to strike out pleaded meanings (now codified in CPR Part 53 PD 4.1), which was also intended to lead to certainty, clarity and costs-reduction, but brought about their opposites. In addition, there would be a period of considerable uncertainty as a body of case law developed interpreting the provision.

There are several further disadvantages to clause 1. The substantial harm test would impose a burdensome evidence-gathering exercise on claimants, frontloading costs and leading to mini-trials where the issue of substantiality would fall to be considered. The claimant would face the onerous and expensive task of gathering evidence to show substantial harm, or – which is more evidentially problematic – a *likelihood* of substantial harm. Worryingly, he would also be faced with the invidious prospect of the defamatory statement being publicised more widely in hearings in open court and in subsequent media reports. He would need a particularly robust appetite for litigation to bring a claim where he first faced a preliminary mini-trial, which would give no scope for vindication, nor any ruling on whether the allegations are true or false, but would publicise the defamatory statement much more widely than its original publication, and afford any republication of it the protection of privilege.

4. In principle, the *Reynolds* defence should be of huge value to publishers. It allows for untrue allegations to be published with impunity provided that the journalism leading to such publication is responsible.

We have heard it argued in the context of discussions about libel reform that the effectiveness of the defence is inhibited as a result of concerns about whether the defence will apply in practice. Given the defence is still relatively new, we predict any such uncertainty will fall away over time, thereby alleviating concerns about how the way defence currently works in practice. Certainly, introducing a new codified version of the test now will put publishers on uncertain ground again.

Codification would also be to the detriment of the common law flexibility which allowed the development and refinement of *Reynolds*. Furthermore, codification would risk ossifying the law with the balance between freedom of expression and the right to reputation fixed at today's standards.

5. Clause 3 is a restatement of the common law defence of justification in all but name. To that extent, it does identify appropriate conditions for deciding when the defence is available.

However, we have concerns about the idea of codifying the existing defence. The aim of codification may be sound: to clarify and consolidate the current law to give it more certainty and make it more accessible. However, as Lord Hoffmann reflected when speaking on the second reading of Lord Lester's prototype, codification will lead not to clarity, but to extensive (and expensive) satellite litigation over whether or not, and to what extent, Parliament intended to change things. Furthermore, codification trades the flexibility of a common law approach for, in Desmond Browne QC's phrase, 'the straitjacket of legislation'.

To sweep away the bedrock of decided cases, which have developed organically over hundreds of years, would put libel litigants on very uncertain ground. Given that the case law on justification will become guiding, but not binding, we will see a period of considerable uncertainty where lawyers argue over the old authorities, but with this novelty: they will no longer be able to advise clients with any certainty whether and to what extent those authorities now apply.

Given the immense benefits in having a body of authorities on which to rely, the difficulties that would arise in advising clients on the statute where the applicability of each of these authorities was yet to be tested and the concomitant increased complexity and uncertainty for parties, it is unclear why the Ministry of Justice, with its admirable aims of producing clarity and certainty in the law, feels compelled to put on the statute books what is effectively a restatement of the common law position, with many of the old authorities disappplied. The defence of justifying a defamatory statement as true will become more complex and more expensive to run if clause 3 is enacted.

Clause 4 appears to effect a slightly more radical change to the current common law defence of honest comment. This will almost certainly lead to a period of increased costs and uncertainty as a body of case law is built up interpreting the statute. Again, similar problems as elucidated above in relation to Clause 3 are likely to arise in practice where it will be unclear which of the authorities on honest comment remain binding, and which only guiding. It seems likely that the defence will thus become neither simpler nor cheaper to use.

One of the more problematic aspects of the new defence, as highlighted by the Bar Council in their response to the Committee, is that clause 4 does not require the comment to identify, in general terms, what it is about. The current

defence of honest comment, following its refinement and elucidation by the Supreme Court in *Spiller v Joseph* [2010] UKSC 53 requires that the words complained of must, at least in general terms, specify what it is that has led the commentator to make the comment, so the reader can understand what the comment is about. The common law defence, following *Spiller*, has two chief merits in that 1) it gives a wide scope for passing comment; and 2) it avoids undue unfairness on the defamed because the reader will know more or less what the comment is about and will be able to gauge the fairness (or not) of the comment based on that knowledge.

The new defence proposes to do away with the latter requirement. The example given by Lord Phillips in *Spiller* will serve to illustrate the extent to which this would create unfairness. The comment in his example was that a barrister was said to be “*a disgrace to his profession*”. For the defence to apply, the commentator “*should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands.*” It would be unfair if a commentator called a barrister a “*disgrace to his profession*” because of his unkempt appearance, without identifying in general terms that his appearance, and not, say, his professional conduct, was what the comment was based on. Without that knowledge the reasonable reader would be likely to assume the lawyer was negligent or seriously unprofessional in his conduct. By removing the requirement to identify what in general terms the comment is about, clause 4 would lead to serious injustices for the defamed. Furthermore, it would serve the public interest better for readers to be informed generally of the basis for the comment.

Another problematic element of clause 4 is the removal of the subjective element from the current test (save for the issue of malice) (see Condition 3). At present a defendant must demonstrate that he was aware, or had been aware, of the facts on which his comment was based at the time of making the defamatory statement. In *Lowe v Associated Newspapers Ltd* [2007] QB 580 Eady J held that in order to rely on the fair/honest comment defence the defendant must have actually known of the facts in question, although it is not necessary that they should all have been in the forefront of his mind, nor did it negate the defence if he had forgotten them, since it may have contributed to the formation of his opinion.

Under the proposed defence a publisher would only need to show that an honest person would have been justified in holding the opinion, based on one or more facts or privileged statements. On our reading of subsection 4(b) all it appears the publisher needs to establish was that a fact “*existed*” (which throws up something of an ontological conundrum) at the time the statement was published that would have justified an honest man holding the opinion. This is deeply problematic and goes too far in favour of freedom of expression. A well-resourced media defendant, or even a lone but assiduous blogger, can run a fact-gathering exercise all the way up to trial in order to try and justify the opinion which was not “*honestly*” held (in the sense of based on known facts). As the law stands, succinctly repeated in the consultation paper, if the fact was not a sufficient basis for the opinion, an honest person would not have been

able to hold it. So too, if the fact was not known to the defendant at the time the opinion was formed, it cannot be a sufficient basis for the opinion, and opinion cannot, in the sense of clause 4, be 'honest'. It would be helpful if subsection 4(a) were drafted more clearly to require that the fact(s) on which the defendant seeks to rely must have been known to the defendant at the time of publication, to avoid media defendants engaging in an exercise of justification after the event.

Subsection 4(b) is of concern as it allows an entirely "dishonest" opinion (in the sense that it was based on untrue privileged statement(s) or fact(s) not at the time known to the holder of the opinion) to be justified as "honest." It is surely wrong as a matter of principle – and one can only imagine the endlessly proliferating stream of falsehoods that would follow – if a defence were introduced that allowed a defendant to publish a defamatory opinion on another defamatory opinion, neither of which has a factual basis. Honest opinions should be based on true facts, not on information which might be true or false.

Furthermore, it should be made clear that in clause 4 privilege does not include *Reynolds*/clause 2 privilege: the defence would otherwise allow a defamatory opinion based on untrue facts to receive protection of the defence. This would be against public policy.

6. There is a risk that extending the rule at clause 6 to cover republication of the same article by a different publisher would lead to injustice for the defamed. A publisher could bury an article in an obscure publication and then, a year and a day later, the same story could be published on the front page of a prominent newspaper, leading to substantial harm to the subject of the defamatory statement(s), but leaving him with no redress.

For the same reasons, and to avoid likely injustices where a claimant does not discover the publication of a defamatory statement until the limitation period has expired, the court should be able to order that false or defamatory material be taken down even after the end of the limitation period.

7. If there ever was a real problem with "*libel tourism*", which we do not accept, this is being satisfactorily dealt with by the courts using its existing powers, namely the law of abuse. It is addressed at the preliminary stage in which a potential claimant seeks permission to serve the claim form out of the jurisdiction. Libel tourism is based on a false caricature of the law and is no longer a real problem. Clause 7 in its present form, therefore, ought to be excised from the Bill. We commend the approach adopted by the Committee in this respect.

Please do not hesitate to contact us if you have any questions or would like further information in relation to the above.

*July 2011*

## Written Evidence, The Media lawyers Association (EV 43)

### Draft Defamation Bill

Thank you for giving me the opportunity to give evidence to the Committee on Monday 9 May.

Subsequently the Clerk to the Committee, Chris Shaw, wrote to me seeking some more evidence and I said I would let the Committee have a letter with a succinct summary of our suggested changes to the Bill.

I do, however, wish to reiterate a point which I made when giving evidence and which I believe it is vital for the Committee to have at the forefront of their mind when they make recommendations about the draft Defamation Bill. That is that without substantial procedural and cost changes being made any changes to the law will not bring about the changes that the Government wants to see from the draft Defamation Bill. The importance of procedural **and** cost changes cannot be underestimated and it must be understood by the Committee that the Government's proposed changes to the cost regime, following the recommendations of Sir Rupert Jackson, whilst welcome will not be enough to bring about the changes to costs that are required to bring about the changes that the Government says it wants to implement in this area of the law.

In March the Deputy Prime Minister, Nick Clegg, said that "our changes to the libel proceedings will massively reduce the time they take, and so the costs they incur, too"<sup>38</sup>. These are laudable aims, which we support, but the bill as currently drafted will not (without other steps being taken) bring about those changes. It is only if other reforms – including changes beyond the bill – are brought about that the aims of the coalition government will become a reality.

Turning to the draft Bill, as the MLA is aware that the Ministry of Justice will be sharing with the Committee the responses it receives to its consultation I am, in this letter, merely summarising the suggestions which we have made to that consultation about how the draft Bill could be improved. (I am doing that in this letter by reference to the clauses in the Bill.)

#### Clause 1: Substantial harm

Whilst we welcome this clause we believe it needs to be extended – perhaps by the use of the phrase "serious and substantial harm within the jurisdiction" (as opposed to just "substantial harm") – and it must be stressed, perhaps through a definition of "substantial", that this is a high test (as opposed to a low one) which the claimant must meet.

We also believe that if the claimant cannot satisfy this test then the court should be required to dismiss the claim/give judgment for the defendant.

#### Clause 2: Responsible publication on matters of public interest

This clause needs to be strengthened, if it is to be effective.

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<sup>38</sup> Article entitled "An end to libel farce" by Nick Clegg: Guardian 16 March 2011

We would suggest the way that this is done is by reference to section 32 of the Data Protection Act 1998 which concentrates on the reasonable belief of the journalist. If the publisher reasonably believed the publication would be in the public interest at the time of publication then this should provide a defence to a defamation claim unless the claimant can show that the publisher was malicious or reckless. We also believe that inferences and statements of opinion should be explicitly included in and defence and clause 2(1)(a) should be widened so that it reads as follows: -

'The statement complained of is, or forms part of, a statement for the purposes or otherwise in connection with the discussion of a matter of public interest'.

It is also important that clause 2(3) in the Bill is widened to protect the neutral reporting of allegations in rolling news programmes.

#### Clause 3: Truth

We have no specific suggestions with regards to the current wording of this clause save for the addition to this clause of wording similar to that in section 5(3) of Lord Lester's draft Bill but we simply wish to reiterate that without procedural changes, to allow issues to be dealt with at a preliminary stage, such a clause may well have little or no effect in practice.

#### Clause 4: Honest opinion

We believe that clause 4(2) should be amended to read as follows: -

'Condition 1 is that the words complained of, when taken in their context in all circumstances (including any other words published on the same occasion, of which the words complained of form a part) are recognisable as opinion'.

We believe that clause 4(3) should be deleted as the defence should be kept as simple as possible and there is no requirement, we believe, for it to include reference to "public interest".

Lastly we believe it is important for this defence to also apply to the statements to which the public interest defence in clause 2 of the Bill applies.

#### Clause 5: Privilege

On a macro level we are in favour of starting from scratch and setting out a new regime of statutory privilege rather than piecemeal amendment of the existing legislation.

We also have specific suggestions as regards categories of privilege but I will not lengthen this letter by setting them out here. They are included in our response to the Ministry of Justice's consultation paper.

#### Clause 6: Single publication rule

We have five suggested amendments to this clause. There are as follows: -

1. We believe that the words “to the public” should be removed from clause 6(1)(a). (This will also necessitate the removal of clause 6(2).)

We believe that the Bill should make clear that the “date of first publication” – referred to in clause 6(3) – is also the relevant date when considering defences which take into account knowledge, intent and the public interest at the date of publication.

We believe that the single publication rule (and the one year period of limitation) should apply to all “publication proceedings” and in this connection we would suggest that the definition provided by the Ministry of Justice in its consultation paper Controlling Costs in Defamation Proceedings (CP 4/09) is adopted. That is as follows: -

**“Proceedings which:**

**(a) include a claim for defamation or malicious falsehood; or**

**(b) are brought in connection with any journalist, literary or artistic material and include a claim**

**(i) for breach of confidence;**

**(ii) for misuse or unlawful disclosure of personal or private information; or**

**(iii) under the Data Protection Act 1998.**

Where the court exercises its discretion and allows a claim to proceed outside of the limitation period we think the relief should be limited to requiring the defendant to remove the specific words from the article complained of.

We believe the words “the manner of” should be removed from clause 6(5), where they appear twice.

Clause 7: Action against a person not domiciled in the UK or a Member State etc

We support this clause but we think it needs to be extended to cover the situation where the claimant is not domiciled in the UK and wishes to bring proceedings in this jurisdiction. We support the sentiment expressed in clause 7(2) of the draft Bill but because of the wording in clause 7(1) it does not – automatically – apply to a claimant who is not domiciled in the UK.

It is this latter category of person which the Bill needs to (but doesn’t currently) address. In this connection we think there is merit in including Lord Lester’s draft clause on jurisdiction (clause 13 in his draft bill) in the Bill.

Clause 8: Trial to be without a jury unless the court orders otherwise

We believe a decision should be taken in each case whether there should be trial by jury. Therefore we do not seek the abolition of juries in defamation cases but rather correct scrutiny in each case as to whether a jury is appropriate.



We believe it would be helpful for Parliament to stipulate that juries are still available and the circumstances in which they should be deployed.

We also see considerable merit in the question of damages being removed from the jury altogether and given to the judge in cases where there is a judge and jury.

#### Clause 9: Meaning of “publish” and “statement”

We think it is unnecessary to define “statement” and it might lead to confusion and we would suggest that it would also be helpful to define what is meant by “defamatory”.

There are two other matters – responsibility for publication on the internet and a live broadcast defence.

#### Responsibility for publication on the internet

We believe that the law should be codified to make it plain that: -

- (a) those responsible only as conduits should have no liability for the transmission of defamatory material; and
- (b) secondary publishers should have clear defences available to them.

In relation to (b) we think clause 9 of Lord Lester’s draft bill is a good start although we think the claimant should be required to either: -

- (i) initiate legal proceedings against the originator of the material;
- (ii) establish that the originator of the material no longer maintains that it should not be posted and/or has failed to engage with the complainant; or
- (iii) make the service provider aware of facts or circumstances to demonstrate that there exists no reasonable prospect of defending the case.

The Bill should also provide defendants with a ‘safe harbour defence’ if they add a “fair and accurate summary of the matters set out in the notice [complaining about the words complained of]”.

#### Live Broadcast Defence

We suggest that this could be provided for by slightly modifying the relevant part (clause 9) of Lord Lester’s Bill so that it would provide as follows: -

Any defendant in an action for defamation has a defence if the defendant’s only involvement in the publication of the defamatory statement complained of is as a broadcaster of a live programme.

The defence in (1) shall not apply in circumstances where a claimant can show that the broadcaster knew or had reason to believe that the defamatory statement would be published.

## Conclusion

Nick Clegg said, in the article I have referred to earlier, that the draft Defamation Bill (as published) “will transform England’s libel laws” and “create libel laws that will be a foundation for free speech”. We very much hope that such a transformation can be brought about but in order for that to happen the Bill needs to be considerably improved upon and whatever statutory changes it brings about need to be accompanied by substantial procedural and costs reforms.

We hope that this letter is useful to your Committee and we would happily provide further information if that would assist the Committee’s work.

*June 2011*

## Oral Evidence, 9 May 2011, Q 122–171

Witnesses: **Nigel Tait** [Partner, Carter-Ruck], **Rod Christie-Miller** [Chief Executive and Partner, Schillings Solicitors], **Jeremy Clarke-Williams** [Head of Media, Libel and Privacy Department, Russell, Jones and Walker Solicitors], and **Duncan Lamont** [Head of Media, Charles Russell LLP].

**The Chairman:** Thank you all very much for coming. I suspect that you may have heard me say this already but this is a different session and you have the right to have the same courtesies. The House of Commons probably will not vote while we are talking but the House of Lords almost certainly will, so if that happens then I will have to suspend the session for a few minutes while those of us in the Lords go down and vote. I have to suspend because this Committee is only quorate if there are representatives from both Houses, and by definition there would not be. Welcome, and thank you very much for coming. I am going to invite Lord Bew to start the questioning.

**Q122 Lord Bew:** There is a key issue that we are constantly, in the context of these changes in the law, advised to remember, which is the importance of protection of reputation and individual reputation. I just want to first of all give you the opportunity if you feel uneasy, if you feel that the broad thrust of what is proposed in the Bill may in some way tip the balance in a way that is unacceptable on the question of protection of individual reputation. If you think the broad thrust of what is proposed in the Bill may have that effect, I wanted to give you the opportunity to respond to that broad thrust.

**Nigel Tait:** I think there are two or three factors that the Bill does not address, which are important for the protection of reputation. We will come on to those. One is that there ought to be a declaration of falsity or a claimant should be able to get one. If one is going to sue over a newspaper article that is going to cause you substantial harm, but because the journalist acted responsibly you cannot clear your name and it is false, that seems very unsatisfactory. The claimant just wants the truth to be published. So you should, I would respectfully suggest, consider whether there should be declarations of falsity more often in libel actions.

Secondly, the price of libel has come down far too low. There is something called the offer of amends mechanism and judges decide levels of compensation where an offer of amends has been made, and my clients generally feel that the levels are far too low and that ought to be looked at.

The third aspect is cost. Once the Government's proposals go through on cost reform it will cripple access to justice for claimants because they will not be able to get insurance against the other side's costs, and they will be deterred because of the cost. But by and large, as a claimant lawyer, I do not have much to complain about in this Bill. I have areas of cost that I want to draw to your attention but I do not think the Bill has missed out too much. That is my view.

**Q123 Lord Bew:** Could I then ask you another general question? Libel tourism. There is a view, I think, that this may have been an issue of some significance seven or eight years ago, but it is less so now. Is that your broadly held view that there is no particular need to cure an illness that is now not as great as it once was?

**Nigel Tait:** I do not think there is any particular need to cure it and I do not like the way it is being cured. As an English person who lives in England and may want to sue over a publication in England, I will no longer have that automatic right if this Bill goes through. It talks about where defendants are domiciled. What about the rights of people who live in this country and want to sue over publications in this country? That is not protected completely by this Bill and it should be.

**Jeremy Clarke-Williams:** I wanted to go back to the first part of your question about whether or not one feels uneasy about the balance between the right to a reputation and the freedom of expression. Now, obviously the purpose of any fair defamation Bill is to achieve a proper balance between freedom of expression and the right to reputation. I think, perhaps, the area that does cause one some unease is the internet. In recent years there has been a hugely increased opportunity for people to be defamed in a new and expanding media. I think one can see from this morning's press about the twittering about the identity of people who have obtained super-injunctions, how that can spread globally in a matter of hours. You can compare it to the Wild West in some way, the internet. I think, therefore, it is very important—I know the question has been addressed in a previous panel—about how one copes with internet defamation but that is something, I think, the Committee has to have very much at the forefront of its mind.

**Q124 The Chairman:** If you have something that you want to say on the subject, you should be confident that this panel will be treated entirely the same and entirely separate from the previous one. So if there is something that you feel needs to be said, you must say. You must not leave it to us to infer it from what somebody else in another panel said.

**Jeremy Clarke-Williams:** Perhaps I can give you a case example. It is sometimes easiest to understand a problem from a case example. It is a case I have settled in the last week. A national newspaper publishes on its website an allegation that a parent, a single parent, has made a racist remark about the Indian head teacher of her children's school, which was false. I bring a claim against the national newspaper and before we get to the stage of proceedings that claim is settled, damages are paid and an apology is published on the newspaper's website. However, that allegation and the article that contains the allegation has been picked up by a huge range of websites, most of them based abroad, most of them based in India and Asia. If you Google my client's name, she having received her apology published this week in the national newspaper, there will be a page of references and access to precisely the defamatory article that she brought proceedings about.

She had no means to pay me privately so I acted for her on a conditional fee agreement. Under no circumstances is she going to be able to fund privately claims against websites based in India, Pakistan, Bangladesh so that will remain there.

**Q125 The Chairman:** For clarification, so that I understand what you are talking about, what change in the law do you think ought to be made to address that, or the proposed Bill to address that?

**Jeremy Clarke-Williams:** I think that there has to be a responsibility on a primary publisher to recognise the harm that can be done by the publication of one article; that it will spread. I am obviously aware of the innocent dissemination defence in the existing Defamation Act, the 1996 Act, and would not want to cut across that, but I think it has to be recognised that a responsible national newspaper publishing an article will be picked up and will be published elsewhere. I think they have to have a responsibility to do as much as they can to restrict that damage.

**Q126 The Chairman:** Are you suggesting that an internet service provider, having drawn to its attention that an apology has been issued, should be under some legal obligation to ensure that that apology is then reflected on all of the websites, wherever in the world, that carry the story without the apology?

**Jeremy Clarke-Williams:** I think that would be a very sensible start. Certainly I think it should be an obligation on the newspaper that has published the apology, or whoever else it might be, to write to all known publishers of that same article seeking that amendment to the other websites.

**Q127 Chris Evans:** How would you envisage that happening? That seems to me to be absolutely impossible to police. I agree with you on what you said. For example, last week we had Welsh Assembly elections in Wales where our candidate was said to be in his late 70s and it turns out it was completely false. An apology was taken by the press straightaway, it was about that size, underneath the original article saying this was wrong. I picked it up this morning, it was still on about 25 or 26 sites. To me, once the genie is out of the bottle, how do you bring it back in? It seems to me it is really impossible. I think you are right in the analogy about the Wild West. It comes back to the central issues, how do we police the internet and particularly in terms of defamation? Do you have any thoughts on that?

**Jeremy Clarke-Williams:** I have thoughts but I am not sure I have answers. To quote Richard Nixon, I do not think you can put the toothpaste back in the tube very easily, and that started because you asked us to identify an area that causes unease. That causes unease precisely because of the lack of control that one can exert in that sort of situation. It is an example of why one's personal reputation is so precious and why Parliament has to be so careful to make sure that the baby of reputation is not thrown out with the bath water of twittering about super-injunctions and pleas for freedom of speech. The right balance has to be struck but there is this state—I am afraid I am not sure I have an answer. It will probably require much more thought on my part.

**Q128 Mr Lammy:** To follow up on the point that has been made, I wonder if your other colleagues may have some answers, because this is central for the Committee. I think perhaps we are less concerned with public figures and celebrities that find themselves in this situation but for ordinary members of the public who find themselves caught up in this and whose neighbours, children, and others can see a whole stream of things as a result of something that has then been proven to be not true. That is of concern. So what responsibility should lie on ISPs, what responsibility should lie on the hosts on sites that are user-led, is quite important for this Committee in deliberating the necessary balance, between comment and freedom of speech.

**Rod Christie-Miller:** The ultimate answer to that, I think, is something that Marcus Partington alluded to earlier, which is in relation to pre-publication injunctions. It is a big step to move the law to the position whereby, firstly, as a claimant you are entitled to a pre-publication injunction based on defamation. Public policy was, in the 19th century, that something would be published locally, would be read by a few people and therefore you could correct your reputation by way of a post-litigation apology. In the internet age it is slightly different because you are not able quite so easily to pull your reputation back once it has been besmirched. So ultimately the only way to deal with that is to prevent the publication being made by the original publisher in the first place.

Parliament may not have the appetite to do so, and I imagine that later on we will have a conversation about the way that privacy and defamation are coming together. It may be that that is the mechanism by which one can do it. But absent a pre-publication injunction based on defamation—I refer to something that Nigel said earlier about a declaration of falsity—if one can get a declaration of falsity from the court and you can take it to an ISP and you can say to them, “A court in England and Wales has stated that that fact that you have published is untrue” they will be more likely to remove it than if they just receive a letter from the lawyer or even an apology from another third party.

In terms of serving that on ISPs or other internet-based organisations, I think there are three levels there. There are the Googles, who just collate searches from elsewhere; they should have a certain level of protection. There are the proper internet service providers, so the host companies who may be an enormous multinational based in Baltimore or somewhere that just provides server space to different individuals. Anybody here who has a website will have their website hosted somewhere else, in a mass market somewhere, maybe completely outside the jurisdiction. Then there are chat boards and chat rooms and the people who operate those for gain. I think that those should be dealt with differently. So on the chat board end of the market, if somebody republishes something about me that is defamatory I feel I should be entitled to write to them and give them notice, “You have published that, you may not know that Mr Smith has published this but I am now giving you notice. You are now responsible for it, you should remove it unless you choose to defend yourself in another way”. Mr Evans raised the 14 days point, and he is absolutely right. 14 days in cyberspace is a lifetime. There is no point in doing anything after the first 24 hours, even, on occasion.

**Q129 Lord Morris of Aberavon:** May I touch on internet dissemination, and I apologise for not being here earlier. Internet dissemination is a much wider problem that applies to injunctions generally. I had a very similar problem involving the son of an important politician, where the genie was out of the bottle. There was no answer then. Is there an answer now other than inflating the damages from the original publisher?

**Rod Christie-Miller:** I am so sorry, in relation to publication of injuncted information on the internet, inflated damages may be one answer. What clients invariably want is for the information not to be published in the first place, hence the—

**Q130 Lord Morris of Aberavon:** Accept that it has been published; is there anything that can be done in practice?

**Rod Christie-Miller:** Ultimately, I think, probably the only answer is to have some sort of global arrangement, international arrangement, as to try to find some sort of commonality or balance between free speech and reputation. We are long way away from that.

**Q131 Lord Morris of Aberavon:** I think they are a shade wider than our Bill.

**Rod Christie-Miller:** It is a lot wider than your Bill, yes.

**Q132 Lord Morris of Aberavon:** There is no answer?

**Rod Christie-Miller:** There is probably no practical answer. It is very difficult.

**Q133 The Chairman:** If this Government was to take some action on the internet, whatever it might be, let's leave that for a moment, the argument is frequently made, and I think in a sense Mr Clarke-Williams alluded to it, that it would not matter what the law in this country said because the law in the rest of the world did not agree with it. If the Government was to be courageous and to legislate, do you think that is a positive virus that might spread around the world, or do you think it would just get swamped and ignored?

**Jeremy Clarke-Williams:** I think legislation in this country is respected around the world; whether that means it will be followed around the world I suppose is another matter. I think part of the difficulty with the internet is the anonymity that is permitted to those who post and blog and tweet, because I think people might apply more thought to the harm that they can do from what they are saying if they were required to submit their true name and contact details, even if that did not necessarily appear on the webpage but was held by the host of a website, for example, so that if action does emanate—and I think it is something that Mark Stephens referred to—the polluter could be identified. Mark, I think, said you can find out even an anonymous poster because there will be an electronic fingerprint and the like. But that is an expensive, lengthy process that is beyond the comprehension of most ordinary members of society. It may be something that wealthy corporations or large organisations can contemplate but not ordinary individuals.

So pulling it back to the Defamation Bill, what is needed obviously is the ability for ordinary citizens of modest means who have been defamed to achieve cheap, effective vindication. One can talk about everything else for a long time but ultimately it boils down to that. There has to be a cheap, quick, effective way of achieving vindication for ordinary individuals of modest means, who form my particular client base. But in some ways the argument has been hijacked by celebrity libels, of which there are relatively few and tend to be unusual in all sorts of ways. Just to give you an example, last year we received 414 inquiries in my department from people phoning for advice; we took on 24 cases. So far this year we have had 167 inquiries; we have taken on 13. There is a lot of concern about what is being published but the law does a pretty effective job, when it is filtered through legal advice, with lawyers as gatekeepers, of keeping most of those people requesting advice out of the game. But there should be justice available for those who do have good cases.

**Q134 The Chairman:** Mr Lamont, do you have any view of what might be printed online?

**Duncan Lamont:** Only that one should live in the real world and I think it is very important that if the British media can hold on to its very high reputation, and an apology in a British newspaper means something—and dare I say it means rather more than perhaps it might on continental Europe because of the adversarial nature of it—and if you get your apology you are at liberty to put that on the internet and people will find it if they want to find it. You cannot distort the international way the internet works just to falsely seek to protect with the best of intentions. I think it would fail and it would give the impression that our law is anti-free expression. That is a misperception but it is one that the Americans hold and they would seize upon this, and I think it would achieve more mischief than good, with the best of intentions perhaps.

**The Chairman:** I will go back to Lord Bew as we have had quite a lot of clarification arising out of his first question.

**Q135 Lord Bew:** If I go right back to my first question, there is an issue, not just of individuals and their rights if they are unfairly accused but there are, in recent cases in libel law—in this country and also in Ireland, north and south—crucial issues around terrorist type issues. This affects communities and allegations that are perceived to be fair or unfair. Are you satisfied with the law as it sits in that area?

If I could also ask this question. I notice for example the *Carter-Ruck Winter Newsletter* in 2007 where you specifically addressed the Muslim community and say that we have delivered to you in respect of unfair allegations. But that is not an individual coming to you and saying, “I have been accused” that is you saying to a community in a way that even I have not seen libel lawyers in Belfast do. That is you presenting yourself as offering a service to a community that may feel aggrieved. Are there problems there? Is the law now satisfactory?

**Nigel Tait:** It usually boils down to whether the allegation is substantially true. We have acted for a great deal of Muslim people who have been accused of being terrorists or supporting terrorism or being behind the 7/7 bombings. National newspapers that have made the allegation because it suits them to do so and I think in most, if not all, cases we managed to get them damages and an apology because the allegation was made without foundation.

I am afraid our press like to toss in the occasional allegation against Muslims, that they are funding terrorism or this or that without much thought. I do not think there is any problem in the way the law operates. If you believe someone is a terrorist there is nothing to stop you because you are protected by absolute privilege in reporting the matter to the police or raising the matter in the House or doing something else. If you have acted as a journalist responsibly you will have the protection of the defence of responsible journalism.

**Q136 The Chairman:** When you got your apologies in newspapers, were they of the same size and location as the original allegations?

**Nigel Tait:** When I acted for Tesco, which is not a Muslim case, the allegation covered half of the front page and two months later the postage stamp correction was published on page 36. It is the case that the British press behave disgracefully when it comes to the apology and the original libel and the Press Complaints Commission need to do something more about it.

**Q137 The Chairman:** If in this Bill the Government chose to legislate that apologies had to be of the similar size and location as the original allegations, is that something that any of you would favour?

**Rod Christie-Miller:** Yes.

**Nigel Tait:** It is quite draconian.

**Jeremy Clarke-Williams:** I would certainly favour it. The only difficulty of course is that one cannot bring a claim for an apology in a defamation action. You bring a claim for damages to compensate you for the harm caused to your reputation and a claim for a final injunction, and an apology is always something that emerges as a negotiated term of settlement. It has always struck me as an oddity, an absurdity actually, of the defamation laws that the thing that most claimants want above all else, which is quick vindication, is something that they cannot get as a matter of right by law. It is a by-product of bringing a claim for compensation.

One of the questions, I think, which was raised was to do with apologies and whether or not there would be support for some quick way of achieving an apology. Part of the problem with that is, I think, there is cynicism about the prominence of apologies and that they do not provide the full vindication that a claimant requires



and that is why claimants tend to push for damages as well. If they were satisfied that a front page libel achieved a front page apology then that might well have a beneficial impact on their view of compensation.

**Q138 The Chairman:** Mr Lamont, you do not think so?

**Duncan Lamont:** No, I do not, for a variety of reasons. One, simply it is deeply unattractive to have the front page of newspapers covered with apologies, I would suggest. But also quite often when an article is published much of it is correct; it clearly might contain material that unfortunately was inaccurate and needs to be apologised for. I am not suggesting it should be on page 32, but it does not merit to be on the front page when there may genuinely be important news of interest to readers or viewers, perhaps where my main focus might be.

**Q139 The Chairman:** You do not take the view—and we will have an opportunity to talk to editors—that if they were faced with this prospect front pages in the future might be more appropriate?

**Duncan Lamont:** The front pages sell the paper. I suspect that whatever fine words you may hear, the reality is when a story breaks that seizes the media's attention they will go where they have always done before, which is to sell the story to their readers in the most interesting way.

**Rod Christie-Miller:** The only remedy that one has, as of right, is either a jury judgement that they find for the claimant and a sum or money or, alternatively, if you have no jury you have a judge, he gives you a reasoned judgement that may well not be reported. A claimant can win and still face headlines the next day that they have lost. That is exactly what happened with Catherine Zeta Jones and Michael Douglas when they won their privacy case but the *Evening Standard* that evening carried a big headline saying, "Zeta-Jones loses [Privacy Fight]". She lost on one point out of three but essentially won the case.

So all you get as a libel claimant is a sum of money and a reasoned judgement that may help practitioners but does not help the claimant necessarily. If you have a statutory system whereby an editor or a broadcaster faces the prospect of having to put their words right in an equally prominent way, that will serve the same purpose as the threat of a defamation case 18 months down the line and a large legal bill. I think it would make an enormous difference to the way that newspapers are properly chilled. As I think a member of the Committee said before, there is nothing wrong with proper chilling as long as that chilling prevents wrongful publication.

**Q140 Sir Peter Bottomley:** The fact that the claim has to be for damages, is that statute or is that common law?

**Rod Christie-Miller:** It is the only remedy that is available. That is a very good question, I do not know the answer.

**Q141 Sir Peter Bottomley:** It seems to me that for individuals, separate from corporate things, most people want to have an explanation that allows them to say to their friends, "Look, they have now said what they actually meant" and that is reasonably robust, it is comment, it is opinion, whatever it is. It seems to me if the present law and the practitioners are not sure about it, and the present Bill does not make it plain, perhaps one of the things we ought to give some thought to is whether a claim can be for what the aggrieved person actually wants rather than what they have to go for.

**Rod Christie-Miller.** Lord Mawhinney pointed out to the previous panel that they had not mentioned the word “truth”, and there is a danger that libel or defamation law becomes so academic that we have lost sight of the thing that most people come and darken our doors about, that somebody has published something that is untrue and damaging about them and they want that put right promptly, in a cost neutral way. This is not about making money. In fact even successful libel claimants end up out of pocket because they do not recover all of their costs. Invariably the damages that they get do not even make up the cost shortfall. So they want things put right quickly, prominently and with a genuine apology. At the moment they are not entitled to that.

**Q142 Chris Evans:** Referring to what Lord Mawhinney said earlier about the size of the apology, last night I was reading Lord Sugar’s book and he was talking about his time as the Chairman of Tottenham Football Club and in particular about a back page spread that called him a miser. He said, yes, what option has he got, either he has to sue because he has a gang of kids shouting at him when he is walking down the street, “Oi, Sugar, get your chequebook out, you miser” or he then rings up the editor and says, “Please can you apologise?” and the editors says, “Yes, what part do you want to apologise about, the bit where we call you a miser or—” and they put in something the size of a postage stamp.

Ultimately it seems to me the problem here is editors have the ultimate sanction. They can use three or four pages, as much as they want of their paper, but when they do something wrong they only have to put a small apology in their paper. How do we ensure that somebody’s reputation then is brought back to where it was before these items were published?

**Rod Christie-Miller.** You set up a statutory framework whereby there is a mechanism to determine what proportionality looks like or you give the judges the ability to order the publication of an apology that they determine. It happens in Germany.

**Nigel Tait.** It gives the PCC the opportunity to mediate where there is a dispute between a claimant and a newspaper as to how big or where the apology should be published, and the PCC can say, “Well, this should be a front page apology” or, “Well only part of the story was false so let’s put it on page 3 and it has to be this size”. I think that would be very useful.

**The Chairman:** Mr Phillips wants some clarification and then I will go back to Lord Bew who has poked into the nest on a couple of occasions but has not had a lot of chance to follow it up to see if you are content, then we can move on.

**Q143 Stephen Phillips:** It is really just a couple of points arising out of Mr Christie-Miller’s evidence. Would it be fair to say that the effect of that evidence is that given the current remedies that are available for defamation in English law there is, in fact, a right on the part of any individual to defame someone provided that they are prepared to pay damages as a consequence? Is that a fair characterisation of your evidence?

**Rod Christie-Miller.** Yes, and at the moment damages are limited to approximately what one could recover as a maximum for pain, suffering and loss of amenity in a personal injury case, which is about £220,000, plus any other damages that the claimant could demonstrate they were out of pocket as a result. So technically if I was feeling extremely rich and really wanted to destroy somebody’s reputation I could do so and I would have my damages capped.

**Q144 Stephen Phillips:** On my second point of clarification I am expressing no view, I am only seeking to clarify your evidence. Given the problems that you have identified not only in relation to the modern world and the advent of the internet, and therefore the very quick and worldwide dissemination of information, and also what you have all identified as what your clients for the most part are seeking to achieve by instructing you and bringing proceedings for defamation, is there any alternative but for Parliament to bite the bullet and to create the ability for a claimant to seek an injunction prior to being defamed?

**Rod Christie-Miller:** It is something that has its practical implications but I am absolutely in favour of it.

**Q145 Stephen Phillips:** Could I just ask the other three of you, if we created such a right to an injunction that does not currently exist in common law, what your views would be on that?

**Jeremy Clarke-Williams:** I am in favour but it also implies that there would have to be some sort of obligation of prior notification as well so that if one was planning to publish a story about an individual one had to approach them first to give them the opportunity then to make the application for the injunction to stop that story getting published if they felt they had the evidence to do so.

**Stephen Phillips:** Which, as I understand it, the European Court is shortly to decide in the context of privacy.

**Rod Christie-Miller:** I am not certain I agree with Jeremy that the prior notification is a prerequisite. It is something that would sit naturally but it is not necessary. There is no prior notification requirement in relation to an intent to publish information that is in breach of somebody's personal privacy but those injunctions are available.

**Stephen Phillips:** I notice Mr Lamont and Mr Tait disagree with you.

**Nigel Tait:** I think it would be going too far to encourage or to provide for libel injunctions. I think the position is currently satisfactory that if a newspaper publishes something that is wrong then you sue them for damages. Can you imagine the furore if people were getting injunctions stopping potentially libellous allegations being published about them?

**Q146 The Chairman:** Mr Lamont, did you wish to comment?

**Duncan Lamont:** I think it would bring into focus the role of regulation because, for example, television regulated by Ofcom has a much stronger obligation to give a right of reply whether in privacy or libel and to incorporate that into the programme. It is a matter for the editor to determine the prominence but there has to be a considerable part of the would-be claimant's role. The PCC does not have that requirement, but perhaps it would be something arguable that it would be for the PCC to consider that and come up with a form of words rather than something as dramatic, hard-hitting and controversial as coming from your Houses.

**Q147 Lord Bew:** Picking up this question of terrorist-related cases, I just want to put the question to you like this, if I may. Mr Partington earlier used the phrase "reasonable belief of a journalist" or something as regards a valuable test. What is your reaction to that, bearing in mind the sort of cases I am thinking about?

**Nigel Tait:** If I am accused of being a terrorist I do not give two hoots what the journalist's reasonable belief is, I want my reputation cleared. When you start focusing in on what the journalist believes, it piles on expense and it is irrelevant because I do not really care. What the journalist believed at the time is a factor in

whether the defence of responsible journalism has been complied with, but it should not be a defence per se unless you are talking on privileged occasions at committee meetings or in the House and so on and so forth. It should not be a defence simply that journalists believe what is written.

**Rod Christie-Miller.** It is jolly difficult to get inside anybody's brain, particularly when one has source protection so I as a journalist can say I believe that Lord Bew did X and Lord Bew sues, I argue that I genuinely believed it but it was based on a source but I am not going to tell you who that source was. I am not arguing against source protection, I think that is a very important thing but you see that it does not sit very well with introducing a level of malice or journalistic knowledge on to any of these defences.

**Q148 Lord Bew:** I understand that point but do you think there is absolutely no problem or issue around a libel culture forming in Belfast or in Dublin, or indeed in parts of London, around these cases where there is a keen exploitation of the law to close off legitimate areas of investigative journalism? Do you think there is no real problem in this area at all?

**Rod Christie-Miller.** I think the existing responsible journalism defence very robustly provides the kind of protection that proper investigative journalism is absolutely entitled to and is fundamental. I think it works.

**Q149 Dr Huppert:** A lot of things have been touched on that are tempting to talk about. I will resist the temptation to ask about what is practical to do on the internet. I think tracking down all anonymous posts would be rather challenging. Can I clarify a couple of things that were said towards the beginning and just check that I have understood them. One was to do with issues about libel tourism. There was a concern expressed that if you are domiciled here you might not be able to—my first quick question, if I can just throw in a couple of quick questions and then hear the responses. Would it be helpful if Clause 1 of the Bill said that there had to be substantial harm in England and Wales? Would that solve the libel tourism problem without causing the problems that you were concerned about, so that we are concerned about what is done here?

The other one is about corporations and other non-natural persons. There was a comment about declarations of falsehood and malicious falsehood. Do you think there are sufficient sanctions available to non-natural persons using those routes that would satisfy their realistic concerns?

**Rod Christie-Miller.** We kind of divvied things up as well, like Mark Stephens mentioned to you earlier, and those both fall under my remit so if I run out of steam I will pass to somebody else.

Nigel alluded to the fact that libel tourism may not be an issue or it may have been addressed already. If you take libel tourism as being a non EU resident coming to England to sue another non EU resident, there were no cases in 2009. There was one attempted case towards the end of 2010 but when the claimant went to a Master to ask for permission to serve out of the jurisdiction that was refused because it was shown that there was not significant publication here.

**Q150 The Chairman:** Forgive me for just chipping in. What are we supposed to make of what is alleged to be the case in certain American states who have made it explicitly clear that they will not consider themselves or their residents bound by decisions made in the British courts? Is that a mistaken view on their part or what?

**Rod Christie-Miller:** No, I think it is a small “p” political decision. There was a one case that motivated that. As I understand it, the defendant was Rachel Ehrenfeld who wrote about the funding of terrorism and somebody of non EU origin—and I think it was somebody call bin Mahfouz, but if I get the name wrong I apologise—sued her and various others in the UK. That was a case that was brought in 2007. The American legislators codified what was already known to be existing practice, that one could not enforce in America a defamation judgement from the UK or indeed anywhere else that did not have exactly the same rules as the US. It was codification of existing rules as I understand it, and it was a fine piece of small “p”, politics.

Just in terms of libel tourism in this jurisdiction, the Ministry of Justice working group that was set up under the previous administration had a look at this. I was a member of that. There was a general consensus that the better way to deal with it was as early as possible in the lifecycle of a piece of litigation. So if I want to sue somebody who is an EU defendant I am entitled to do so under European rules. If I want to sue somebody who is a non-EU defendant for publication in this country, I need to go to a court to get permission to serve those proceedings out of the jurisdiction, and at that stage there is a process whereby the court giving you permission looks at the merits of your claim. The only case that I am aware of where an application like that was made throughout the whole of the last calendar year was refused because there was not sufficient publication.

I think we have a system in place that deals with that problem, whether it exists or not. It could be beefed up and the Ministry of Justice working group looked at a way to beef it up, and that was to remove the decision from Masters, junior judges to a High Court judge and also to superimpose the Commercial Court Rules, which set out a checklist of what one needs to prove before you are entitled to issue out of the jurisdiction. If you superimpose those on the Queen’s Bench Division, where libel cases are brought, I think the problem is over.

**The Chairman:** Forgive me, but there is a Division in the House of Lords. If you were here earlier you know we will scuttle back as quickly as possible. Colleagues, thank you, if you would come back as fast as you can.

*The Committee suspended for a Division in the House of Lords.*

**The Chairman:** Dr Huppert, you were in full flow.

**Q151 Dr Huppert:** Yes, I think we had something of a response on libel tourism but the other thing was about options available to non-natural persons. If you are ready to respond to that one, I cannot remember exactly where we got to.

**Rod Christie-Miller:** Have I answered libel tourism?

**The Chairman:** Yes.

**Rod Christie-Miller:** Okay, fine. Corporations are able to suffer loss, even non-quantifiable financial loss, if their reputation is attacked. There is workforce morale, there is the share price that does not belong to the corporation, it belongs to pension funds, it belongs to City investors and it belongs to individuals, all of which are suffering if a corporation is attacked. Proving substantial financial loss is, firstly, enormously difficult; secondly, if you can do it it is a very labour intensive and cost intensive thing to be able to do. You can see another satellite litigation being introduced; eventually the costs of that are going to fall on the defendant if they lose. So there is another sort of complication and another piece of satellite litigation that can be introduced.

I think it is an overarching point. I quite understand the disquiet of the few cases whereby a large corporation has taken on a doctor, but I think those are few and far between. We do not have a sort of David versus Goliath situation all of the time. Most of the time the cases are about an individual who is suing a large media organisation. It is a fairly well resourced, experienced, well-equipped organisation who knows how to deal with a libel claim. So to make some law on the back of what is a relatively few cases I think would be an error.

The other points in terms of whether or not a corporation can go and sue by way of malicious falsehood, for example, is that in malicious falsehood the claimant would need to demonstrate malice. So they would need to demonstrate essentially what was going on in the journalist's mind; very difficult to do. They would need to demonstrate loss and they would also need to demonstrate falsity. There is a reason why people sue for libel as opposed to malicious falsehood. People only ever sue for malicious falsehood when the allegation is wrong but not defamatory. That is the one advantage.

**Q152 The Chairman:** Just to chip in for clarification; we have previously been told that as the share price was not owned by the company and if it dropped it did not hurt the company, it hurt the people who owned the shares, we ought to exclude share pricing from any consideration of corporate damage. I think you are saying something different and I would just like to be clear.

**Rod Christie-Miller:** I am saying the same thing. I am saying that if I defame a company and its share price drops, the person who suffers is the shareholder because the value of the asset in their hands has diminished. They cannot do anything about that anyway. Academically there have been attempts to use the drop in share price as evidence of the diminution of the value of the reputation of the company but that was struck out.

**Q153 Dr Huppert:** Can I just ask one other quickly? You talked about the example, I think there have been doctors who have been sued and so forth. Do you think the other way to resolve things like that would be just to have greater qualified privilege for academic publications, academic conferences and the like?

**Rod Christie-Miller:** I think I have said more than enough for the moment. Nigel?

**Nigel Tait:** One way of dealing with it is to have greater qualified privilege for academics. One of the faults in this draft Bill is that if a newspaper publishes a fair and accurate report of a scientific or academic conference it is going to have the protection of qualified privilege. So who does a corporate sue? It sues the doctor and it sues the academic. One of the vices of this Bill is that it is pitching individuals against individuals and that the press can pull back. I do not think that is a good idea at all. That would be more bullying if you sue the academic as opposed to the newspaper

**Q154 Stephen Phillips:** I have a point of clarification for Mr Christie-Miller if I may. One of the things you said in the course of one of your answers is that the libel working group established under the last administration recommended in terms of procedure the imposition of the Commercial Court Rules in relation to service out on libel cases. I just wanted to know what you meant by that, because I would have thought that service out was dependent on the nature of the cause of action rather

than the court in which the claim was brought. That is certainly my understanding of part 6.

**Rod Christie-Miller:** That is absolutely right. What I meant, and I apologise, is the Commercial Court have a written set of guidelines that state what evidence one needs in order to get over the hurdles that are common across all the divisions. It is probably practice guidance that has been written by a Commercial Court judge.

**Q155 Stephen Phillips:** Is there nothing in the *Queen's Bench Guide* to that effect?

**Rod Christie-Miller:** I do not believe there is.

**Q156 Sir Peter Bottomley:** Can I take a real life example? The NHS training system managed to cook up a thing called MTAS/MMC that totally wrecked the training of half a generation of hospital doctors. A lot of very senior people were involved in that. People at the top of the NHS, people at the top of the royal colleges, people all over the place ignored all the warnings and wrecked people's lives. If I got involved in describing that factually, there is no problem. If I start getting involved in vulgar abuse, there is no problem. If in the middle of all that I make one mistake, where does symmetry come in?

In general I say to people who are thinking of suing, "It's not symmetrical. If they said something that is right, no matter how many they got wrong, do not sue. No matter how many things you've done right, if you have done anything wrong, do not sue". But from the point of view of the publisher or the writer, is it all right to say, if you are making 19 allegations of which 18 are fair comment or fact, that you ought to be seriously exposed to danger if you get one thing wrong, or should you be able to say, "I got one thing wrong but the rest I stand by"?

**Nigel Tait:** It depends on the occasion on which you make the allegation. Obviously if you make it in the House it does not matter. If you make it on an occasion of qualified privilege, then the claimant has to prove malice in order to defeat that. If you do it in a newspaper and you have behaved responsibly, you should have the defence of responsible journalism, possibly coupled with an obligation to correct the error. But it obviously depends on how qualitatively different the one allegation is to the 19 as well.

A lot of the companies sue doctors over allegations that they have been dishonest or that they have suppressed test results, which they take quite seriously. If you stop corporations suing, the board will sue instead. I would ask the Committee just to look at the speech of Lord Bingham in the case of Jameel where he sets out in just two paragraphs why it is important that companies should be allowed to sue for libel. I cannot do any better than that.

**Q157 Sir Peter Bottomley:** One last quick question from me. This is switching subjects. Let us assume there is what was called a super-injunction. Do they first of all run on for ever unless somebody does something about it? Secondly, if it is discontinued, how do you get to know about that?

**Nigel Tait:** I do not think we can have any more super-injunctions. I think we have only probably had three real super-injunctions as I understand it and the Master of the Rolls is going to make it absolutely clear, from what we read, that these judgements have to be given in public but possibly anonymised.

Do they run on for ever? The courts want claimants now to take it to a stage of finality where they get a final order. The problem for claimants is if they get a final order against the individual it is no longer binding on the newspapers that they have served injunctions on and so the newspapers are free to publish the private

information and damages for privacy are so low and there are no exemplary damages in breaches of privacy, that that is not a sufficient safeguard to stop the press from publishing and breaching the privacy. Claimants are meant to take the case to trial and further order.

**Q158 Sir Peter Bottomley:** But if they do not, they just sit around and do nothing?

**Nigel Tait:** They will not be allowed to. It used to happen but I think things are being tidied up and one judgement after the next from the High Court is saying, “We do not like this happening any more”.

**Q159 Lord Marks of Henley-on-Thames:** I just wanted to pick up on something that Mr Tait said first, and then Mr Clarke-Williams also said, about access to justice. If Jackson comes in and the claimant can no longer recover success fees under conditional fee agreements and can no longer recover insurance premiums against adverse costs, how is a claimant who is less well off going to achieve access for justice? Do you see any answer in changing the costs rules as far as the defendants are concerned? Do you see any answer in contingency fees? Should the damages therefore be increased in certain circumstances to enable them to recover out of damages?

**Nigel Tait:** I will be very brief, since you have mentioned my name. Let’s be absolutely clear that the Government are not intending to bring in Lord Justice Jackson’s proposals in relation to defamation. What Lord Justice Jackson said is that you do not need after the event insurance against the other side’s costs because there should be something called qualified one-way cost shifting and that only in cases where the claimant is wealthy or has brought a frivolous claim should he have to pay any of the defendant’s costs. The Government have jettisoned that so access to justice for most people with a bit of equity in their house is going to be destroyed by the Government’s proposals. So it does not matter too much what goes into this Bill; most people are just going to be too scared to sue to clear their names for libel because they will not have adequate protection.

**Jeremy Clarke-Williams:** That is right and I think it could have a devastating impact on access to justice for ordinary individuals because effectively what one is saying to one’s client is, “You have been defamed, say in a national newspaper. It is a complicated case. It is likely to be defended, certainly to a certain stage. I can run this on a conditional fee agreement, which means that I take on the risk and only get paid if you win, but if you lose the case, although you will not have to pay me you are going to have to pay your opponent’s costs. I cannot get insurance to cover that so it is going to wipe you out financially. So if you run this case, you have to be prepared to risk everything”. That is how the law will be if the Government’s response to the Jackson consultation paper is introduced. That is the position that it was back in the late 1980s before the Woolf reforms and before CFAs were introduced in defamation cases. Somebody who was not wealthy who wanted to bring a libel case had to be prepared to lose everything to clear their name. That seems to me to be a massive retrograde step.

**Q160 Lord Marks of Henley-on-Thames:** May I just clarify that very quickly? It was really bringing in the Government’s response that I was talking about, and I was asking you whether you saw any way of improving access to justice if insurance premiums and success fees are not recoverable.

**Nigel Tait:** Qualified one-way cost shifting would include the position if insurance is not recoverable. A claimant at the moment may recover 80% of his costs



but if Jackson and the Government's proposals are implemented he is going to recover about 50% of his costs, so an impecunious claimant is either going to be massively out of pocket or his solicitor is going to have to subsidise the case. You want to defend academics and scientists. Even if the defendant is successful in defending the case, they are going to be massively out of pocket because what you recover is being driven down. What we are all in favour of is the judges taking hold of cases and managing them so that the costs come down as well as what you recover coming down or instead of.

**Q161 Baroness Hayter of Kentish Town:** I want to go back to corporations, about how there may not be many cases or they are against the doctor, but about the threat against non-government organisations of a corporation suing? When I used to run Alcohol Concern, the drinks industry used to threaten me with lawyers' letters as soon as I said anything vaguely, vaguely critical of the drinks industry. We have concentrated mostly on personal reputation on this but I am thinking, should there be an extra hurdle or something about corporations before they could sound threatening? I think the threat is much greater than the trial.

**Nigel Tait:** I am just going to say two sentences on that because I have done a lot of talking.

In the last 25 years I have seen people put in extra hurdles in defamation law and it has driven up the cost. Whenever you look at any clause in this Bill and ask, "Is it going to pile on the cost?" the answer to several of these clauses is yes. Is it really worth it, because it is going to destroy access to justice for defendants and claimants? Does what you are getting in the Bill outweigh the additional costs of the hurdle? I think you need to consider that seriously.

**Q162 Baroness Hayter of Kentish Town:** I am really asking is it right to have the same sort of hurdles for an individual's reputation as for a company's reputation? Is the same procedure for these two really quite different things the right way to approach this?

**Nigel Tait:** I am happy to answer, but I have done a lot of talking. What we are talking about is a false statement that is likely to cause substantial harm that has been published irresponsibly and is not the honest opinion of someone. With all that in play, should a corporation be disabled from clearing its name? I think no. A corporation will get round any hurdle you put up. You will have six directors suing instead of Sainsbury's. It will be able to prove special damage. It will then have run up a huge legal bill and it will want you as the defendant to pay it. That is the reality.

**Q163 The Chairman:** I will conclude with the same two questions that I concluded the previous session with. Do any of you see scope in this Bill as presently drafted or in terms of a report from this Committee that might affect clauses not thus far drafted that would overlap with super-injunctions?

**Nigel Tait:** I would agree with Lord Lester that you should concentrate, if I may respectfully say so, on defamation. If you start getting involved in the law of privacy, this Bill will not see the light of day for years.

**Q164 The Chairman:** Except, as was pointed out in our previous session, which we knew but it was always good to have it reaffirmed—because at least we do not know; you may but we do not—there has already allegedly been one super-injunction wrapped around a libel defamation case. Does that not suggest that your clear-cut

differentiation between defamation and privacy is not quite as clear-cut as some would say?

**Nigel Tait:** There has been one injunction, not a super-injunction, because we know about it.

The defendant was allegedly blackmailing the claimant and the judge did not think, given the gravity of the allegation, that he should put them in an open judgement, say what they were, because everyone could just repeat them, about the claimant. It would be completely self-defeating. So I think he anonymised the name of the claimant and did not mention what the allegations were. But libel injunctions are very, very rare and only granted in very extreme circumstances.

**Rod Christie-Miller:** A very quick thought is that because of the way with respect to reputation is developing, we are coming to a point, if not now then in 18 months or two years or so, where defamation and privacy laws in this country and across Europe will be one and the same. If we stay inside the European Union and subject to the ECHR, that is the way things will be and our courts will have to interpret what is published by way of Article 10, the right to free expression against Article 8, whether that is privacy or defamation or confidence or whatever it is. Of course, you can separate things out in a Defamation Bill but whether you will need to revisit it later on I do not know because the laws are coming together.

**Q165 The Chairman:** On the other hand, and I am not a member of the Government, my understanding is that any Bill arising out of this probably would not even see the light of day until the beginning of the next Session, which is May or June, if it was at the forefront and later if it was not. By the time it became legislation, your 18 months would be up.

**Nigel Tait:** Yes.

**Q166 The Chairman:** My second question is it is alleged that some of the super-injunctions have sought to inhibit the historic freedom of Members of Parliament to say what Members of Parliament want to say, to which only occasionally people want to listen; that is their choice. It has also been alleged that attempts have been made to restrict the ability of Members of Parliament to talk to their constituents. If the Government was to produce a Bill that legislated to protect those historic rights, albeit that they exist but might be reinforced if they were put in modern legislation, would you have a view as to whether that was a good or a bad idea?

**Rod Christie-Miller:** Can I disclose that I am also a member of the Master of the Rolls Super-Injunctions Committee, so can I be silent?

**Q167 The Chairman:** My apologies. I do not think I was told that.

**Nigel Tait:** The Procedure Committee of the House looked into this in 1999 and 2005 and I think they came up with the right answer, which is that Parliament reigns supreme but in a cases where there is an injunction there should be self-denial by members, if the House thinks it is right to do so, to not—

**Q168 The Chairman:** You have managed to get Sir Peter's attention. He has the last question.

**Q169 Sir Peter Bottomley:** In some family cases where injunctions or court orders can come in and if someone says, "I want to talk to my Member of Parliament" but they are told that they cannot—it is not a question of the MP being self-controlling; it is somebody else being inhibited from doing it—do you think there can be a common acceptance, whether it is lawful or not, that nothing can stop a constituent talking to a

Member of Parliament about something that concerns them? Or do you think we need to go to statute, whether it is in defamation or for that matter in other cases?

**Nigel Tait:** I think this all started because no one thought about it very carefully. In Trafigura an injunction was granted preventing anyone telling anyone about the injunction.

**Q170 Sir Peter Bottomley:** Which purported to affect us?

**Nigel Tait:** Yes. So it was thought that that meant that one could not tell one's MP and that one's MP could not raise the matter in the House. It is just that no one thought about it on a Thursday night or whenever the injunction was granted. It was a very complicated question. One would have thought that constituents ought to be able to talk to their MP about anything and that their MP ought, while respecting the rule of law, talk about anything he or she wishes to in the House.

**Q171 The Chairman:** On that affirming note in this building, can I thank you all on behalf of the Committee for your time and your thought and your advice. It is much appreciated. Thank you.

**The Guardian, Daily Telegraph and The Times  
Oral Evidence, 11 May 2011, Q 172–244**

Evidence Session VI

Members present

Lord Mawhinney (Chairman)  
Rehman Chisti MP  
Dr Julian Huppert MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Morris of Aberavon

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**Examination of Witnesses**

Witnesses: **Mr Alan Rusbridger** [Editor, The Guardian], **Mr Philip Johnston** [Assistant Editor, Daily Telegraph] and **Mr Alastair Brett** [Former head of legal department, The Times].

**Q172 The Chairman:** On behalf of the Committee, I welcome you and thank you very much for being willing to come. I have two things by way of starters. The first is to alert you media people that you are in the media focus this morning. I gather that we are being televised as well as recorded. Secondly, as a matter of good governance, in this Committee there are a number of people who at some point over the years have written or been the sources of information for all three newspapers represented here. Rather than have every member start by declaring an interest and saying, “I wrote an article for this and I wrote an article for that”, the record should show that at some point most of us, or at least many of us, have written for or had an involvement with all three newspapers.

Can I start by asking each of you a fairly general question? What are your procedures for trying to protect yourselves against libel allegations and perhaps legal processes, and in what way are those procedures amended or changed in relation to what is put on the net in your name as opposed to what is published on paper in your name?

**Mr Alastair Brett:** Can I just make one point. I cannot speak for News International, the *Times* or the *Sunday Times*. I left the *Times* and the *Sunday Times* at the end of last year. I am now a media consultant and trying to set up Early Resolution with Sir Charles Gray. All I can do is speak from some hindsight and with a bit of knowledge, having worked at the *Times* and the *Sunday Times* for 33 years.

**Q173 The Chairman:** Your statement is noted and understood, and we will operate on that basis. But you do have 33 years’ experience and we would be happy to fish in that pool if you are willing to help us. Would you like to start?

**Mr Alastair Brett:** I can say that last year, when I was working at the coalface, there was an increasing problem with newspapers receiving blogs or comment

pieces from third parties. At that stage, it becomes incredibly difficult to check the accuracy of what someone has said or the comment that they have posted on the newspaper's website. Then, of course, you have the difficulty of somebody writing in or emailing that the comment is highly defamatory and to take it down immediately. But you do not know, because you have not had the time to check, its accuracy or its provenance. So there is an increasing problem.

Every newspaper has its team of lawyers who check the hard copy as it goes to press at night. When you have a 24-hour internet service, which is being changed the whole time, it means that either you have to have 24-hour legal advice or you have to have other teams. We had a team of moderators, but they look at it from the decency aspect and all sorts of other aspects. They are not trained lawyers, so they can allow something to slip through. They do not know that, if someone is in the middle of a blackmail case, you simply do not name them. They are not trained in the finer arts of media law.

**Q174 The Chairman:** What interests me in your reply is that you immediately focused on what other people send you by way of publishing. Tell us a little bit about what happens with in-house generated stuff, such as how you protect yourself and whether you have to have different procedures to protect yourself as far as the electronic copy is concerned.

**Mr Alastair Brett:** In the normal course of events, a journalist such as Dominic Kennedy, who is the very well known senior investigative journalist at the *Times*, would come to me in my office and say, "Look, Alastair, I am investigating such and such"—a donation to a political party or whatever it may be—and we would discuss it. He would go away with a list of things and I would say, "Look, you must do this Dominic or that". He knew the ropes.

But there is an interplay between the legal department—the *Guardian* legal department is here today and they would be able to help—and good journalists. The discussion takes place and when the first draft of an article comes up, it goes straight to the legal department to be looked at. Then the lawyer will say either that it seems fine or that you have to go away and get more evidence.

**Q175 The Chairman:** And you do not change that procedure for the electronic copy?

**Mr Alastair Brett:** Electronic copy is different because it is quicker. You do not have the lag time involved with someone deciding that there will be a big investigation into something. I go back to the days of Harry Evans when he sent journalists to Barbados to look at Lynden Pindling and what was going on there. That was months of serious investigative journalism. But electronic journalism is in a different category. It is quick and fast, and that much more difficult to stop.

**Q176 The Chairman:** That is precisely why I asked the question, if you do not mind me saying so. Because it is so quick, we who know little about it might legitimately think that you would have to have different procedures. That is really what I am getting at. If you have different procedures because it is so quick, what are they?

**Mr Alastair Brett:** If you are absolutely going to stop everything, the procedures would have to be non-stop, 24-hour legal advice, but that is massively expensive. You could look at it the other way around and ask whether the procedures should be different as to an electronic publication with a 24-hour take-down notice. If the law said that as long as you take down a posting or a comment within 24 hours

you will not be liable, that is a change of the law, as opposed to the practice of what newspapers do to stop things getting on to the internet which are damaging.

**Q177 The Chairman:** In as much as we are going to be offering a report to Government about framing law, is that something you would like us to think about?

**Mr Alastair Brett:** Yes. I think there has to be a variation. We have at the moment a distinction between libel and slander. I fear that one of the worst aspects of the current draft Bill is a failure to amalgamate slander and libel and to look at elements of slander which might be imported into libel. For instance, there used to be the old four categories where there was deemed to be automatic damage to somebody's reputation. That could be looked at carefully. Interestingly, in the case of substantial harm in Clause 1 of the Bill, perhaps we should see whether we should do something along those lines. I fear that the draft Bill so far is a codification of the current, horribly complex law. It might have been better to toss all the law out of the window, start from day one and say, "Right, what are we doing with protecting reputations? We are after truth and the public interest". It is a triangular situation and we would be better to begin to frame a new law from that point of view.

**Mr Philip Johnston:** I think the dialogue between journalists and lawyers is more routine even than that referred to by Alastair. It does not necessarily occur only when there is a major investigation. I write leaders and comment pieces and routinely will send them over if I think that there might be something that is potentially defamatory or the law may come into play.

We do take a great deal of care. Even from my point of view—I am not an investigative reporter—it is not uncommon in a week to send two or three pieces to the lawyers asking whether they are okay. They will come back with marks on them, which we will then change. Great care is taken on a daily and a routine basis to try to be sure of the printed copy that is going in. If stories are going to be updated, we will also take care there to make sure that nothing improper goes in. There can be a caricature of something cavalier here but there is not. It is a quite routine exercise and a routine dialogue between the journalists and the lawyers.

**Q178 The Chairman:** And on the electronic?

**Mr Philip Johnston:** There will be care taken there too. There are off-duty lawyers, lawyers on call and all sorts of things. If there is a concern that some information is likely to be defamatory, one would hope that the journalists concerned would make sure that they check.

**Q179 The Chairman:** So if, unfortunately, something got written that was untrue and/or defamatory, how would you explain that to yourselves internally?

**Mr Philip Johnston:** On the web?

**The Chairman:** Either way.

**Mr Philip Johnston:** Inevitably there are stories that you will write and that we will have, which we believe we could justify were fair comment or in the public interest. In the end, a court may decide that we have not, if that is what you say may occur eventually.

**Q180 The Chairman:** So a "failure" is simply a judgment call on people's understanding of the law?

**Mr Philip Johnston:** It can be. Yes.

**Q181 The Chairman:** What else might it be if it is not that?

**Mr Philip Johnston:** Something could slip in that has not been properly vetted or that the journalist has not sent over but normally we would endeavour to check as much as we can. We are in the business of reporting truth and fact.

**Q182 The Chairman:** Is the non-transmission by the journalist to the lawyers, if that were to happen, a disciplinary issue?

**Mr Philip Johnston:** We would like our stories that might cause a problem to be tested by the lawyer but I am not sure whether it is a disciplinary issue.

**Mr Alan Rusbridger:** I think we have several layers here. We have regular training for all reporters and moderators. We have an in-house legal team. We have night barristers reading for the paper and who occasionally will go to external legal advice on big investigations.

There are a couple of particular things of context about the web, which it might be worth getting in early. One is that the nature of a story is changing. A couple of years ago my head of digital said that the story is gone as a form of information telling and I thought that she was mad at the time. But if you look at the form of live blogging on the web, I now see what she meant. It is a way of telling a story as it is happening. In the olden days—Michael will recognise this—you wrote a story, you put your jacket on, you went to the pub and that was it. The story had no afterlife.

Now, increasingly, the moment you write a story, there is an afterlife and people start responding. They say, “That is not quite right. It didn’t quite happen like that. I was a witness”. Newspapers are struggling with how you build that into the mechanism of telling a story. I think that it is an improvement because you can begin to clarify and add facts as you go along. You can say, “At 11 o’clock we said this, but that was not quite right because we have now heard from X that it was five people dead and not three people dead”. So you are building as you go along, which has become a really interesting, new way of telling stories.

The second is a strong belief, certainly where we work, that the future of news will flourish best if we harness the ability of other people to publish and the multiple sources of really good as well as dodgy information out there. If part of the skill of a journalist is now editing the work of others and aggregating and linking to it, and pulling it into what we are doing, you create what I think of as a mutualised platform. The skills then become sifting and editing that. I do not see anything in the Bill as it stands, except in Anthony Lester’s Appendix C, that begins to get to grips with that. But that will be a huge part of journalism in the future, and rightly so.

**Q183 The Chairman:** Bearing in mind what Mr Brett told us a few minutes ago, does what you have described suggest that there is going to be a potentially greater incidence of defamation in the future?

**Mr Alan Rusbridger:** Not necessarily. I do not think that there is anything about a live blog that implies that you are being hasty or inaccurate. In a sense, Reuters and PA are live blogs. The skill of agency reporting in reporting what you know at the time is a good discipline. It may be that we could get some elasticity into the defamation framework. So, should you publish something and within an hour you realise that it is wrong and correct and clarify it, any defamation framework has got to take account of what that hour of misinformation is worth before you voluntarily corrected it yourself. Perhaps we are living less in an age when newspapers imagine that they are making tablets of stone pronouncements about the truth. We are doing something more tentative. We are saying, “These are the facts as we know them at the moment but if we discover that the facts are different, we will tell you”. There is more elasticity that perhaps is not reflected in the Bill at the moment.

**Q184 The Chairman:** Mr Brett, you wanted to add something.

**Mr Alastair Brett:** Just the point that lies at the heart of this, which is Section 1 of the Defamation Act as it stands. If you can genuinely say, “We didn’t know that this was up on our website” or you are an ISP or something like that, and it is just flowing through your systems and you were not responsible for it or did not know about it, you have a defence. Every newspaper has this problem. Do we monitor everything that goes on to our website, every posting from an outside person when a newspaper asks for a comment on a particular article, or do we not monitor? If you monitor, you are guaranteed to be held liable because you knew the darned thing was going to go on the website. If you do not monitor, something damaging will slide into the system. That is a classic example of an area where the substantive law, as opposed to a procedure, needs to change.

**Q185 The Chairman:** Does it need to change in a way that says that internet service providers should have some responsibility?

**Mr Alastair Brett:** No, I think the case law at the moment with Godfrey, Blunt and Tilley and all the rest of it are about right. I cannot see anything wrong with that. The area on which newspapers want to have clarity is, if someone has posted something on a newspaper website, is the newspaper going to be held liable because it does some spot-checking but does not do 24-hour absolute moderation of what goes on to its site? We do not know whether we are going to be held liable or not. The most important thing is to clarify the takedown obligations. The work that Jill, and Sarah Jones at the BBC, did for Lord Lester’s Bill on facilitators and all the rest of it was stunningly good and could really be learnt from.

**Q186 The Chairman:** Takedown means that the defamation, if it is a defamation, has been aired. The damage to the reputation cannot be undone even if it ceases to be promoted after 24 hours, 7 days, 14 days or whatever. Is that a price that you think we should all be willing to pay?

**Mr Alastair Brett:** That takes you straight back to Clause 1 substantiality. The claimant must then demonstrate that the nasty, damaging comment that has been posted has been seen by people. Very often, that is the billion dollar question in libel actions. In the Underhill and Watson case involving a steam locomotive—they had to sell the steam locomotive because the legal costs were £350,000 or something absolutely astronomic—this defamatory thing had been sent to 13 photographers. You have to come to grips with what amounts to a substantially damaging piece.

**Q187 Lord Grade of Yarmouth:** On the takedown issue, having agreed to take something down and assuming that there is some legislative framework, would it not be helpful, since people will have seen it, to recall the fact that this item has been taken down? Just the act of taking it down does not undo. But to try to undo the damage that was done in the first place it could perhaps be registered on the website that something has been taken down because it has not been possible to substantiate it.

**Mr Alastair Brett:** But that is one of the difficulties of publishing electronically as well. Very often you have something on the website, which is then changed and taken down. You do not always guarantee to get the nib item the next day being correlated or linked to the original. But it is resolvable.

**Q188 Lord Grade of Yarmouth:** There is a difference between an established publishing organ, which you represent or have represented in the past, with a brand



to protect with its consumers and so on, and merely enabling internet sites that just allow anyone with a different kind of brand. A newspaper brand depends on reliability, accuracy, good journalism and so on.

**Mr Alan Rusbridger:** In some ways we are trying to blur that. The simplest way I can describe this is by using the theatre critic. Throughout the 19th and 20th centuries, we sent theatre critics to sit in the front row of plays. We still do. We have Michael Billington, a wonderful theatre critic. If you ask whether the other 899 people in the audience have got anything to say, of course there would be many people who would. So you say, "Let's create a forum where those people can say something". I think of the future of newspapers as a mutual endeavour. The future is not about us lecturing and giving sermons to passive readers. We want them to be involved and value their opinion. That poses a huge dilemma in terms of editing, sorting out the good ones from the bad ones and how you moderate that. You then work out, if it works in the theatre, can you apply it to politics, international politics and science? That is the process in which we are engaged at the moment. But we are positively trying to build and engage the readership—we know all about the trolls and the troublemakers—and a lot of these people are deeply knowledgeable and contribute to the democratic debate.

But it gives you a huge problem in an age in which two out of the three newspapers represented—if I include Alastair—are losing substantial sums of money. I read in some of these pages of the defamation consultation about the Goliaths of the industry. There are no Goliaths left. This is not a rich person's game anymore. You are struggling to reinvent news organisations, a lot of which will be trying to harness and involve the readers because that is the democratic reshaping of the world of information. This clear division between what we do and what they do is going to become more fluid.

**Q189 The Chairman:** There are no Goliaths any more. If I am a non-celebrity, non-sportsman, non-politician living in middle England and for whatever reason a national newspaper defames me and I am on, let us say, £1,000 a week, do you not think that that individual views any of you or your colleagues as a Goliath?

**Mr Alan Rusbridger:** That is a perfectly reasonable point and maybe we will come on to this. But in the consultation paper about corporations someone tried to draw a distinction between big media and small media organisations. The truth is that, in the kind of sums we are talking about in some of these actions, we are talking about papers that are making no money, particularly local papers. It is almost impossible for local papers to mount any kind of libel defence at the moment. They simply do not have the money. We will be lucky to have local papers at all in 10 years' time. So it is a completely changed landscape.

**Q190 Lord Grade of Yarmouth:** I think we can all agree—please disagree if you do—that one of the two objectives we are trying to reach is to reduce the cost and to get a greater equality of opportunity to get redress. Secondly, we are trying to get early settlement. Part of that is a mechanism that you do not end up in court with expensive briefs and all that that entails.

One thing which in my experience militates against early settlement—I have had a number of issues with the *Times* and the *Sunday Times* over the years, and Mr Brett is smiling—is the utter reluctance of editors or newspapers to even consider for the first six months of engagement that there is any chance that they could possibly be wrong or have got any of it wrong. It is a two-way street because if you are going to

get early settlement, newspapers have got to be much more open to the possibility that they might have got it wrong. Whatever goes on internally is one thing. There was a comment by Mr Rusbridger in his article in the *New York Review of Books* on the Tesco case in which he very wholesomely admits to the errors of what happened. He said, "Tesco's extreme irritation can well be imagined". I would imagine that if somebody accused the *Guardian* newspaper of the equivalent charges that the *Guardian* levelled against Tesco, you would feel a bit more than irritated. I thought that "irritated" was a quite revealing choice of word. This is pretty serious stuff.

Newspapers have a reluctance to engage. They immediately take the decision, "We got it right. Go away. We've got more resources than you. We will fight this all the way. See you on the steps of the court". That is the reality of what happens.

**Mr Alan Rusbridger:** There is something in that. We have a readers' editor and he is sitting behind me. If anybody wants to complain about the *Guardian*, they do not come to me, they go straight to him, so we have an independent mechanism. Our libel costs have gone right down because we believe that it is part of the duty of the paper to correct regularly and as a matter of course.

The Tesco thing was tremendously complicated because Tesco had to spend £300,000 to explain to themselves their tax arrangements. As the case went on, it transpired that they were doing corporation tax avoidance and other kinds of stamp duty and land tax avoidance. It took quite a long time for anybody to understand what on earth had been going on in this fantastically complicated area. That was an exceptional case but the moment we understood what had been going on we handsomely apologised and corrected it.

**Q191 Lord Grade of Yarmouth:** Do you feel that the *Guardian* is exceptional in having that attitude?

**Mr Alan Rusbridger:** We are, as a matter of fact, the only paper that has an independent readers' editor. I have often wondered why that is the case. It is fairly standard in the United States.

**Q192 Lord Grade of Yarmouth:** Can I ask Mr Johnston why he would reject that kind of approach?

**Mr Philip Johnston:** I am not necessarily saying we would always reject that approach, but we seek to correct as soon as it is brought to our attention that something is wrong. Part of the problem is that immediately we are confronted with a lawyer's letter the drawbridge tends to come up and the moat cannot be crossed. Once the legal process starts to get going, it is slightly different from when somebody is making a complaint through the PCC or whatever. I think you will find that newspapers are much more accommodating there. If you are confronted with a legal letter, the lawyers tend to be very reluctant to admit anything because of what might happen subsequently.

**Q193 Lord Grade of Yarmouth:** The worry about early settlement from an editor's point of view presumably is that if you settle it too early to the satisfaction of the complainant, the risk is that more will come out which will eventually substantiate the story that you wrote. Presumably, that is always a concern.

**Mr Philip Johnston:** To be honest, the main concern in all of this for most of us, as Alan has just said, is the exceptional costs that are involved in going any distance in a libel action.

**Q194 Lord Grade of Yarmouth:** Yes, but there must be some journalistic imperative. If you say something about somebody or some corporation, you would not publish it unless you thought that you had more or less got it right and that it was defensible in the form in which you have published that side of the story. Let us assume that you believe that it is defensible and that they then complain and throw a lot of facts at you. You think, “Oh, if we had known that, we probably would not have published at that point. We had better settle this”. So you reach an early settlement, publish a quick apology and there are no damages or legal costs. Your fear at that point, as a serious newspaper, is that you were right and that if only you had taken your time. My point is, will it militate against an early settlement if the newspaper reserves the right to revisit the story if they had further evidence that was uncovered later? But you probably would not get a settlement in that case.

**Mr Alan Rusbridger:** I think in 99 out of 100 cases, it is pretty obvious if you have got something wrong.

**Q195 Lord Grade of Yarmouth:** That was not my experience with Mr Brett over the years.

**Mr Alan Rusbridger:** Maybe you were the 100th case. In the 100th case, you know you are on to something. But if you want to fight the case, you have to bear the cost even if you have some hope that on discovery you will get the evidence that you are lacking at the moment. That is going to be an expensive thing but that is really the exception rather than the rule. Is that fair?

**Mr Alastair Brett:** Yes. I think that the incidence of a full-scale battle between a claimant and a newspaper over the facts is relatively rare—it has got to be a Jonathan Aitken. Someone has got to be lying, basically. Usually, it is the inferential meaning. It is that underlying inference, assumption or something else that the reasonable reader will suddenly gather from the facts being presented which is often right at the core and the heart of libel actions.

Going back to your point, I fought the Grigory Luchansky case. He was a Russian oligarch who had been refused entry to the United Kingdom by no less than two Home Secretaries on the grounds that he was an undesirable in this country. We linked him into the Bank of New York money laundering scandal and he sued. There, there was an ongoing investigation. Money laundering is the most difficult thing to prove. It is about every bit as difficult as tax evasion or tax avoidance. So there was an ongoing worry that, yes, this man was deeply involved in money laundering. I remember even sending somebody out to Italy because the Italian police had him on their books. But then we applied to amend our defence very late in the day and we were told, “No way. You are far too late”.

At the end of the day, after God knows what in legal costs, he walks away with no damages and no apology but with buckets of money having been spent. If ever there was a case for someone saying, “Look, you people will sit down and try to work something out”, that was the kind of case where it should happen.

**Mr Philip Johnston:** We had a similar case many years ago where an allegation was made against a residential home company, largely as a result of complaints made by our readers who wrote in in droves and were making claims that the company said could not be substantiated. We fought this case all the way and after three weeks of a trial, a phone call came from a reader saying, “Did you know that this particular company had been convicted in a Dorset court on trade description charges?”. We did not know that and they had not admitted it. There was an argument for it to admit it at the last minute. The company pulled out on a drop-hands basis. No damages were paid, but it cost £350,000, and this was 10 to 15

years ago. So here we were: we believed we were right, we fought the case and effectively we won the case. Evidence did come forward at a late stage to show that the company had not been forthcoming with all the information that it should have been. Yet, we were still £350,000 out of pocket.

**Lord Grade of Yarmouth:** I have other issues, but we will move on.

**Q196 Rehman Chishti:** I would like one clarification with regard to the point made earlier by Mr Johnston and Mr Rusbridger about when there has been an error, liability has been accepted and a correction is made. Often, people out there see the correction on page 50 and it is about two lines. Is there a procedure to make that correction proportionate in terms of the damage that has already been done, rather than at page 50 where not many people see it in two lines?

**Mr Alan Rusbridger:** Our procedure is exceptional. Because we correct every day, we have an institutionalised column. It is right next door to the leader, so it is not tucked away on page 50. It is the second best read and most important page, after the front page, and that is where we correct. It is there every day and we do it as a matter of routine. Only in one case, which was Tesco, have we veered from that. I think we should have some credit for having a regular place where you can find it, which is absolutely in tune with the *New York Times* and the *Washington Post*, the best American model.

**Mr Philip Johnston:** We certainly do not have 50 pages of news. It will go on a page that the editor decides on the day.

**Q197 Rehman Chishti:** So we have a difference. The *Guardian* will put it on a specific page where people will see it often. You feel that you would like to put it wherever you want. Therefore, although an acceptance has been made, sometimes, with regard to proportionality of damage, putting it right at the back with two lines does not achieve that result for the person who has been victimised. Do you accept that?

**Mr Philip Johnston:** In a defamation case, the case has been resolved in court and the damages and so on are dealt with there.

**Q198 Lord Grade of Yarmouth:** Can I pick up an immediate point on that? There are two kinds of apology or correction, or three if you take the voluntary one from the *Guardian*. You have a PCC instruction, which would be dictated or agreed. Certainly, there would be strong pressure from the PCC for prominence. In a case where you are settling a defamation and agreeing an apology, surely there would be negotiations between the person who has been defamed, or the lawyers of that person, and the publisher. Part of that negotiation would be the prominence or otherwise of the apology.

**Mr Alan Rusbridger:** That might have a bearing on the damages. They might say, "We will take lower damages if you are going to put this prominently".

**Mr Alastair Brett:** The difficulty with Alan's position is that if you have your readers' column on a set page and the person was defamed on page 2, the person wants the apology on page 2. I know from my experience that I have different managing editors. A managing editor may say that we are going to do all corrections on the letters page. Unfortunately, the letters page was page 18 or something. I would say to the managing editor that I know that the claimant would not accept the apology going on the letters page and that he wants it on page 2. The really hard decision is where you have a front page story which needs correcting. No editor on this planet wants to put an apology on page 1.

**Q199 The Chairman:** Before I come back to Lord Grade, let me pick that up. I asked previous witnesses—who were all lawyers, on both sides of the argument—why we should not recommend to the Government that apologies should be located on the same page as the error was made and should be of a similar size—in other words, size and location should be the same. I am well aware of the argument that you cannot specify a day but it could be within, say, seven days. What is the argument against saying, “If you have defamed, a person who has been defamed deserves as much attention drawn to the apology as to the original error”?

**Mr Philip Johnston:** If you mean that you want to put that requirement in statute law, the argument is that I do not think that the state should be telling the newspapers what to put in the newspaper.

**Q200 The Chairman:** The state is entitled to tell newspapers that what they put in the paper may sometimes be considered to break the law that the state has set.

**Mr Philip Johnston:** In which case, there would be a legal redress for that—contempt of court or whatever. In a free society, surely we cannot be dictated to by the state, its agency or the judiciary on what we put in the newspaper.

**Mr Alastair Brett:** The really complicated case is where one of your journalists—a defence correspondent, or somebody—has a tip-off from MI5 or MI6 that somebody is involved in terrorism or something like that. There is no way in the world that the newspaper is really going to be able to prove and justify the thrust of the article.

Over the last couple of years we have had endless articles about mosques and about who is or is not involved in Jihad and heaven knows what else. Very often, the newspaper will have pretty good circumstantial evidence but nothing to prove a level 1 meaning of “you are a terrorist” or something. In those cases it is very difficult. For the state suddenly to say that you have to publish something on page 1, when the newspaper has a bucket of circumstantial evidence and genuinely believes that the person they have investigated is much more knee-deep in something very unpleasant than they can prove, creates real problems.

It goes back to Lord Grade’s point about to what extent the onus of proof is on the newspaper—very often it is not able to prove, or the police or the security services have told the newspaper and we simply cannot call those people into court—which is a real difficulty.

**The Chairman:** We are clearly exciting a lot of people. I have three colleagues who would like clarification before I go back to Lord Grade.

**Q201 Dr Huppert:** Is there not also a particular issue about the fact that you may have a very large front-page piece where the libellous section is one sentence? How would you define what was the equivalent space? Presumably, a one-sentence apology on the front page would not have enough information, or there could be a 10-page special feature. I do not know. Is there a way that you could possibly define what would be an equivalent apology?

**Mr Alan Rusbridger:** I was going to say that. Quite often you get nine things right and one thing wrong. You have to work out the proportion of error within the overall space. I think that I am with my colleagues. I would be reluctant to have judges dictating to me how I edit my newspaper. But to go back to my point to Michael, it is perfectly reasonable for that to become an element in the damages. So if I want to bury it away, I am going to have to pay more than if I am going to be more prominent and put a little box around it. This is what happens. You get a last-minute

settlement where they say that they want a black line round it; that they want it in 32 point and not 24 point; and they want nothing else on the page. That is the kind of negotiation. If you want to hang in tight and say that you will put it on the racing page, it will cost you more. That is more reasonable than getting judges to stipulate.

**Q202 Rehman Chishti:** Going back to the point that I raised earlier about proportionality, Mr Johnston said earlier that he do not want the state telling him what to do. Equally, does that mean that the *Telegraph* does not believe in proportionality? If you say something quite defamatory about someone on page 1 and then have something on page 8, in terms of proportionality that may not be quite right.

**Mr Philip Johnston:** I think that point was just addressed. Proportionality is not necessarily concomitant upon the size of the article on page 1 because the whole article may not in any way be defamatory. It may be some part of it. That is an editorial judgment we have to take.

When I said that I do not think the state should intervene, I think that in a free democratic society you cannot go down that road. In fact, the whole essence and intent of this Bill would seem to be more liberal rather than more restrictive. I do not think we should go in that direction.

**Q203 Baroness Hayter of Kentish Town:** I am interested about where the reader comes in this idea that you negotiate with the lawyers for the claimant on one side and the lawyers for the newspaper on the other. What the reader is going to take from it seems to be excluded, which rather worries me and I would like your comments on that. In a sense, it goes back to the point that Lord Grade made earlier about there being a difference between an established public organ and putting it on your website. What can the reader trust? If the two sides are negotiating on how big the apology is going to be, it seems to me to exclude the reader from their right to know the truth. I would like your comment on that.

On the second point about the state, the examples given were rather unfortunate because they were mostly leaks from bits of the state—either the security services or the police. Newspapers often seem happy to take leaks and briefings from exactly those that have given rise to some of the biggest defamation cases, featuring people potentially involved with kidnaps, murders or handling dangerous products. Those things came from the state and were given newspaper coverage. I am slightly surprised that you are then objecting to the state making requirements about the size of the apology.

**Mr Alastair Brett:** But that brings you straight back to the public interest, which I mentioned earlier. If you believe that one of the objects of the national press is to be the fourth estate and bring things to the attention of the public, what may be happening in a particular mosque, or something like that, does need looking into. We did a story last year about a lecturer who was a member of Hizb-ut-Tahrir, which is a radical Muslim outfit. You may get the information in the form of a leak. It may be an unassailably true fact, but it may produce a reaction from the claimant that is out of all proportion to what has been said. When we had Michael Evans as our defence correspondent, he had fantastically good contacts within the security services, but there is no way that he could say, “I’ve been told this” or expect that person to come out and give evidence. Within the defamation laws, you have to have a strong public interest defence, however you look at it. I would resort to that as the answer to cases where the state may have told us something. We have to be flexible and there may be cases where it just does not sound right. I would say that to a journalist. But if

Mike came to me and said that he had a fantastically good tip, I knew it was right and I could trust the source, you have to go down that route.

**Mr Philip Johnston:** On the question of readers, do you mean that we exclude them from the process, in so far as it is a legal process between the lawyers and the individual complainant? I am sure that is true, but in the sense that the readers are informed through what is in the paper, they would certainly let us know if they felt that we had got something wrong, so I would hope that they are involved.

**Mr Alan Rusbridger:** On the readers, we think the best answer in the paper is to have it in a set position. I hope every *Guardian* reader knows where we correct, because it is slap bang next door to the main editorial; it is not tucked away. There is an interesting question on the web, which is what we used to call invisible mending. We are against invisible mending, which means correcting it so that there are no traces left behind. We are trying to hold the line in saying that what we have published is an archive of integrity, and therefore if we change things or we get things wrong, rather than invisibly amending them we will inform the readers that it has been changed. That comes into tension with some aspects of the libel law, because quite often people just want stuff off the web—they want it taken down. There is a tension between saying that this is the record, but we got this fact wrong or we have altered this bit, so we apologise or correct it, but we did publish in this form originally, and solicitors saying, “I don’t care, we just want the whole lot down”, which obviously expunges the record.

**The Chairman:** Lord Grade, you wanted to change the subject. After you have had your question, I will call Lord Bew.

**Q204 Lord Grade of Yarmouth:** The framework within which all debates about old press and new press take place—I do not want to be pejorative, but you get the distinction between the internet and hard copy—always starts with an assumption that you will have to have different rules and different forms of regulation for one and the other. So far as the reader is concerned, they are just consuming information of one kind or another. How long should it be before we think about having a single regulatory legislative regime for all forms of publication?

**Mr Alan Rusbridger:** My position is that one of the great things about living in this country is that we have different regulatory regimes. The BBC is a tent peg of impartiality and everything else. If it strays from that, it loses its Charter. Then you have the much freer, more polemical and opinionated press, but you can always return to the compass point of impartiality and record, which is the broadcast media. That is a nice tension to have. In America it is the other way round, in a way. The papers strive for impartiality and then you have Fox TV doing what some of the newspapers in this country do. I would quite like to see these twin regulatory mechanisms going in harness for as long as we can. If newspapers want to develop opinionated TV, as it were, with multimedia, that would be a good commercial opportunity for them, but we should keep these different regulatory mechanisms.

**Q205 Lord Grade of Yarmouth:** Do the others agree with that?

**Mr Alastair Brett:** My experience would indicate that newspapers would be terrified of having an Ofcom-kind of regulatory framework. It would very seriously affect the way that newspapers operate.

**Q206 Lord Grade of Yarmouth:** I do not think I was suggesting that. Simply for the purposes of publication, in the end the internet is a means of distributing information, however it is gathered and whether it is pushed or pulled, to use the vernacular.

Newspapers do the same thing. I was trying to understand why we have to have separate rules for both. How long can we sustain having a separate regime for two different means of distribution of the same information?

**Mr Alastair Brett:** I agree with you. If you are going to introduce a Defamation Bill, you might as well do a root and branch job. You have the Theatres Act and all sorts of distinctions between the spoken word on the stage, the spoken word in public meetings and then the written word and all the rest of it. I feel that at the moment we are codifying the current libel law. If somebody gave me the right to start from scratch, I think we should do so. You should be looking at the relief that people want. Do they want a correction and an apology? Do they want the record set straight? Do they want a right of reply? Do they want damages? Do they want an injunction? You start almost from that area and work backwards.

**Q207 Lord Grade of Yarmouth:** Last question. If you accept that takedown might be a good solution on the internet, is there a hard copy version of that?

**Mr Alan Rusbridger:** Does this go back to the invisible mending point?

**Lord Grade of Yarmouth:** Yes. They are all shaking their heads behind you.

**Mr Alastair Brett:** No, there is not a simple answer. Sally Baker liaises with readers at the *Times*. She will come down and tell the legal department that she is putting a nib correction in the paper tomorrow. Not everything goes to the legal department. As Philip was saying, letters from lawyers go to the legal department. Letters from readers will very often be dealt with by somebody else on the editorial team, who will just say that we should put this on the right page and do a nib on page four, or whatever.

**Q208 Lord Bew:** Mr Johnston, I listened to your first remarks about the process and you used the phrases “great care” and “routine dialogue with legal staff” on investigative stories. I wanted to tease out a little bit more about what goes on in that context, in particular whether you have a sense that there is a certain type of story—we have already referred to terrorist-related stories—that is particularly problematic and requires special care, or whether particular constituencies are more likely than others to resort to law. I would like to have a sense of how fraught this terrain is, what goes on in a newspaper and whether you are, in your phrase, taking great care engaging in a routine dialogue about investigative stories that may be challenged.

**Mr Philip Johnston:** If it is an investigative story, there will be regular contact with the lawyer and the journalist as the story develops. What I was talking about in terms of routine contact with a lawyer is that if you have been in the business a long time you have a sense that there might be a problem with a story or the way it is phrased, particularly if it is an ongoing legal issue or something in court, and you will be careful to make sure that enough caveats and “alleged”s are put in to ensure that it passes muster and gets through the lawyers. A big investigation is a different thing. At each stage you will seek to ensure that what you are doing is properly within law and is well covered and great care is taken to ensure that that is done.

**Q209 Lord Bew:** I want to move on to the Reynolds defence. We have tended to hear that it has been a disappointment from some points of view. There is an argument about why it has been a disappointment. Some people in the legal profession believe it is the fault of newspapers that it has not been more significant in recent years. I notice that the *Guardian* takes this very seriously. I do not get the impression from reading your remarks on the subject, Mr Rusbridger, that you think it is a story of simple disappointment. You take it seriously and you pay a lot of



attention to it. Can you explain why you think it has worked a bit more effectively than we have been told up to now, if I can put it like that? Are there possible means of expanding the Reynolds defence, maybe dealing with confidentiality of sources and deepening it? I realise that it rather complicated and has many different elements to it in the first place. Is that a line of development that is worth talking about?

**Mr Alan Rusbridger:** Reynolds is now a verb in our office. “Have you Reynoldsed this?” Like Google. The best investigative reporters on the *Guardian* quite like working with Reynolds. It gives you a framework and you know you are going to get some protection. The more of the 10-bar gate that you can climb in terms of ticking boxes, the safer you are going to be. On the stuff about tone of voice, reporters who 10 years ago would have written stories that were very assertive have now learnt to write things more tentatively, raising questions rather than asserting. There is lots that you can do with Reynolds that is quite good. There was a period of unpredictability in the early years of Reynolds, when the courts were interpreting it too rigidly. If you had got over eight of the bars on your 10-bar gate but had not scaled the last two, you were knocked out. I think that Jameel brought more elasticity into the process. Jameel interpreted Reynolds in the spirit in which it was intended. Our concern about the current proposals is the fear that this is going to go back to codifying Reynolds and not taking account of the common law interpretation, which has built some fluidity and flexibility into it. We find Reynolds quite helpful.

**Q210 Lord Bew:** This is news to me, that the *Guardian* has internalised Reynolds into its practice and therefore we have an element of its significance that was not immediately obvious to me at the beginning of this Committee. Is that true of the *Telegraph* and the *Times* as well? Is it internalised there? This means, in effect, that it is of more significance than what we learn about when cases go to court. It has been a quite significant development over the past few years, if you are also doing it at the *Telegraph* and the *Times*.

**Mr Philip Johnston:** Obviously we had experience of using the Reynolds defence, not successfully, in one libel action. As Alan says, it is a checklist. At least you can see that if you are going through the procedures, there will be a defence. Obviously, it will not necessarily be successful, but there are elements to it that we can follow, many of which we always used to follow even before Reynolds, to be honest. At least you can see that we will be covered on this and on that if we do the thing properly.

**Mr Alastair Brett:** It is undoubtedly a broadsheet defence. Take MPs’ expenses, which is the classic example of something being in the public interest. I had one fantastic case where we were not quite sure whether the politician was going to get an injunction against us for indicating how much tax he paid. He applied for an injunction and the judge decided no, it was in the public interest that the world should know how much money he paid as a multi-millionaire Member of the House of Lords.

There will be cases where you cannot prove every last jot of what you are saying, but it is clearly in the public interest, and those are the cases where you will undoubtedly have to go through a Reynolds process. I would reiterate exactly what the other two have said. The Bill at the moment is getting perilously close to setting up a series of hurdles that the press are going to have to get over. The more flexible Jameel test is miles better than what I think this Bill does. I think Anthony Lester’s Bill was better than the current Bill.

This Bill is good in one respect. It has introduced the neutral reportage defence, so that if you are sensibly reporting a spat between two people and you do

it without taking sides, that now falls within a kind of Reynolds defence, but it does drive a coach and four through the repetition rule.

**Q211 Lord Morris of Aberavon:** Could I clarify one thing? Given the vast resources you have to ensure you are protected, is there a greater propensity for defamation to arise from 24-hour editions and the web, or whatever, where the task is much more difficult? Secondly, how can local newspapers survive defamation cases without the kind of resources that you have?

**Mr Philip Johnston:** Where the local newspapers are concerned, I am not sure that they are able to.

**Q212 Lord Morris of Aberavon:** On this ground only. I am not thinking of the other general grounds.

**Mr Philip Johnston:** On the Reynolds grounds? As Alan said earlier, most local newspapers just will not go there any more because of the potential costs that would be involved.

**Mr Alan Rusbridger:** There was evidence given to the Culture Select Committee when they were looking at defamation a couple of years ago. A solicitor who acts for a lot of local papers came up with a startling claim. I think he said that no local newspapers had defended a libel action within two years. It was one of those really stark moments. He said that the simple fact is that it is going to cost £10,000, and that is just unaffordable nowadays to a local paper. Routinely, local papers settle, which means that anybody who knows that fact is going to use it. There were one or two startling examples of MPs who were eventually exposed by Philip's paper who had managed to silence their local newspaper when they had questioned them.

Local newspapers are in serious trouble. But I want to repeat my earlier point. Even at a national level, three out of four main national newspaper groups are losing quite large sums of money. At the same time, we are having to reinvent ourselves as web businesses, which as you say involves 24-hour publication. The resources are much more thinly spread. If somehow the purpose of what you are trying to do is to preserve the existential question of newspapers in society so that we can continue, you have to give us some kind of weapons of protection if we are trying to do stuff for the public good. Obviously, we should not have a defence if we are not doing stuff in the public interest.

**Q213 Lord Morris of Aberavon:** Can I come back to my other question on the propensity for defamation to arise in non-hard-copy editions, because of the sheer speed at which news and stories develop? Are there more defamation cases in that kind of sphere?

**Mr Alastair Brett:** I do not think that there are. Before I left at the end of last year, we certainly were not deluged with lots of claims relating to the internet and the website electronic version. In fact, we were getting more complaints or concerns about breaches of an injunction. There was one case where one of the Royals had been threatened and there was a blackmail allegation. It had got into an Australian newspaper. It clearly should not have been in a newspaper, but somehow somebody had posted it on our website. When we realised it had been posted, we took it straight down. There are more cases where members of the public do not understand the complexities and the reporting restrictions. They do not understand that there is a case going on and you have to be careful, or they do not understand that there is a law preventing you naming someone who is the victim of blackmail. These things get

on to the internet. You take them down. They are not in the same league as libel. On the whole, we have not had many more claims in relation to the website version.

**Q214 Dr Huppert:** It was suggested by the last panel that we had that there is a particular issue that libel is focused on damages rather than declarations of falsity and corrections. I would be interested to know a bit more about whether we should be looking at trying to change the aim of the libel action. Mr Brett, I think you are doing some work on alternatives. I would be interested to know where that is. Are you having problems in getting that going and should the legislation be changed to make it easier, or is it not a legislative problem that you are having? I am sure the other two of you have similar comments.

**Mr Alastair Brett:** The Government's consultation paper makes it perfectly clear that it is interested in pursuing alternative procedures, as opposed to the substantive law. If you park the substantive law on that part of the desk and look at the procedures, the short answer is that every libel action in this country is scandalously expensive. Last year, Sir Charles Gray chaired a committee looking at early resolution procedures. We came up with the answer that until Section 69 of the Senior Courts Act on jury trial is abolished or amended so that it is not automatic, there will be cases where claimant lawyers will insist on going to court and getting a jury verdict. The jury do not come back and say what the article means; they just come back and say that they find for the claimant or the defendant. So you never know. It is the most unpredictable and really scandalous state of affairs, where neither side can predict the outcome of a case, particularly where it involves relatively complex facts and the inferential meaning that may come out of those facts.

Charles and I basically agreed that as a result of the committee last year, we should set up an early resolution procedure. I operated it at the *Times* before I left. I had one wonderful case with two MPs who we had said had come out of Madame JoJo's in Soho. They were very angry, because they had not come out of Madame JoJo's in Soho; they had just been hailing a taxi. So we apologised. But the solicitor said, "No, we want money. It is defamatory to say that they had been in Madame JoJo's. I said, "Well, hang on a sec. This is a modern, pluralistic society. What do you want?" They said, "Well, we want damages". So I said, "Let's arbitrate. One: is it defamatory to say that you came out of Madame JoJo's? Two: if it is defamatory, how much in damages?" We decided to send it to Sir Oliver Popplewell, who is a retired High Court judge. He decided that they should both get £4,000 in damages. He came up to me at the drinks party at Christmas and said, "Alastair, I think we were a bit generous with those two, but by the way, when are we going to go to Madame JoJo's?"

It is a wonderful way of dealing very quickly with a case. In that case, the question was: is it defamatory? I had a fair comment case in which a journalist wrote a piece about a snooker player. He said that the one word that has not been used in all the articles about this semi-final is the word "cheat". In that context, was it a statement of fact—this guy is a cheat—or was it a matter of opinion? We agreed after a series of negotiations with the solicitor acting for the snooker player that it should go to arbitration. Sir Henry Brooke looked at it. With his knowledge of fair comment and all the rest of it, he said that it was clearly a comment piece. At that point, the snooker player backed off.

Last year I had two cases on exactly the same issue. Was a French journalist involved in the death of David Holden back in 1977, when he was murdered in Cairo? Again, we got the answer that the article makes it perfectly clear that this journalist clearly was not. It was a CIA operation, or something else. But you do need to get an

expert. It goes back to the point about editors hating to say sorry. They do hate to say sorry, on the whole, particularly when they have a bee in their bonnet about a particular issue. But if you go to them and say that you are going to arbitrate the meaning of an article and decide whether it is a level 1 meaning or a level 2 meaning, that is what the jury are going to decide if we go to jury trial. The editor will say that they would much rather get it sorted out now. It is a very good way of resolving. Until both sides know what the words mean, you cannot very often operate the offer of amends defence. If you do not know exactly what the article means to the average reasonable reader, you cannot necessarily say sorry in a proper way and you get difficulties where the article has inferential meanings and may mean one thing to someone and something different to someone else.

**Q215 Dr Huppert:** So the key thing that you think we should do it to get rid of jury trials completely. Is that right?

**Mr Alastair Brett:** No, I am not saying you should get rid of it in every case; I am saying it should not be automatic. The court should have an ultimate discretion, particularly where it is on what may be a moral issue or something like that, where you really do need 12 good men and true to decide whether these words are seriously damaging and, if they are, what the damages should be. But it should be a rarity. It should be the exception rather than the rule that it is at the moment.

**Mr Philip Johnston:** That sounds a very persuasive argument, but I wonder to what extent you could legislate for that and whether there are elements in the draft Bill anyway that might go to that point rather than getting something done quickly through the substantial harm test, if there is a strikeout mechanism. Secondly, on the question of whether there should be a presumption of a jury, I agree that you should not rule it out entirely, but the presumption should be reversed. When a jury is involved, the costs get hugely higher, not least because the judge will then wait quite a long time for the jury to make a decision on meaning. Someone suggested to me that you could have a grand jury on meaning. You could put lots of meanings before a grand jury over a couple of days and get it over and done with and move on from there once that is decided. It is an idea, but not one that Alastair likes, apparently.

**Mr Alastair Brett:** No, the Irish have that and it is a nightmare. You get a page and a half of meanings, as we all know in the profession, and you just wade through every kind of defamatory meaning. It is ghastly. It is much better for each side to take a position and then let the arbitrator find for one meaning or another, or for a slightly lower meaning that you have to focus on.

There is nothing to stop a libel action not being allowed to go forward until both sides know exactly what they are arguing over. That would stop hundreds of thousands of pounds being spent on claimants trying to strike out particulars of justification that they say are just stuck there to try to embarrass the claimant away. They are not, usually. They are usually there for a purpose, because the barrister will have pleaded them in some way as some kind of mitigation—a Burstein mitigation point, or something else.

**Mr Alan Rusbridger:** I support everything that Alastair is saying. Instinctively, or after publication, editors quite often know that they have made a mistake and they are willing to apologise and correct. Anything that you can do then to speed it all up and find some quick resolution would be really helpful, possibly to the extent of saying that a case should not be able to go to trial before an attempt has been made at mediation. If there is a willingness to apologise and correct, in some ways that ought to be a defence.

**Mr Alastair Brett:** Alan has used the word mediation. I have a guy setting up our website at the moment. We have a not-for-profit company called Early Resolution. We will help people try to get preliminary issues resolved, such as what the meaning is, whether it is fair comment, whether the person is identified and a whole series of other things. When you get somebody coming to you with this kind of problem, it is essential to have the parties knowing that somebody is going to come down with a fixed decision. Alan used the word mediation. Mediation is facilitative. That is a different body from arbitration. In arbitration, the skilled arbitrator will say that this means this, or I find that. I need to be able to go back to my editor and say that the expert has found this and we are now faced with that and we go down that route.

**Mr Alan Rusbridger:** Are you offering to do both? Are you offering to mediate and arbitrate?

**Mr Alastair Brett:** Where somebody wants to mediate, we will do so. I have mediated four cases.

**Q216 The Chairman:** Forgive me, but I think probably we ought not to be pursuing the merits of an individual company or organisation being set up. We should probably keep it slightly more generic.

**Mr Alan Rusbridger:** Can I just say something on juries, just before we rush to abolish them? I am a bit anxious about that. We had a case with the Police Federation, which at that point had won 95 cases in a row. They were called garage actions, because the Police Federation were buying an awful lot of cops just enough money to build extensions to their houses. It was a case where the policeman we had not named had sued two years and 51 weeks after the piece. It was a clear abuse of process about a very high public interest matter of corruption in Stoke Newington police. By the end of the case, we had virtually lost all our defences because we had a judge who did not seem terribly interested in free speech—in fact, we learnt later that he was not well. It was a jury who saw the public interest of the case and came to our rescue. It was completely the right decision. I felt uneasy about Jonathan Aitken, a high profile public figure, being able to get rid of a jury. There are cases on both sides.

**Q217 Dr Huppert:** I think you have all said that you would like things to be resolved quickly and easily. How does that work when you have an article by somebody who is not employed by the paper? What happens if the person who wrote the article wishes to stand by what they said, but the editor of the newspaper does not feel interested enough in the facts of the case to fight it? For example, in the case of Simon Singh the *Guardian* was not that interested in defending, if I am correct.

**Mr Alan Rusbridger:** We were interested, but our advice was that we had no defence, because it was a question of meaning. We had just staggered through the enormous expense of the Tesco trial and we thought that we were then going to stagger into another case in which we were told at the outset that we had no defence on meaning. All credit to Simon Singh. He was less battle-weary than we were and he fought it, but it is very difficult to justify to your board that you are going to fight a case in which you are told at the beginning that you have no prospect of success.

**Q218 Dr Huppert:** I can understand that. Perhaps I should not have raised that particular example, but there may be other cases where there is a difference between the interests of the writer and the publisher. How can you ensure that both of them have an interest? It may reflect very badly on the writer if you apologise for

their article because you wish to just close the case off quickly. Is there a way around that?

**Mr Alastair Brett:** But you would not do that. It is very rare that a newspaper is going to apologise for something when the writer is standing firm. The newspaper leaves itself horribly vulnerable to the journalist turning round and suing it in turn.

**Mr Alan Rusbridger:** It does happen, though.

**Mr Alastair Brett:** It has happened, but it is rare. We looked after Simon Singh. He wrote something for us and we saw off the claimant. Even when you have a freelance who is not a member of staff, you take the automatic position that even a freelance will be helped by the newspaper. It is very rare that a claimant will only sue the writer and not the newspaper. It is usually for a reason, and it is not usually the best reason.

**Rehman Chishti:** Going back to what Mr Rusbridger said about seeing an argument for the retention of jury trials, in what circumstances would you say that a jury trial would be appropriate? You gave the example of where it helped a case, but in what circumstance would you say that a jury trial would be most appropriate?

**Mr Alan Rusbridger:** The defence or the claimant ought to be able to make the case to the judge rather than simply abolishing them altogether. As I said, it can be with people of high public profile, such as politicians—I hesitate to say that in front of this audience. I have a strong feeling, perhaps unjustly, about getting rid of the jury in the Aitken case. There was a powerful figure who had been in the Cabinet. He was an Old Etonian. The judge was an Old Etonian. I would have felt happier if there had been 12 ordinary men and women taking a view of that case rather than what seemed to me sometimes, until we produced the devastating evidence, quite a cosy conversation in court between quite similar kinds of people.

**Q219 Rehman Chishti:** Basically, the argument is that justice should be seen to be done. Leaving it to a jury rather than to a judge would give that impression.

**Mr Alan Rusbridger:** Yes, and it ought to be open to people to make the case to the judge before the case starts that there may be an argument for having a jury.

**Q220 Rehman Chishti:** Moving on to libel tourism, I should like to ask first Mr Brett, then Mr Johnston and then Mr Rusbridger. Would you agree with the statement that the existing law had encouraged forum shopping and made London the libel capital of the world and that the burden of proof must be reviewed?

**Mr Alastair Brett:** I would agree with bits of that, but not the whole lot.

**Q221 Rehman Chishti:** What bits would you agree with?

**Mr Alastair Brett:** You only have to look at the case of Furtash and Kyiv Post, or whatever it is, involving a Ukrainian politician and a Ukrainian newspaper in this jurisdiction. What reason is there for that happening other than the fact that this jurisdiction happens to have libel laws that favour the claimant? It is nothing like as big a problem as it has been portrayed over the last year. To that extent, Lord Hoffmann is basically right in much of what he said in his lecture last year or the year before.

I feel deeply uneasy when you get someone like Polanski giving evidence by video link from Paris in his libel action against *Vanity Fair*. It leaves me with a deep sense of unease that he will not come over to this country because he might be extradited, but he gives evidence from Paris and gets £50,000 or £60,000 in

damages in this jurisdiction when he does not live here. *Vanity Fair* publishes elsewhere.

There is a problem. It needs looking at and somebody needs to put a clause in the Bill about the claimant suffering substantial damage in this jurisdiction. I think what is being proposed is on the whole right.

**Mr Philip Johnston:** Yes, I think the proposals in the draft Bill are on the whole right, as Alastair said. There does not seem to be a lot of evidence of trials taking place, as far as I can see. I know that research has been done, but I think there is a lot of evidence of threats that are what the lawyers call chilling to NGOs and smaller groups that they may be taken in this jurisdiction because the opportunity arises for them to do so.

**Mr Alan Rusbridger:** I agree with those comments. Can I just improve on my answer on juries? The litmus test is who is telling the truth, which was the case with Aitken. That is what juries are for in trials. I think it is better to have 12 ordinary people deciding whether someone is telling the truth than to have a judge deciding that.

**Q222 Rehman Chishti:** Going back to this question, would you agree that the “existing law had encouraged forum shopping, made London the libel capital of the world and the burden should be reviewed”?

**Mr Alan Rusbridger:** I agree with all of that.

**Rehman Chishti:** Great, because that is a quote from the *Guardian* to the Culture, Media and Sport Committee.

**The Chairman:** I think Lord Morris wants a clarification and then I will ask Dr Huppert for a quick question and then Baroness Hayter will ask a question. After that, I need to do some questioning. Part of my job is to get you to answer a few questions on the record to help us to get our heads around the complexity of all this later on. There is one issue that I want to pursue and I have a few relatively brief questions.

**Q223 Lord Morris of Aberavon:** In practice, we do not seem to have jury trials, but we have been told in evidence that the chilling effect of the prospect of jury trials adds to costs. Do you agree with that? Secondly, how would you draft those exceptional cases that Mr Rusbridger has advocated, whereby jury trials could still be contemplated?

**Mr Alan Rusbridger:** My answer is that you want a jury trial where the issue is who is telling the truth. I agree that they add to complication and cost, so I am not against the possibility of hearing cases without. I just think that before you completely abolish them, there are some cases where the issue is who is telling the truth, when you might want a jury.

**Mr Philip Johnston:** I think I am right in saying that the draft Bill proposes to reverse the presumption. Presumably the argument can still be made before the judge, as now. I do not think there has been a jury trial in libel for a couple of years. I certainly stood in the Queen’s Bench Division box in front of a jury on a libel action many years ago. I can tell you that there is no more chilling effect on a journalist than having to justify yourself in front of a jury. Alan is right. There will be circumstances where you will wish to have a jury. It is a great tradition in this country that we should do so on the question of truth. We are placed in a position of saying that maybe there should not be because of cost. If it could be done more cheaply, I think we would want them.

**Mr Alastair Brett:** I agree with everything that has been said. Alan is absolutely right. Where the key issue is who is telling the truth, you may well want a

jury, particularly if the claimant is a high-profile person who might be a politician or somebody who needs a jury to produce a verdict.

**Q224 Dr Huppert:** Can I return to something that was touched on lightly at the beginning about corporations or non-natural persons, to be more precise? We have had various discussions over these sessions about whether they should be able to take action in libel or whether they should use alternative routes such as malicious falsehood or declarations of falsity, and whether it should be all non-natural persons, large non-natural persons or various other forms. What do you think about what we ought to be looking at in this area?

**Mr Alan Rusbridger:** I think the Bill ducks it. I do not understand why the guidance notes say that the Australian model is non-viable. They assert that without explaining why. If you go back to the history of the libel laws, in the 18th century the Monarch used them because there was such power. If you look at where power lies in society today, it is quite often the global corporations. At the time of the Derbyshire case it was perceived that local councils and state governmental organisations were so powerful that there ought to be some countervailing balance. In the modern world, it is global corporations that are immensely rich and extremely concerned about their reputations. They can be fantastically aggressive and there is now a complete mismatch. That issue has been dodged in the Bill and it is a big missing element.

**Q225 Dr Huppert:** So would you support the Australian model? Would you support no non-natural persons being able to take libel action?

**Mr Alan Rusbridger:** When I wrote that piece about Tesco I looked into the Australian model and it seemed a rather good model. That applies if there are more than 10 employees—that may be a random number, but you have to draw the line somewhere—unless you can prove actual harm or malice. Otherwise, they are big boys and girls and they ought to be able to take it as part of the fair exchange of information.

**Mr Alastair Brett:** I agree with Alan, basically. I think you need to go back to Lord Lester's clause, which is much better than the current nothing, or ducking as Alan calls it. The company should basically have to prove some pecuniary or financial damage, or the likelihood of it, to get the action off the ground. I had a case of multinational Indian company suing the *Sunday Times* last year. The *Sunday Times* had done nothing other than repeat what an Indian NGO had said about a development that they were involved in, but we were sued in this jurisdiction. The NGO in India was not sued. It was just a big company wanting to try to silence somebody who had dared to speak out and criticise what it was up to. I genuinely think that companies are not like individuals. They do not have the horror of going through a long libel action.

**Mr Alan Rusbridger:** At the same time that Tesco were suing us, they were suing three individuals in Thailand, including one for criminal libel. They were using the example of us and handing it out in a Thai court. What the British courts do about this is going to be really important, as Alastair says, and will send a message to countries in other parts of the world about this matter.

**Q226 Dr Huppert:** Can I get a quick response from Mr Johnston? A yes or no would be enough.

**Mr Philip Johnston:** Yes, I agree



**Q227 Baroness Hayter of Kentish Town:** There have been a lot of calls to reduce the chill factor, but we have also heard from you some very good practice about the relationship of responsible journalists with their legal department and, from Mr Rusbridger, about the training of journalists. Do you think any reduction of the chill factor as a result of this Bill might lead you to reduce your own safeguards?

**Mr Alan Rusbridger:** Not if there is something that looks a bit like Reynolds in there. I suppose we are all arguing that this should be slightly elastic so that there should not be a literal 10-bar gate that you have to get over. But I imagine that if Reynolds is going to stay in any form, there is still going to be a great consciousness in the newsroom that you have to clear a number of these hurdles to show the steps you have taken. I think that is the way the world is going. It is going the same way in the PCC jurisprudence. You have to keep an audit trail of what you have done prior to publication to show that you had thought about these things and taken certain steps. I do not think it would lead to a lessening of standards.

**Mr Philip Johnston:** I am sure it would not. Those standards were there before Reynolds. I have been working on the *Daily Telegraph* for 22 years and those standards have been scrupulously observed, as far as I am aware. We are rare as an industry, in that each day we have to produce a brand new product. Given that so few mistakes are made, compared to the millions of words that are published, that shows that a great deal of care is taken and will continue to be taken.

**Q228 Baroness Hayter of Kentish Town:** Can I raise a quite separate point? When a criminal case is taking place in a court, if you as newspapers write enormously about the prosecution side, which is always the big opener, and then lose interest by the time it has come to the defence, do you think that is a form of defamation?

**Mr Alan Rusbridger:** I think it is a problem. We have been discussing this in consultation with the judges. There is a technological help here that judges are thinking about. With the resources and financial constraints that newspapers are acting under, particularly local newspapers that cannot cover cases like they did in the past, there ought to be a way of sending out email alerts so that if you covered the prosecution you can register with the court so that when the time comes for the defence to open, you should be alerted so that you can send your reporter down. It is an important point that too often we cover one side. There should be a discussion with the courts about trying to use technology so that we are kept informed. You might have a two-week case and you cannot keep a reporter down in court on the off chance that the defence is about to start.

**Mr Philip Johnston:** It is the case that after the openers, when you get into three or four weeks of very detailed legal discussion, it is not something that you are going to put in a national newspaper. It would not be interesting enough to anybody—often even to people on the jury. The openers are where the story is, and usually there will then be a story at the end when there is a verdict.

**Mr Alastair Brett:** I think I would agree with that. Can I go back to the previous point? You were worried about the chilling effect being taken out. If you look at Lord Justice Rupert Jackson's cost reforms, he suggests that there should be a 10% increase in defamation damages and the removal of CFAs. CFAs have terrified newspapers, because they have enabled some people who are less well off to get legal advice and to go for a newspaper. The massive uplift, if you get anything like 100% uplift, devastates a newspaper and it could cause a regional newspaper to go clean out of business. There will always be increased damages and the possibility of

costs. If CFAs go, that is not going to stop the basic hourly rate of solicitors who work in this field being around £450 per hour, which is mind-blowingly expensive.

**Q229 Lord Grade of Yarmouth:** Very quickly, the big hurdle to get through in the United States jurisdiction to mount a libel action is the concept of malice. Do you think that has any validity or application here?

**Mr Alastair Brett:** I am not in favour of going down the American route. I would not want to change the onus of proof. The onus should probably remain on the defendant. The only case where you get the possibility of the onus being changed is with public interest publication. Then you get into whether, in that situation, the newspaper is proving that what it has published is in the public interest and is responsible. I would not want to go down the route that the Americans have, where a public figure has to prove malice before they even get going. I think that is going a step too far.

**Q230 The Chairman:** Can I ask you four questions that are meant to be reasonably brief? If one of you answers, I will assume that the other two agree unless you specifically say that you do not. It would be helpful to us in our broader remit to have views on the record so that we can compare and contrast.

I understand that at the moment the courts do not have the power to order an apology. Do you think they should?

**Mr Alastair Brett:** You are right. The courts have the power under the summary provisions of Section 8 to order a summary of the court's finding. It cannot tell somebody to say sorry to somebody else, and I think that would breach human rights.

**Q231 The Chairman:** That would breach human rights?

**Mr Alastair Brett:** I think it would. I suspect that Anthony Lester would argue that the right to free speech equally means the right not to be forced to say something when you do not believe it.

**Mr Alan Rusbridger:** I agree with that.

**Q232 The Chairman:** Thank you. My second question is that our hearings and the discussion of these issues in the media and elsewhere frequently throw in the phrase public interest. Do you think it ought to be defined? If so, who do you think should define it?

**Mr Philip Johnston:** I do not think it should be defined in law. There is a pretty well established definition through the courts and there is an element of knowing it when you see it, to be honest.

**Q233 The Chairman:** Is that your lawyers knowing it when they see it? Your journalists knowing it when they see it?

**Mr Philip Johnston:** Usually a coalition of journalists and lawyers, and courts as well. Over the years, the courts have identified the public interest. I am slightly worried about putting it in statute. I would not know how you would define it in statute.

**Q234 The Chairman:** I am thinking back to earlier evidence that if only we could get a clear definition of what the issue was between the two sides, that would be a great step forward and it would reduce the costs and so on. In that umbrella, getting a clear definition of public interest might go along with that bit of evidence.

**Mr Alastair Brett:** You could make a start. The PCC code has a definition of the public interest. So does the NUJ code. There are a number of codes of practice by journalists or the PCC or elsewhere, which you could have as a bedrock base, but you will always need some flexibility at the tail end whereby somebody will have to make a decision on an article that is right on the cusp. You will get articles that are right on the cusp of what is or is not in the public interest.

**Mr Alan Rusbridger:** I agree with that. I think the PCC code is pretty good, but it is quite narrow and proscriptive. It is really there to justify breaches of the code, whereas I think in some libel cases you would want to be more broadly based in what the public good is behind what you are publishing.

**Q235 The Chairman:** We have had a certain amount of evidence that suggests that there ought to be a cap on legal fees. You have made reference to this issue earlier. Mr Brett particularly made some comments about it. In principle, do you favour a legislative form of capping of legal fees?

**Mr Alastair Brett:** The critical question is recoverability of costs from the other side. That is why some parties want a cap on costs. They will say, "I do not see why the other side should be allowed to spend half a million pounds and if it goes belly up on me I am going to have to pay that half a million pounds". The issue is recoverability. I do not think anybody should be prevented from spending as much money as they want defending or pursuing a libel action. The only issue is what the poor old loser is going to end up paying.

**Q236 The Chairman:** That is fine. What has been clear to me and to colleagues is that the issue of costs looms larger at the end of every session that we have had. We are trying to get some sense of this. Your idea that it is just about recoverability adds to that panoply of information, although I have to say that I think it breaks new territory to a certain extent.

**Mr Alan Rusbridger:** I do not think that I necessarily agree with Alastair. The Tesco case started at the beginning of March. By May we had put our hands up and said that we had got it wrong. We had offered a front-page apology. Alastair says that he does not mind how much money the other side spends. I really minded how much they spent. They went on spending hundreds of thousands of pounds because they knew they had us over a barrel. Eventually the judge stopped it. With Tesco it was a case of proportionality. The damages were piffling but the costs were huge. There was a complete mismatch between what it was all about and the costs of proving it. It is as much proportionality as recoverability.

**Q237 The Chairman:** I guess that we have to at least bear in mind, at some level, the individual who wishes to sue a corporation, whether it be a newspaper or somebody else, where the costs that a newspaper or some corporation can run up are in most cases way beyond what an individual could do. We are back into the conversation about chilling effect. That is why I am asking the question.

**Mr Philip Johnston:** A lot of those individuals might be on no-win, no-fee, CFA uplifts. I think there was a Statutory Instrument before Parliament just before the last election which fell. Now the Government has wrapped all this into Jackson. If they could get on with that, it would help. I do not know whether the Government have indicated that they are going to pursue that soon. Some reform of the fees arrangement would be very helpful.

**Q238 The Chairman:** You have touched on my fourth question, but I think I want to ask a slightly different question. It is about the reputation of an individual and the reputation of a corporation. You have talked about Australia in answer to Dr Huppert. In principle, do you think that the reputation of an individual and the reputation of a corporation are the same?

**Mr Alan Rusbridger:** I think they are different. As I said in my earlier answer, corporations are now more akin to Derbyshire County Council in their power. They increasingly have the means. The web enables people to get their own version of the truth out and to attack the publishers and place matters on the public record. I think the law ought to be more aimed at protecting individuals, including the individuals you are referring to, who do not have great access to money and so forth. We have to move on in corporations and realise that, particularly as the state gets smaller and corporations become more global, that is where the power is these days and they ought to be treated differently from individuals.

**Mr Alastair Brett:** It also comes back to the issue of what a tort is. A tort is damage and hurt. You cannot really hurt a company; it does not have feelings. Individuals will have feelings and can be deeply hurt and really feel that something has to be done quickly to restore their reputation.

**Q239 The Chairman:** Can I explore one final issue with you, going back to the conversations that we had about arbitration and the like? In the context of a potential dispute between an individual and a newspaper, what do you think are the prospects of newspapers contributing to and participating in a voluntary scheme of arbitration on defamation?

**Mr Philip Johnston:** A voluntary scheme? It would be up to us to make that decision. We would have to have a discussion about the prospects. I think a voluntary scheme is worth exploring, though not a statutory one.

**Q240 The Chairman:** On the receiving end of your words, Mr Johnston, I do not think I detect a huge amount of enthusiasm. Is that a fair assessment?

**Mr Philip Johnston:** It is not necessarily a fair assessment. It is not a subject that I have thought that much about. I would have thought that if you were talking about something that was voluntary and self-regulatory, it is clearly something that we could consider.

**Mr Alan Rusbridger:** I am much more enthusiastic. On both sides, libel is a hangover from the 18th century. When you look at people who have been bankrupted or ruined or jailed because of this medieval fight in which neither side can back down, I think newspapers would really welcome something much more informal that can be resolved more quickly and informally through mediation and/or arbitration. It is probably going to become essential, given the financial constraints that we are going to be operating under.

**Mr Alastair Brett:** The key to it is money. If newspapers think that a voluntary system is going to be cheaper and quicker because you get something resolved on day one, they will join it. It is persuading them that it is better for the newspaper to bite on it, having put into the public domain words that are ambiguous or that may carry inferential meanings that the journalist did not intend. I take Alan's point that there is not a newspaper around that is making much money, but if you are a commercial publisher you should pay for the resolution of those key issues in a libel action, such as meaning, ambiguity, fair comment or whatever else it is. I would love to persuade. The regional press will come in for it. Hiscox, the insurers, who do libel insurance, are very excited at the idea of parties who are insured against libel having

to get key issues resolved on day one. That saves massive amounts of money in legal costs. I know Alan would come in it, because Jill will advise and help, as will Geraldine, but there are other newspapers that will be very worried that they are going to encourage a flood of complaints. That is the terrifying prospect with various other newspapers. That is why it has to be voluntary. If it is a no-no claim, the newspaper will not pay for the resolution or the cost of the arbitration of the key issue.

**Q241 The Chairman:** So are you saying to us that our recommendations to the Government on the Bill should not include a requirement that there should be an arbitration approach?

**Mr Alan Rusbridger:** I think I said earlier that I would be interested in you considering inserting a requirement that people should try to settle it through arbitration or mediation before anything can go to full trial. A claimant should not be able to take the thing all the way unless they could show that they had tried to settle it first.

**Q242 The Chairman:** Which I think leads me to my last question. If there is to be some element of voluntary agreement to do an early resolution, what is the role of the PCC in such an idea and why has it not been already driven by the PCC, or at least the PCC asking for its terms of reference to be changed to include such a development, given that you self-regulate?

**Mr Alastair Brett:** The PCC does not get involved in the law. It hates lawyers getting involved in various complaints that it is dealing with. It deals with accuracy, primarily. The only clause in the PCC codes that overlaps with the law is paragraph 3 on privacy. The PCC is there to deal with complaints about inaccuracy. The law courts are there to grant damages and injunctions.

**Q243 The Chairman:** But you might argue that a libel case is a dispute about accuracy.

**Mr Alastair Brett:** You might well do, but it involves legal representation and a stack of complicated common law and everything else. The PCC is good for people who want to bring their complaint to it without involving lawyers. The area where the PCC is really useful is in sending out pre-notices and warnings to newspapers saying, "Lay off. Don't go and start photographing Wills on his honeymoon, etc". That is incredibly useful. I remember advocating years ago that the PCC should do that. It is doing that now, but it should be allowed to stay as a clean little body without having too many lawyers trampling on its doorstep.

**Q244 The Chairman:** Let me try to summarise what I think you are telling me, then you can tell me if I have got it wrong. I think you are telling me that there might be a favourable reaction to setting up a new organisation—not linking it to the PCC in any way, despite what may be elements of overlap—on a voluntary basis, although you are open to the possibility of the courts having the power to direct that operations should be used. This might involve a degree of funding out of the newspapers themselves and there should be allowed to grow up a presumption that in most cases this had to be tried before legal proceedings could be taken, and the earlier it was tried the better. Is that a reasonable summary of what you are saying?

**Mr Philip Johnston:** My only concern is what the consequences will be from putting this into statute. Some of these ideas are very good and they go to the point

of high costs and getting things settled quickly. The uncertainty of putting it into law and that becoming part of statute worries me.

**Mr Alan Rusbridger:** I think the PCC is quite an effective mediator. It is more a mediator than a regulator. It has image problems and problems in fact, because it sails under the cover of regulator. It is not a very good regulator—in fact, it is a rather incompetent regulator—but it does good mediation work. Where this dovetails with what you are considering may be a separate track, because the one thing that newspapers fear when dealing with the PCC is that they want to know that it is an alternative to the courts. Quite often, you can have a franker conversation with the PCC and deal with stuff more quickly if you are completely clear from the outset that none of this is going to be used—as it were, the claimant is not going to pocket the PCC findings and your admissions to the PCC and say, “That’s great, I’ve got my PCC judgment; now I’m going off to the courts”. Theoretically there is nothing to stop people doing that. They try to get an agreement first. It is where you get that overlap. You are going to be much more informal and make admissions and so forth in an attempt to mediate it, but that can subsequently be pocketed and turned into a legal process. That is where the two things become uncomfortable.

**The Chairman:** On behalf of my colleagues, I thank all of you very much indeed for coming, for the time that you have given, for the time that you have very clearly put into preparation, for being willing to share your experience with us and for what appeared to us to be the reasonably straightforward and helpful attitudes that you took to answer our questions. Thank you very much indeed.

## **Liberty, Which?, Global Witness and Mumsnet Written Evidence, Liberty (EV 37)**

### *About Liberty*

*Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.*

### *Introduction*

*The Draft Defamation Bill ("Draft Bill") was published as part of a Ministry of Justice consultation in March 2011. It follows a long line of calls for reform and builds on the pivotal step taken in Lord Lester's Private Member's Bill tabled in the House of Lords last year.<sup>39</sup> The Draft Bill presents for the first time in more than a century an opportunity for open and robust debate both in Parliament and amongst wider social interest groups. There is clear evidence that the current legal framework for libel is unbalanced, tipping in favour of litigants with deep pockets at the expense of those who use the media to ensure that corporations, individuals and governments are held to account for their actions. Liberty believes that the chilling effect on those who speak out in the public interest must be redressed, and this Bill goes a long way to rebalancing free speech considerations with the important aspects of privacy that defamation law encompasses.*

*Liberty believes that for far too long the balancing of the right to reputation and the right to free speech has been tipped in favour of the former. Free speech has long been recognised as being crucial to the effective functioning of a democracy and is closely intertwined with notions of fairness, freedom and liberty of the individual. Effective and responsible government is based on the ability of citizens to freely exchange ideas, criticise policy and openly disagree with each other, and, often through reportage, hold government to account. Freedom of speech then is something that the UK as the world's oldest democracy holds protectively. The 'chilling effect' of defamation law is, in this sense, somewhat of an historical anomaly. It is an anomaly we hope that this Draft Bill will address.*

### *Outline of the Bill*

*Clause 1 of the Bill imposes a new substantial harm threshold before a defamation claim becomes actionable; clause 2 provides for a defence of responsible publication on a matter of public interest; clause 3 provides for a defence of truth; clause 4 outlines a defence of honest opinion; clause 5 outlines a new framework for parliamentary privilege; clause 6 allows for a single publication rule; clause 7 provides for jurisdiction in a UK court if it is the most appropriate place in which to bring an action in respect of an allegedly defamatory statement; and clause 8 reverses the presumption of the right to trial by jury in defamation proceedings. The Committee is also consulting on a number of issues which although not included in the Draft Bill are open to consideration, including the role of protection for internet*

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<sup>39</sup> The Bill was read for a second time on 9<sup>th</sup> July 2010. <http://services.parliament.uk/bills/2010-11/defamationhl.html>

service providers, early dispute resolution measures for defamation litigation and the ability of corporations to found a defamation cause of action.

### *Achieving a better balance*

*The law of defamation, protecting a person's right to reputation, traces its history back to the 16<sup>th</sup> century.<sup>40</sup> For the past century, the law has developed in a piecemeal fashion, with numerous attempts to reform it. In addition to the progression of the common law, there have been significant changes to the law's social and broader legal context: the advent of human rights law and the rapid expansion of the internet.*

*The impetus for reform has been steadily building for several decades.<sup>41</sup> From the early Porter Report in 1948<sup>42</sup> to the Faulks Report in 1975,<sup>43</sup> to the more immediate calls for reform from the United Nations Human Rights Committee in 2008,<sup>44</sup> the Ministry of Justice (MOJ) Libel Working Group<sup>45</sup> and the Culture, Media and Sport Select Committee in 2010.<sup>46</sup> Last year English PEN, Index on Censorship and Sense About Science, which form the Libel Reform Campaign, collected 52,000 signatures in support of reform of libel law, and English PEN and Index on Censorship published a report examining the impact of the current law on free speech.<sup>47</sup> Significantly, each of the main political parties committed to review and reform of libel law in their election manifestos in early 2010.<sup>48</sup> Most recently, in July of 2010 Lord Lester tabled a Private Members' Bill on Defamation in the House of Lords.<sup>49</sup>*

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<sup>40</sup> The concept of defamation, rather than the tortious action, has even earlier roots, with malicious statements in court actionable from the 14<sup>th</sup> century. A general action on the case for defamatory words was permitted by common law judges in the first two decades of the 16<sup>th</sup> century. Legal historians discovered the first writ on the plea rolls in 1507, and the first judgment was issued in 1517. See "Chapter 25: Defamation" in Baker, JH (2002) *An Introduction to English Legal History* (4<sup>th</sup> Ed) (London: Butterworths Lexis Nexis).

<sup>41</sup> For a summary of the early reviews see the Explanatory Memorandum for the Defamation Bill, *ibid*, at para's 11 to 44.

<sup>42</sup> Report of the Committee on the Law of Defamation, chaired by Lord Porter, Cmd 7536/48 (1948).

<sup>43</sup> Report of the Committee on Defamation, chaired by Mr Justice Faulks, Cmnd. 5909 (1975).

<sup>44</sup> UN Human Rights Committee, Ninety-Third Session *Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/CO16 (30 July 2008).

<sup>45</sup> Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), accessed at <http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>.

<sup>46</sup> House of Commons Culture, Media and Sport Committee (24 February 2010) *Press Standards, Privacy and Libel* (Second Report of Session 2009-10, Vol. 1) (London: TSO).

<sup>47</sup> See The Libel Reform Campaign (Index on Censorship, Sense About Science and English PEN), briefing on Lord Lester of Herne Hill's Private Member's Defamation Bill; and the English PEN and Index on Censorship (2009) *Free Speech is not for Sale: The Impact of English Libel Law on Freedom of Expression*. Both accessed at <http://www.libelreform.org/>.

<sup>48</sup> See the Labour Party Manifesto at page 9:3, in which it pledged to bring forward new libel legislation "(t)o encourage freedom of speech" and "protect the right of defendants to speak freely"; the Conservative Party Manifesto at page 79, pledging to review and reform libel "to protect freedom of speech, reduce costs and discourage libel tourism"; the Liberal Democrat Manifesto at p 93, pledging to reform libel law to protect free speech, investigative journalism and academic writing, "including by requiring corporations to show damage and prove malice or recklessness, and by providing a robust responsible journalism defence".

<sup>49</sup> <http://services.parliament.uk/bills/2010-11/defamationhl.html>.



*The importance of free speech cannot be underestimated. It is enshrined as the right to freedom of expression under the Human Rights Act 1998,<sup>50</sup> and Article 19 of the International Covenant on Civil and Political Rights.<sup>51</sup> The right includes the right to freely hold opinions, and to receive and impart information. Given the “duties and responsibilities” which the right carries, it can be limited on enumerated grounds, including “for the protection of the reputation or rights of others”.<sup>52</sup> The right to privacy is also protected by the HRA, and again this is a qualified right which allows for justified and lawful interference where the interfering measure is proportionate to a legitimate aim.<sup>53</sup> The right to privacy has been held by both the Court of Human Rights and the UK Supreme Court to extend to a person’s reputation which “forms part of his or her personal identity and psychological integrity”.<sup>54</sup>*

*Where there is a conflict between the right to privacy and right to free expression, a Court is required to perform a balancing act which is built into the structure of the HRA framework:*

*Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. ...There is...no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need.<sup>55</sup>*

*Courts deciding a defamation case do not have the benefit of the balancing exercise inherent within the human rights legislative framework. Instead, the clear imbalance in the law of defamation which has led to the chilling effect on publication outlined above stems from out of date, complicated defences, inequality of arms issues and so on.*

*Liberty believes that the balance currently tips too far in favour of the protection of reputation at the expense of freedom of speech. Reform of defamation law is required to rebalance the scales of justice – not to place primacy on the freedom of expression at the expense of the right to privacy, but to ensure that free speech is not unnecessarily or disproportionately infringed, particularly for those who wish to publish in the public interest. Reputation is inherently connected to the human rights values of dignity and privacy and as such deserves protection. Indeed this is recognised by the Article 10 right to free expression which provides that exercise of the right necessarily imposes “duties and responsibilities”.<sup>56</sup> Organisations must all*

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<sup>50</sup> Article 10 of the European Court of Human Rights as incorporated by the Human Rights Act 1998.

<sup>51</sup> Art 19(1) provides “Everyone shall have the right to hold opinions without interference” and 19(2) protects “the right to freedom of expression”. Art 19(3) provides that the exercise of these rights may be restricted only as necessary to protect the rights or reputations of others or for the protection of national security or of public order, or public health or morals.

<sup>52</sup> Article 10(2).

<sup>53</sup> Article 8 of the ECHR, as incorporated into UK law by the HRA.

<sup>54</sup> Per Lord Rodger (with whom Lords Phillip P, Hope DP, Walker, Brown, Kerr and Baroness Hale agreed) in *Application by Guardian News and Media Ltd & Ors in Ahmed & Ors v HM Treasury* [2010] UKSC 1, at para 39, adopting jurisprudence of the European Court of Human Rights in *Pfeifer v Austria* (2007) 48 EHRR 175, 183 at para 35, followed in *Karako v Hungary* (Application no 39311/05) (28 April 2009).

<sup>55</sup> Per Lord Hoffman in *Campbell v MGN Ltd* [2004] UKHL 22, at para 55.

<sup>56</sup> Article 10(2) of the *European Convention on Human Rights* as incorporated into domestic law by the *Human Rights Act 1998*.

*be held to account for the things they say and claims made if, in particular circumstances, the words can be considered defamatory. The way the current law is structured however - outdated and with uncertain defences - means that the threat of libel is enough to force the withdrawal of publications resulting in the stifling of free speech. Our main hope then for this Bill is that it will provide the certainty which is currently lacking, reduce costs and redress this imbalance which has for so long been part of English law.*

#### *Clause 1: a test of substantial harm*

*The Draft Bill proposes a new threshold for an actionable claim in defamation. Currently a defamation claim does not need to show proof of actual damage before it will be heard by a court and harm is assumed.<sup>57</sup> Under clause 1 of the Bill, a statement will not be defamatory unless its publication has caused or is likely to cause substantial harm to the claimant's reputation.<sup>58</sup>*

*Lord Lester's Private Member's Bill proposes that the court must strike out an action unless the claimant shows that the publication causes or is likely to cause substantial harm to the claimant's reputation, unless in exceptional circumstances it is in the interests of justice to hear the claim.<sup>59</sup> The clause in Lord Lester's Bill would be additional to the power to the general power of a court to strike out a claim. Under the Civil Procedure Rules a court may strike out a statement of claim if it discloses no reasonable grounds for bringing or defending the claim, that the statement is an abuse of process or is otherwise likely to obstruct the just disposal of proceedings, on procedural grounds following a failure to comply with a rule, practice direction or court order.<sup>60</sup> The Draft Defamation Bill does not similarly impose an additional strike out power in its provisions; the Ministry of Justice was of the view that it is better to leave it to the courts to exercise its discretion to strike out or give summary judgment in relation to an application which may fail to show substantive harm rather than legislating to make it mandatory to strike out in certain circumstances.<sup>61</sup>*

*Liberty welcomes the new threshold test in the Draft Bill. We believe that the first hurdle in a claim for libel should require substantial harm to be shown in order to deter spurious or speculative claims, and to stop knee jerk threats of libel at the point of publication regardless of the actual impact on a person. We would extend our support to increasing that threshold, such as by including a requirement that a case proceed only where there be a prospect of vindication, and that vindication if achieved by litigation would be proportionate to the costs of the trial, as enunciated in *Dow Jones & Co In v Jameel*.<sup>62</sup>*

*Additionally, we do think it important that there be a strike out procedure as proposed by Lord Lester's Bill, in the event that the claim does not pass the initial clause 1 threshold. We also favour Lord Lester's preserve for judicial discretion in allowing for,*

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<sup>57</sup> See paragraphs 1 to 6 of the Ministry of Justice *Draft Defamation Bill Consultation Paper (CP3/11)*.

<sup>58</sup> Clause 1 of the Draft Defamation Bill.

<sup>59</sup> Clause 12 of Lord Lester's Private Members Defamation Bill. Under subsection 12(3) in determining whether there is or is likely to be substantial harm the court must have regard to all the circumstances of the case. Under 12(4) a claim may be struck out by the court of its own motion or on an application by any party to the action.

<sup>60</sup> See Rule 3.4(2).

<sup>61</sup> See the Consultation Paper at para 5.

<sup>62</sup> [2005] EWCA Civ 75, per Lord Justice Phillips (as he then was), at para 69.

*in exceptional cases, claims to proceed on the basis that it is necessary in the public interest for a claim to proceed, in the rare case where the harm may, for whatever reason, be difficult to demonstrate but there is a public interest that the litigation go ahead. We imagine this will be a rare case.*

#### *A new court-based procedure*

*The Draft Bill is accompanied by a new draft procedure for defamation cases. The MoJ proposes a High Court defamation litigation procedure, which would provide for key issues to be decided at a preliminary court-based hearing early on in the claim. Key issues to be decided at that time include whether there is substantial harm (under proposed clause 1, above); what the actual meaning is of the words subject to the complaint and whether that meaning is defamatory; and whether those words are a statement of fact or opinion. Other issues which could be decided at that early hearing include whether the publication is in relation to a matter of public interest; whether publication can be defended on the basis of qualified privilege in Schedule 1 of the Defamation Act 1996; and the consideration of costs budgeting in appropriate cases. A judge will also have to decide at the early stage whether the case, if it does proceed, is suitable for jury or judge-only trial.<sup>63</sup> An appeal on any of these issues would lie to the Court of Appeal.<sup>64</sup>*

*Considering one of the central concerns of defamation defendants, who are frequently forced to capitulate to claimants with more resources, is the often drawn out procedure for defamation trials, this new procedure is a welcome one. Liberty also encourages for the use of mediation, and we suggest that this be a mandatory part of this new procedure.<sup>65</sup> However, we do not support the concept of a specialist libel tribunal. Apart from being somewhat unrealistic in an era when court services are being drastically cut in the public spending budget, we do not see that it would lead to significant reduction of costs, and indeed may add another layer of costly appeals. Nor do we think there is evidence that there is a lack of specific judicial expertise to deal with defamation claims in the court that necessitates a specialist legal forum in which to bring libel actions.*

#### *The public interest defence*

*The Draft Defamation Bill incorporates three defences: (a) responsible publication on matters of public interest; (b) honest opinion; and (c) truth. Liberty is broadly happy with the formulation of the latter two defences in the Draft Defamation Bill. We address our comments specifically here to the first defence, responsible publication on matters of public interest.<sup>66</sup>*

*The public interest defence is a new statutory defence based on the test developed in Reynolds v Times Newspapers.<sup>67</sup> Broadly, the defence allows for a full defence where the defendant can show that “the statement complained of is, or forms part of,*

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<sup>63</sup> The reversal of the presumption for jury trial, to which Liberty objects, is discussed below.

<sup>64</sup> See Annex D of the Consultation Paper, at page 90.

<sup>65</sup> The Ministry of Justice has not included a formal requirement for mediation in their draft procedure, but notes “this would be available as an option for the parties to use if they wished to agree a settlement in the light of the court’s preliminary findings”. See Ministry of Justice Consultation Paper, at page 91.

<sup>66</sup> Clause 2 of the Draft Defamation Bill.

<sup>67</sup> [1999] 4 All ER 609.

a statement on a matter of public interest, and that he or she acted responsibly in publishing the statement.<sup>68</sup> In determining if the defendant acted responsibly the court may have regard to a non-exhaustive list of factors including the nature of the publication and its context; the seriousness of any imputation about the claimant conveyed by the statement; the extent to which the subject matter is in the public interest; the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information; whether the defendant sought to claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed; whether any steps were taken to verify the accuracy of the statement; the timing of the publication and whether it was in the public interest to urgently publish the statement; the tone of statement and whether it draws on suspicions, opinions, proven facts, etc.<sup>69</sup> Further, a defendant will be treated as having acted responsibly if it can be shown the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person.<sup>70</sup>

Lord Lester's Bill also includes a public interest defence, which is substantially the same as the above draft clause but which also allows for a few additional elements.<sup>71</sup> Importantly, Lord Lester's Bill provides that in determining whether the defendant acted responsibly in making the publication the court may have regard to all the circumstances of the case.<sup>72</sup> The latter we believe ought to be incorporated in the Bill as the context of publication can be so important – whether a statement is made in a satirical publication, a broadsheet newspaper, a report by an NGO or on an online blog, will be relevant to the consideration of responsible publication. Lord Lester's provision provides for an important element of judicial discretion to remain in the responsible publication consideration.

As discussed above, one of Liberty's primary concerns is the chilling effect on free speech on matters in the public interest, which the common law, on the basis of well-established evidence, has failed to adequately protect. The chilling effect spreads from the court room right back to decisions made not to publish on threat of libel action. Accordingly we believe that the defence ought to be available not only to journalists, but to all organisations and individuals who are actively publishing in the public interest. We understand that there have been suggestions to have a more radical public interest defence, such as making it presumptively available to any author who believes his or her opinion or inference is in the public interest. Liberty cautions against wholesale any removal of the 'responsible publication' element of the public interest defence. While we believe the defence ought to be as robust as possible, we also believe that the imposition of duties and responsibilities which accompanies the right to freedom of expression in Article 10 necessitates retaining the element of responsibility and a responsibility 'test' is a sound way to ensure that.

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<sup>68</sup> Proposed clause 2(1) of the Draft Defamation Bill.

<sup>69</sup> Proposed clause 2(2).

<sup>70</sup> Proposed clause 2(3).

<sup>71</sup> Clause 1 of Lord Lester's Defamation Bill.

<sup>72</sup> Clause 1(3) of Lord Lester's Defamation Bill.

## *Jury trials*

*Under the current law a claim in defamation is a civil claim which is able to be tried with a jury under section 69 of the Senior Courts Act 1981 and section 66(3) of the County Courts Act 1984. The sections provide that if a party to a libel or slander proceeding so requests it, the court is obliged to order a trial by jury, unless it can be shown that the case would require “any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury”. Accordingly there is, with this limited exception, a presumption in favour of jury trial where it is so requested by a party to the proceedings. The Draft Defamation Bill proposes to remove this presumption, thereby overturning an important feature of defamation proceedings.*

*Clause 8 of the Draft Defamation Bill proposes that actions in libel and slander will not be heard by a jury in any case unless the court orders otherwise. Lord Lester’s Private Member’s Defamation Bill similarly reversed the presumption of jury trial in defamation proceedings.<sup>73</sup> Additionally, however, Lord Lester qualifies the reversal by stating that the court may order a trial by jury on application by any party if satisfied “it is in the interests of justice to do so”.<sup>74</sup> In so deciding it is proposed that the judge has regard to all the circumstances of the case, including, but not limited to, a number of factors including whether there is a public interest in the action, the identity of any parties to the action, the extent to which early resolution is likely to facilitate settlement of the action, etc.<sup>75</sup> The Draft Defamation Bill chose not to include such a list, but that appears to be open to consultation.<sup>76</sup> The Ministry of Justice is also consulting on whether certain functions in defamation proceedings in relation to determining meaning ought to be removed from juries altogether and be determined by a judge alone at the early stages.<sup>77</sup>*

*Liberty believes that juries have a particularly important function in defamation proceedings. A judge will determine primarily whether the words complained of are capable of bearing a particular meaning or meanings alleged in the statement of claim; it is for the jury to then determine what the actual meaning of the words is in the particular context of the words spoken and whether that meaning was defamatory in the way outlined in the statement of claim.<sup>78</sup> A jury must determine the meaning to be attributed on the basis of an objective test, that is, on the basis of what the ‘reasonable reader’ would understand the meaning of the words to be.<sup>79</sup> The jury has a number of other functions, for example in the context of the justification and honest opinion defence, and in determining the assessment of damages (as directed by the judge). As liability in defamation ultimately depends on the perception of the ordinary person, it is important that the jury continues to be the rule rather than the exception in statutory provisions. Indeed as noted by the Ministry of Justice,*

*a number of lawyers working in the field have argued that it is important for the principle to be upheld that a jury of one’s peers should be able to decide issues*

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<sup>73</sup> Clause 14.

<sup>74</sup> Clause 15(1), (2).

<sup>75</sup> Clause 15(3).

<sup>76</sup> Draft Defamation Bill Consultation paper, at para 97.

<sup>77</sup> Ibid, at para 98, 99.

<sup>78</sup> As outlined by Hirst LJ in *Mapp v News Group Newspapers Ltd* [1998] QB 520. See also *Carter-Ruck on Libel and Privacy* (Sixth Ed) (2010) (London: LexisNexis), at 4.27.

<sup>79</sup> See *Carter-Ruck on Libel and Privacy*, *ibid*, at 4.29.

relating to reputation, and that this is vital for maintaining public confidence in the outcome of cases.<sup>80</sup>

*Liberty appreciates the motivation to reduce costs in jury trials and action reform that addresses the current inequality of arms problem in defamation proceedings. However we believe that the presumptive right to a jury trial is an unnecessary casualty in the overall context of this reform. The right to protect one's reputation is an important right which will, where necessary, involve court action, and litigation inevitably involves costs. It is important that the law is rebalanced to stop the chilling effect caused by threats of libel action, but rebalance will not mean an end to litigation and should not mean eradicating the important constitutional right to jury trials in defamation cases.<sup>81</sup> Indeed there is already a safeguard written into the section 69 test, which will allow for refusal of an application for a jury trial in circumstances where investigation will not be convenient to be heard by jury. In exercising judicial discretion under section 69 the courts have articulated a number of relevant principles to be taken into account, which includes a number of factors such as the additional length of a jury trial compared to judge only trial, the additional cost of trial by jury etc.<sup>82</sup> This we believe to be a sufficient safeguard against avoidable trial expense, while still preserving this important function of defamation law.*

*As well as the practical importance of juries outlined above, there are reasons of principle underlying why a jury trial is a fundamental part of defamation proceedings. As noted by the Master of the Rolls Lord Neuberger in a defamation case just last year, considering a judge's decision on appeal to order a judge only trial:*

*Jury trial will almost always take longer, and cost more, than trial by judge alone. The extra time taken, and the extra costs involved, in a jury trial may often be a useful sort of quantitative cross-check of what might otherwise be a purely qualitative assessment of the extra inconvenience of a jury trial. ...However, it would be dangerous if those two factors were given much independent weight, as it would risk undermining the important right to a jury trial which s 69(2) gives – to Defendants as well as to Claimants – in libel actions.<sup>83</sup>*

*Further, while the proposal in the Draft Defamation Bill is for a reversal of the presumption, rather than the excluding juries absolutely, it is the very fact of presumption in favour of jury trial which underlies its importance, even though section 69 means it is not an absolute right. As noted by Lord Neuberger, a jury's*

*constitutional significance is perhaps emphasised by the fact that there is a right to a jury trial unless both the...s 69 questions are satisfied, and the fact that, even in a case where the court is satisfied that those...questions are satisfied, there will still be a jury trial unless the judge, in his reasonable discretion, otherwise decides.<sup>84</sup>*

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<sup>80</sup> Draft Defamation Bill Consultation paper, at para 95.

<sup>81</sup> As noted by the Master of the Rolls, Lord Neuberger, in *Fiddes v Channel Four Television Corporation & Ors* [2010] EWCA Civ 730, at para 9.

<sup>82</sup> As articulated by Lord Bingham LCJ in *Aitken* [1997] EMLR 415 at 421 to 422; cited and expanded in a number of cases, see for example the judgement of Lord Neuberger in *Fiddes*, *ibid*, at para 15 onwards.

<sup>83</sup> *Fiddes v Channel Four Television Corporation & Ors* [2010] EWCA Civ 730: at para 18.

<sup>84</sup> Lord Neuberger in *Fiddes*, *ibid*, at para 9.

*The Coalition Programme for Government was unequivocal: “We will protect historic freedoms through defence of trial by jury.”<sup>85</sup> This commitment to reverse a damaging trend perpetuated by the former Government was extremely welcome. Indeed a legislative proposal to reverse the removal of jury trial in complex fraud cases is already making its way through Parliament in the Protection of Freedoms Bill.<sup>86</sup> Accordingly to simultaneously undermine the right to jury trial in yet another area would be a backwards step. As explained above, Liberty welcomes changes which will increase the threshold for bringing an actionable claim, and improving and strengthening defences. In the context of these improvements we believe there will be sufficient rebalancing without the need to excise the important constitutional right to jury trial.*

### *Online publication*

*Liberty believes that there ought to be provision in the Draft Bill to deal with the issue of responsibility for online publication. We do not believe that online media can continue to be treated as a niche area, particularly given the line between mainstream and online media is becoming increasingly blurred. Indeed, as events in recent weeks have shown, a cast-iron distinction between tweeting and broadcast can no longer be maintained. Accordingly Liberty would not support a procedure which creates exceptions for particular types of publication, rather we would prefer a special procedure which appreciates the particular nature of those types of publications and which takes into account the particular context of online publication. We support the approach advocated by the Libel Reform Campaign for a court-based procedure.*

### *Position of corporations & public authorities to bring an action in defamation*

*Under current law a corporation is able to bring defamation proceedings on the basis of presumed hurt to trading or business reputation. While we believe corporations ought to have some means of legitimately protecting their reputation, there is clear inequality of arms when it comes to deep pocketed corporations suing for defamatory damage where the defendant is an NGO or an individual financially unable to engage in a David and Goliath battle. As noted by the Committee on Culture, Media and Sport.*

*It is clear that a mismatch of resources in a libel action, for example between a large corporation for which money may be no object and a small newspaper or NGO, has already led to a stifling effect on freedom of expression.<sup>87</sup>*

*The Committee recommended that a new category of “corporate defamation” requiring a corporation to prove actual damage to its business before an action could be brought.<sup>88</sup> This is the approach adopted by Lord Lester’s Bill, which requires proof*

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<sup>85</sup> Coalition Programme for Government 2010, at page 11. Accessed at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition\\_programme\\_for\\_government.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf).

<sup>86</sup> Clause 99 of the Bill proposes to repeal s 43 of the *Criminal Justice Act 2003*; see Liberty’s Second Reading Briefing on the Protection of Freedoms Bill in the House of Commons (February 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-protection-of-freedoms-bill-feb-2011.pdf>.

<sup>87</sup> House of Commons Culture, Media and Sport Committee, Second Report of Session 2009-10, *ibid*, at para 177.

<sup>88</sup> *Ibid*, at para 178.

of substantial financial loss to the body corporate before a claim in defamation can be held to be actionable.<sup>89</sup> The Committee also envisaged alternative means by which corporations can seek redress, from non-legal avenues including publicity campaigns to counter falsehoods and unfounded criticism,<sup>90</sup> to the tort of malicious falsehood, requiring proof of damage maliciously or recklessly caused.<sup>91</sup> The Draft Defamation Bill, however, does not contain a provision relating to the ability of corporations to bring an action in defamation. The Ministry has concluded that in light of the new procedure it proposes, and other provisions in the draft Bill, in context of the separate proposals being made in relation to civil costs, there is no need for a specific provision to address inequality of arms issues.<sup>92</sup>

Liberty believes that the Bill ought to address the ability of corporations to fund long, drawn out defences couched in the uncertainty of legal proceedings, which clearly outweighs the limited funds of small public interest organisations. We do not think it sufficient to rely, as the Ministry of Justice does, on the introduction of a new non-statutory procedure and the new threshold substantial harm test. While we do not propose an approach which would exclude the right of a corporation to sue altogether, we believe that the scope for defamation actions by large corporations needs to be significantly curtailed.

In *Steel and Morris v United Kingdom*<sup>93</sup> the European Court of Human Rights, in determining that the ability of a corporation to sue in defamation does not breach the right to free expression, stated that the status of the applicant in this case as a large multinational company should not “in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made”.<sup>94</sup> However, questions remain as to whether a corporation is entitled to protection within the scope of the human right to privacy.<sup>95</sup> It is clear that a company cannot suffer injury to feelings, but rather “can only be injured in its pocket”, which can be loss of income or injury to its goodwill.<sup>96</sup> It is therefore doubtful that a corporation could use human rights to obtain redress in the way that individuals can. Regardless, the human rights framework and indeed the very nature of human rights would necessitate the subordination of a company’s rights to those of an individual. Further, the right to privacy is a right which can be limited provided the interference can be justified for legitimate purpose. Whether that limitation be along the lines of that envisaged in Lord Lester’s Bill, or an exclusion of the right to bring an action in favour of a claim in malicious falsehood, the public interest vested in having corporations monitored and held to account by NGOs, for example, outweighs any possible infringement on a corporation’s ‘right’ to reputation and the limitation is justified.

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<sup>89</sup> Clause 11.

<sup>90</sup> House of Commons Culture, Media and Sport Committee, Second Report of Session 2009-10, *ibid*, at para 176.

<sup>91</sup> *Ibid*, at para 178.

<sup>92</sup> Whether there is a need for further provisions to address situations where an inequality of arms between the parties is subject to consultation. See Q38 in the Consultation Paper, *ibid*, at page 54.

<sup>93</sup> (2005) 18 BHRC 545, [2005] EMLR 314.

<sup>94</sup> *Ibid*, at para 94.

<sup>95</sup> As protected by Article 8 of the *European Convention on Human Rights*, as incorporated into domestic law by the *Human Rights Act 1998*.

<sup>96</sup> Per Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, at 262.



*On the basis of this jurisprudence we believe that the right of a corporation to sue in defamation ought to be limited, on the face of the statute, to situations where it can show substantial pecuniary loss from a defamatory publication or statement which has been made with malice.*

*June 2011*

## Written Evidence, Which? (EV 08)

### 1. Introduction

1. Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books.
2. A key part of our work is confronting important consumer issues. Tackling everything from the mis-selling of financial products to the labelling of foods high in fat, sugar and salt, our commitment to providing unbiased advice to consumers is at the heart of everything we do. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.
3. We thank the Committee for the invitation to submit evidence on the Draft Defamation Bill and welcome the opportunity to do so. The Committee will be aware of the significant concern expressed by non-governmental organisations and public interest groups that the current libel regime represents an inherently unjust imbalance between reputation and freedom of expression where the fear of potentially ruinous libel claims suffocates freedom of expression. We agree and commend and endorse the excellent work of the Libel Reform Campaign and its members.
4. Libel is a significant problem for us too. Like many other non-governmental organisations with comparatively modest means (in comparison to the national and multi-national corporations whose products and services we review and comment on or whose commercial interests are impacted by our policy and campaigning positions), libel risks in light of the current libel regime play a significant part in the way we publicise important consumer issues and report our research both in print in Which? magazine and online at [www.which.co.uk](http://www.which.co.uk). We recognise that this suffocating effect is caused by a number of reasons other than just the substantive law. We also recognise that the most significant of these other factors, costs, is outside the scope of the Draft Bill.
5. This evidence has been informed by our experience of the impact of the regime on our publications both pre and post publication and our experience of the burgeoning 'reputation management industry'.<sup>97</sup> We have sought to answer the questions posed in the call for written evidence to the Joint Committee dated 5 April 2011.
6. Please note, this evidence has been prepared for the Committee in advance of the Government's consultation on the draft Defamation bill closing on 15 June 2011. As a consequence, a limited number of the points made are our preliminary view. Where this is the case, this is noted in the response below.

### Summary

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<sup>97</sup> Examples of this experience are included at Annexes A and B with a background to the case studies at Annex C – see also paragraphs 35 to 38

7. We firmly believe the law of defamation needs meaningful reform to reinstate the proper balance between reputation and freedom of expression, to make it fit for purpose for publications that are inherently in the public interest and, more generally, for publications in the digital age – an age where a very significant number of individuals are publishers at common law.
8. We agree the law of defamation needs to strike a fair balance between reputation and freedom of expression. To achieve this, proper weight must be given to the inherent public interest in the open debate of empirical issues but also to the practical realities of the way in which individuals now receive and convey information and expresses matters of opinion.
9. The issues addressed in the draft Bill must be seen as a complete package, each one important in achieving the required balance. Procedural reform is also necessary to rebalance the practice and procedure of defamation law in a way that is much more consistent with the overriding objective in the Civil Procedure Rules ('CPR').<sup>98</sup>
10. It has been suggested that some of the relevant common law principles are too well established and/or too complicated to be included in the draft Bill. This is not a valid argument against reform. The law of defamation increasingly impacts a wider spectrum of 'publishers' and so regard needs to be had to the accessibility of the law to those other than lawyers.

## Answers to questions

### Clause 1: definition of defamation; a “substantial harm” test

*Should there be a statutory definition of “defamation”? If so, what should it be?*

11. On balance, we believe there should be a statutory definition of defamation containing a threshold of seriousness test whereby it has to be proved the statement in question has caused or is likely to cause substantial harm. This definition should be combined with clear procedural guidance on how the court is to determine whether the definition is satisfied.
12. As the Committee will know, a precise definition of defamation has proved elusive at common law but we believe that statutory clarification is desirable to provide clarification and certainty and to reflect the development of morality since many of the common law authorities informing the existing 'definition' were decided.
13. As to the form of such a definition, a pragmatic approach would be to start with the definition recommended by the Faulks Committee in 1975:

*'The publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.'*<sup>99</sup>

<sup>98</sup> Civil Procedure Rules, Part 1 – the Overriding Objective

<sup>99</sup> Cmnd 5909 (1975)

Our views about the other factors that should be included in such a definition are set out in paragraph 14 below.

*What are your views on the clarity and potential impact of the “substantial harm” test, including its relationship to other elements of the current law such as the presumption of damage in libel claims?*

14. Clause 1 of the draft Bill needs to provide for the definition described above and to include a threshold of seriousness test to codify and expand the various common law positions in *Thornton v Telegraph Media Group Ltd*<sup>100</sup>, *Jameel v Dow Jones*<sup>101</sup>, and *Hays Plc v Hartley*<sup>102</sup>. Such a test should require a claimant to show that the meaning of the publication in question is sufficiently serious taking into account the nature and context of the publication, that the publication gives rise to a real and substantial tort and that the means sought to protect reputation are proportionate to the harm caused by the publication with reference to the meaning of that publication. The test should also incorporate the rationale behind the judicial comments about the sorts of language that fall outside the current common law definition of what is defamatory, for example ‘saloon bar moaning’<sup>103</sup> and ‘pub talk’ to reflect the practical realities of ‘casual publication’ (especially online) the content of which reader will ‘take with a pinch of salt’.
15. The court should be obliged to consider whether a claim passes a threshold of seriousness test and whether it causes or is likely to cause substantial harm. This is perhaps a matter that is better dealt with by procedural changes if new procedures for the disposal of defamation claims are to be introduced.

## **Clause 2: Responsible publication in the public interest**

*Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not, what changes should be made?*

16. No. We do not think that clause 2 overcomes the uncertainties surrounding the effectiveness of the Reynolds defence because it simply codifies the existing common law position which we regard as completely unsatisfactory. We regard a statutory public interest defence as being of paramount importance because of the inherent benefits of debate and discussion about issues that are important to society as a whole. Parliament should demonstrate its clear intention to recognise the importance of publication on matters of public interest and to clarify the scope and availability criteria of the defence. We support the inclusion of a public interest defence in the Bill.
17. Our view is that the absence of guidance about the weight attaching to the ‘Reynolds factors’ and the wide margin of judicial interpretation accorded to the Reynolds defence means that there is significant uncertainty about the circumstances in which the defence will be available in practice. This is so despite the development of the defence in *Jameel v Wall Street Journal Europe*

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<sup>100</sup> [2010] EWHC 1414 (QB)

<sup>101</sup> [2005] QB 946

<sup>102</sup> [2010] EWHC 1068 (QB)

<sup>103</sup> per Parkes QC in *Sheffield Wednesday Football Club Limited & Another v Hargreaves* [2007] EWHC 2375

*Spr*<sup>104</sup> and in *Seaga v Harper*.<sup>105</sup> The problem is compounded by the Court of Appeal's recognition in *Flood v Times Newspapers*<sup>106</sup> that Lord Nicholls' observation in *Reynolds* that: '*any lingering doubts should be resolved in favour of publication*' can not now stand because the House of Lords has since recognised that Articles 8 and 10 of the European Convention on Human Rights are of equal weight.

18. We think a better starting point is to adopt a similar approach to that taken in section 32 of the Data Protection Act 1998 so that there is a public interest defence if the defendant reasonably believes, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest.

19. Any public interest defence should also explicitly provide that inferences and statements of opinion are within the bounds of the defence. Provided that the public interest defence is sufficiently robust, we, on balance, favour the abolition of the existing common law Reynolds defence.

*Should the meaning of "public interest" be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?*

20. No, we do not believe that 'public interest' should be clarified. Any clarification would be beset by difficulty and risks excluding matters that might come within the accepted notion of public interest in the future.

### **Clause 3: Truth**

*What are your views on the proposed changes to the defence of justification? In particular, would it be appropriate to reverse the burden of proof in relation to individuals or companies?*

21. We broadly support the changes to the defence of justification in particular clause 3(3). '*Substantially true*' in clause 3(1) should be clarified so that the defence will succeed where the gap between what the defendant can prove and what the claimant alleges the words mean is so small that there is no substantial defamatory meaning.

22. We have set out our view on the ability of companies to bring libel claims in paragraph 37. Part of this view is that a company bringing the claim will need to prove the falsity of the statement in question.

### **Clause 4: Honest opinion**

*What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened? Is its relationship to the responsible publication defence both clear and appropriate?*

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<sup>104</sup> [2007] 1 AC 359

<sup>105</sup> [2009] 1 AC 1

<sup>106</sup> [2010] EWCA Civ 804

23. We broadly support the changes to honest comment. The defence should be broadened to remove the requirement for the opinion to be on a matter of a public interest because it is disproportionate to require honestly held opinions based on facts to also be in the public interest in order to fall within the defence. If this approach is adopted, an effective balance might be struck by retaining the requirement set out in *Spiller v Joseph*<sup>107</sup> that the comment must explicitly or implicitly indicate the facts on which it is based.

#### **Clause 5: Privilege**

*Are the proposals to extend the defences of absolute and qualified privilege appropriate and sufficient?*

24. They are appropriate but not sufficient. We have had the benefit of reading the evidence to the Committee of Dr Evan Harris and we agree with and endorse the arguments he puts forward for extending statutory qualified privilege to peer-reviewed scientific and academic publications. If further fine tuning of the balance between reputation and freedom of expression is required, these publications could benefit from statutory privilege subject to explanation or contradiction (in a reasonable way) to reflect the benefit to the subject matter of these publications being refined through argument and counter-argument.

25. The qualified privilege attaching to notices and other documents issued by entities performing governmental functions (for example Trading Standards) must be preserved.

*Is there a case for reforming the Parliamentary Papers Act 1840 and other aspects of Parliamentary privilege within the draft Bill (in the light of recent coverage of super-injunctions); or should this be addressed by the (forthcoming) draft Parliamentary Privilege Bill?*

26. This should be addressed by the draft Parliamentary Privilege Bill.

#### **Clause 6: Single publication rule**

*Do you agree with replacing the multiple publication rule with a single publication rule, including the “materially different” test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired?*

27. Yes, we support the replacement of the multiple publication rule with a single publication rule including the ‘materially different’ test. The existing multiple publication rule places too great a restrictive burden on publishers who maintain online archives because of the open ended liability it creates.

28. The retention of the court’s discretion in clause 6(6) is sufficient to allow claimants to seek redress in appropriate circumstances. However, where the court exercises its discretion, the removal or qualification by ‘Loutchansky’<sup>108</sup> type notice should be the available remedy. More generally, we think that

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<sup>107</sup> [2010] UKSC 53

<sup>108</sup> *Loutchansky v Times Newspapers Ltd* [2002] QB 783 (CA)

'Loutchansky' type notices have an important role to play in either mitigating concerns about the abolition of the multiple publication rule and/or in addressing the problems faced by secondary online publishers.

### **Clause 7: Jurisdiction – “Libel tourism”**

*Is “Libel tourism” a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach?*

29. We agree with the approach taken in the draft Bill.

### **Clause 8: Jury trial**

*Do you agree that the existing presumption in favour of trial by jury should be removed? Should there be statutory (or other) factors to determine when a jury trial is appropriate?*

30. Yes. We broadly agree with the approach taken in clause 8 though there should be a mechanism for the defendant to apply for a jury trial in certain circumstances, for example when the statement in question relates to public figures, officers of the state or the performance of public functions more generally.

### **Consultation issues:**

*Does the current law provide adequate protection for internet service providers (ISPs), online forums, blogs and other forms of electronic media?*

31. No. The 'notice and takedown' procedure that has evolved in light of the provisions of the Electronic Commerce Directive<sup>109</sup> and its implementing regulations<sup>110</sup> simply results in private self censorship by secondary publishers.

32. We think there are a number of different options to which the Government should give consideration. We are still developing our thinking in this area and will be responding fully to the Consultation paper on the issue but one option could be the formalisation of the use of 'Loutchansky'<sup>111</sup> type notices as a defence. These ought to provide the necessary balance to the meaning of the original statement while preserving the retention of the statement in its original form. This has an obvious advantage in that it ought to enable the original publication to remain online. The secondary publisher would have the choice about whether to use such a notice as a defence or whether to risk a claim and rely on other defences.

*What are your views on the proposals that aim to support early-resolution of defamation proceedings? Do you favour any specific types of formal court-based powers, informal resolution procedures or the creation of a libel tribunal?*

33. We firmly support proposals for the early resolution of defamation proceedings. There is no reason why defamation actions should be the preserve of the High

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<sup>109</sup> Directive 2000/31/EC

<sup>110</sup> Electronic Commerce (EC Directive) Regulations 2002 (No 2013)

<sup>111</sup> *Loutchansky v Times Newspapers Ltd* [2002] QB 783 (CA)

Court providing that the judges used in any sort of specialist court or tribunal are sufficiently experienced in defamation matters.

34. We favour the implementation of each of the options as follows:

- a. The court should be required to take a much more robust approach to case management than at present and should be obliged to consider whether a claim satisfies the substantial harm test. If it does not, it should strike the claim out of its own volition.
- b. As part of any specialist court (see further below), informal 'ADR' procedures should be introduced to provide an opportunity for the parties to resolve complaints quickly and cheaply. This could include telephone hearings between the parties and judge at which the judge would give a preliminary view about whether the publication met the substantial harm test in order to focus the mind of the claimant to resolve the dispute.
- c. A specialist libel court should be created to deal with the majority of cases. Such a court could be modelled on the Patents County Court, a specialist court dealing with intellectual property matters. We are not suggesting that defamation claims be heard by county courts more generally. A defamation county court could be established with:
  - i. A Specialist Circuit Judge with defamation experience to handle cases in London with trials up to two days in duration;
  - ii. Proactive case management similar to that outlined in CPR Practice Direction 63, para 29.1, with no automatic disclosure and where the court can consider the matter on paper if both parties consent; and
  - iii. Summary assessment of costs, with maximum recoverable costs fixed at £50,000.

*Is there a problem with inequality of arms between particular types of claimant and defendant in defamation proceedings? Should specific restrictions be introduced for corporate libel claimants?*

35. Yes, in our experience there is a problem with inequality of arms between particular types of claimant and defendant in defamation proceedings. Large well resourced and well financed (in terms of reputation management budgets) companies use the threat of proceedings for libel to try and prevent publication or to force publication of retractions or apologies.

36. A good example of each of these practices are included in Annexes A and B to this evidence. We trust that the contents of the Annexes are self explanatory but we would be more than happy to expand on the associated circumstances in our oral session. The background to the case studies in Annexes A and B is described in Annex C. At present, we respectfully ask that the Committee does not publish Annexes A and B to the public.



37. We strongly support a variant of the approach taken by Lord Lester on the ability of a company to sue for libel. Our preliminary view is that:

- a. Companies cannot sue for libel unless the words or matters complained of has caused, or it likely to cause, substantial financial loss to the company and the company can prove the statement is false;
- b. Before a company can bring a claim for libel, it will need to submit evidence on a. above in a paper application to a specialist judge before the claim can be issued; and
- c. Non-profit corporations and small trading companies should not be included in a. above.

38. Even if a. to c. above is not adopted, the Bill must clarify the position that malicious falsehood is the appropriate claim for companies where the statement in question is on a product or service produced or supplied by that company. We think the analysis on this point by Moorland J in Charterhouse Clinical Research Unit Ltd v Richmond Pharmacology Ltd & Another<sup>112</sup> is the correct approach and consistent with commercial reality.

#### **Overarching issues:**

*Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?*

39. Broadly, yes provided that procedural reform is also implemented. Privacy and reputation have become fused concepts and the development of the jurisprudence of the European Court of Human Rights supports reputation as a right protected by Article 8. However, the opportunity for reform should not be missed by trying to combine the two 'rights' in the draft Bill.

*Will the draft Bill and Consultation proposals adequately address the problems that are associated with the current law and practise of defamation? If not, what additional changes should be made?*

40. Yes though we reiterate our comments about a package of reforms being necessary to achieve the proper balance between Articles 8 and 10.

May 2011

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<sup>112</sup> [2003] EWHC 1099 at paragraph 17 et seq

## Written Evidence, Global Witness (EV 29)

### *Clause 1: definition of defamation; a 'substantial harm' test*

*What are your views on the clarity and potential impact of the 'substantial harm' test, including its relationship to other elements of the current law such as the presumption of damage in libel claims?*

*Global Witness agrees with the Libel Reform Campaign's view that the substantial harm test in the Bill is not strong enough to prevent trivial and vexatious claims which silence legitimate publications. We agree with the proposal that the word 'serious' should be added, so that the threshold becomes 'serious and substantial harm.'*

*We believe that this would be an improvement from the current situation, in that it would prevent weak or trivial cases from being initiated, or, should these cases reach the court, the proposed change would result in their early resolution.*

*Global Witness often faces threats of unfounded libel claims, which we are forced to take seriously under the current law. These threats usually come from powerful companies, individuals and high-ranking officials, who can easily afford to make claims which force us to dedicate crippling amounts of resources to refute them.*

*A strong enough preliminary test would ensure that organisations like Global Witness do not have to withhold important information in order to avoid unjust threats.*

### *Clause 2: Responsible publication in the public interest*

*Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not what changes should be made?*

*Global Witness is concerned with the codification of a 'check-list' which places a huge burden on publishers, including NGOs. Global Witness agrees with the Libel Reform Campaign that "the public interest defence needs (...) to reflect the importance of free speech on matters of public interest. (...) the search for the truth requires the publication of uncertain or one-sided material and that the law should err on the side of the publication."*

*The existing Reynolds defence - and in particular the requirement to seek the claimant's views on a statement before publishing it (proposed point (e) of Clause 2 Section 2) - weighs down heavily on investigative NGOs. Global Witness is committed to responsible publishing, and as a principle, we aim to seek the views of those we publish about. However, there are circumstances in which complying with this requirement is not appropriate. Contacting the 'other side' before publication in order for them to comment alerts them to the planned allegation, and therefore provides the claimant with an opportunity to seek an injunction against the publication. It can also risk the security of sources who provide sensitive material, and who receive a higher level of protection post publication through the exposure of the alleged bad acts. In addition, especially in the case of an extensive investigative report on issues that Global Witness often deals with (for example overseas corruption or the funding of conflicts), contacting those unfavourably mentioned in the report significantly drains the already limited resources of an NGO.*

*Albeit a case of attempted injunction based on privacy claims, the son of the president of Congo-Brazzaville's case against Global Witness shows how powerful individuals spare no effort to stop the publication of unfavourable information about them. In 2007, Global Witness published bank and corporate documents showing that Denis Christel Sassou-Nguesso had spent hundreds of thousands of dollars on luxury goods and other items using a credit card that was paid out of funds appearing to have come from sales of oil by the government. In 2006, Congo-Brazzaville had around \$3 billion in oil revenues, while 70% of the population lived on less than a dollar a day. As well as being son of the country's president, Denis Christel Sassou-Nguesso was the Director of Cotrade, the marketing arm of the state oil company and as such was the public official in charge of these oil sales. After publication by Global Witness, Sassou-Nguesso and his company, Long Beach Limited, sought a High Court injunction to force Global Witness to remove his company records and credit card statements from its website. Judge Stanley Burnton dismissed this case and found that "once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny."*

*Global Witness' investigations on Charles Taylor, former Liberian president, highlight the risks sources face pre publication. Taylor funded Sierra Leone's Revolutionary United Front (RUF), notorious for the mass amputation of limbs of the civilian population, with revenues from the diamond and timber industries. Working with Liberian counterparts who infiltrated the Liberian timber industry, Global Witness obtained critical information documenting this industry in detail, the resultant corruption, state looting and the timber for arms trade. This information was published in order to persuade the United Nations Security Council (UNSC) that they should impose sanctions on Liberian timber, which they did in May 2003. Within two months Taylor fled into exile and is now on trial at the Special Court for Sierra Leone in The Hague charged with war crimes and crimes against humanity. Global Witness' reports have been presented as evidence at the trial. If this information had not been made public, the UNSC timber sanctions may not have been imposed at all, or at least not as soon as they were, which would have prolonged the war with increased loss of life, forced displacement and general destruction. Had Global Witness been forced to contact individuals named in our reports prior to publication we would have jeopardised the lives of our sources and driven the corruption even further underground.*

*A third instance from Global Witness' experience shows how disproportionately taxing it can be to contact for comment each individual and entity named in a planned publication. The meticulous system of ensuring accurate and public interest publication has very high costs in terms of legal fees, staff time and resources. It may also result in significant delays in publication. A Global Witness report on the looting of state assets in Cambodia by the Prime Minister and his cronies involved writing detailed letters (which required legal input) to 87 individuals as part of complying with the requirements of the Reynolds defence. Virtually all the letters had to be translated into Khmer, Vietnamese and Chinese and then couriered, which cost approximately £12,700. In addition, follow up letters and calls were required. It took two staff working for two weeks. Of the 87 letters sent there were five responses which were predominantly from major companies based in America and Australia. The total cost including translation of the letters, legal advice for the letters and couriering was over £17,000, with staff time on top of that.*

*For these reasons, Global Witness agrees with the Libel Reform Campaign's position that in order to establish a simple, clear and fair public interest defence, "the defendant should show that the publication was on a matter of public interest. If it passes that hurdle then the defence should only be defeated if the claimant is able to show that the publication was malicious or reckless (grossly negligent)." We furthermore endorse the Libel Reform Campaign's proposal to build in safeguards to protect those who are the subjects of statements that cannot be shown to be true. These include, among others, a declaration of falsity by the defendant for statements that it accepts cannot be justified.*

*During the consultations around Clause 2, it has been proposed to include professional codes of practice as a reference point for responsible publication. Global Witness is of the opinion that it is unnecessary and misleading to include guidelines such as those of the Press Complaints Commission (PCC), as much of the publishing in today's society is not carried out by mainstream media organisations, but by NGOs, or even individuals, who do not have overarching codes of conduct. We are concerned that any inclusion of codes of conduct would be used by the courts as a de facto check list.*

*Should the meaning of 'public interest' be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?*

*Global Witness agrees that public interest should not be defined in the statute, so that courts can continue to interpret the scope of public interest, and possibly broaden the interpretation, should new circumstances justify that.*

*Should the Ministry of Justice decide that there is a need for a definition, Global Witness supports the Libel Reform Campaign's submission that the PCC Editor's Code definition would be suitable. This definition provides a non-exhaustive list of public interest issues, such as detecting or exposing crime or serious impropriety, and preventing the public from being misled by an action or statement of an individual or organisation.*

### *Clause 3: Truth*

*What are your views on the proposed changes to the defence of justification? In particular, would it be appropriate to reverse the burden of proof in relation to individuals or companies?*

*Global Witness agrees with the Libel Reform Campaign's submission on this question (see paragraphs 13-14). The Libel Reform Campaign lists the following three reasons why the current drafting of clause 3 is not satisfactory:*

*i. Changing the defence from 'justification' to 'truth' implies a narrowing of the defence because it suggests that what is necessary is to demonstrate the 'whole truth and nothing but the truth' of the statement, when in fact the existing case law and the proposed statute considers a statement justified when the 'substantial truth' of a defamatory imputation is demonstrated.*

*ii. The defence of truth should not fail only because one meaning alleged by the claimant is not shown to be substantially true, if that meaning would not materially injure (see sub-paragraph iii. here) the claimant's reputation in the light of what the*

*defendant has otherwise shown to be substantially true. This was provided for in clause 5(3) of Lord Lester's Bill.*

*iii. There is possible confusion between the language here ('materially injure') and the language in clause 1 ('serious and substantial harm'). We suggest that the language should be consistent.*

#### *Clause 4: Honest opinion*

*What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened? Is its relationship to the responsible publication defence both clear and appropriate?*

*Global Witness believes that Condition 2 (that the opinion is on a matter of public interest) should be removed. The core of the honest opinion defence is that one should be able to hold an honest opinion and it is irrelevant whether the expression of that opinion is in the public interest or not. Where the defence of public interest is to be used, Clause 2 should apply.*

#### *Clause 5: Privilege*

*Are the proposals to extend the defences of absolute and qualified privilege appropriate and sufficient?*

*Global Witness welcomes the proposed extension to the range of privileged publications, but does not believe it goes far enough and suggests the following amendments.*

*In Section 5, the definition of 'company' (quoted company as per Section 385(2) of the Companies Act 2006) only encompasses entities that are: listed on the London Stock Exchange, officially listed in an EEA state, or admitted to dealing on either the New York Stock Exchange or the Nasdaq. We believe that this definition is too narrow in two respects.*

*Global Witness believes that with regard to UK companies, the range of companies whose documents are privileged should not be restricted to those listed on the London Stock Exchange. We are happy to provide our opinion on what the definition should be, once we have completed our research.*

*On the other hand, with regard to companies outside the UK, Global Witness thinks that the Bill should go as far as Lord Lester's Bill, and include overseas companies in general (see Section 15 of Schedule 1 to Lord Lester's Defamation Bill). There does not seem to be a reasonable ground for limiting the scope of companies under Clause 5 to those listed in the European Economic Area and New York.*

*Global Witness' reasons for the proposed extensions arise from our investigative work and the fact that in our reports we utilise documents obtained from the companies we write about. Since the sources are the companies themselves, it seems unnecessary to have to prove further basis for our statements than a reference to the document in question. For this reason we would like to encourage a broader scope of privilege with regard to company documents, which go beyond companies listed on stock exchanges, and also beyond the boundaries of Europe.*

*Global Witness also believes that it would be useful to include a broad definition of 'academic and scientific conference' in Section 9, together with the other, existing definitions. We are concerned about the complete lack of guidance as to what would constitute an academic or scientific conference, as the provision rendering documents from such a conference privileged in its current form does not provide ample protection. Without knowing what an academic or scientific conference is, those relying on reports, copies, extracts and summaries from the conference run a risk of being found liable for defamation until there is a defining court decision.*

*Furthermore, Global Witness agrees with the Libel Reform Campaign's views in that qualified privilege should be extended to fair and accurate copies of, extracts from or summaries of material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired.*

#### *Clause 6: Single publication rule*

*Do you agree with replacing the multiple publication rule with a single publication rule, including the 'materially different' test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after one-year limitation period has expired?*

*Global Witness agrees with the introduction of the single publication rule and welcomes it as a sensible way of redressing the balance between the publisher and those potentially defamed. It will have a substantial and helpful impact for, among others, NGOs and book publishers, whose publications are intended for the provision of long term information rather than daily news. The multiple publication rule simply does not reflect the internet age.*

#### *Clause 7: Jurisdiction - 'Libel tourism'*

*Is 'Libel tourism' a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach? Even though it is hard to show its impact through statistics of concluded court cases, the threat of foreign individuals using the claimant friendly libel laws of England against foreign publications is a real and pressing problem. Global Witness often works in partnership with NGOs from the Global South, for whom it is a genuine concern that they may be sued in the UK, even though the nature and content of their publication does not justify the jurisdiction. These small organisations work on international public interest issues, such as the harmful acts of large multinational companies committed in their countries, and their very limited resources prohibit them from entering into any type of legal dispute.*

*Global Witness agrees with the Libel Reform Campaign's views that under EU law this Clause will not apply to defendants domiciled in the EU, and that further protection from the censoring effect of libel tourism needs to be incorporated into the test under Clause 1. As detailed in paragraph 4.11 of the Libel Reform Campaign's submission, "harm to reputation from publication in the jurisdiction must be judged having regard to the extent of publication elsewhere (...) This would protect authors or publishers domiciled in the EU (...) from claimants with a reputation elsewhere in circumstances where the majority of publication is outside England and Wales such that the proportion here does not cause serious and substantial harm."*

## *Consultation issues*

*Does the current law provide adequate protection for internet service providers (ISPs), online forums, blogs and other forms of electronic media?*

*Global Witness supports the Libel Reform Campaign's proposed scheme, detailed in paragraphs 39-41 of their submission. The 'court based liability gateway' would prevent secondary publishers from feeling obliged to take down material from their websites at the request of the claimant, without regard to whether the content is indeed defamatory or not, and without contacting the author.*

*Under the scheme, one of the provisions would require the claimant to show to the court whether and when they contacted the primary publisher to request that the material be removed, and what the primary publisher responded. This would answer the concern of many primary publishers whose materials are currently being taken down by internet service providers, as the latter have no time, resources or background knowledge to examine the material in question and decide whether it is appropriate to take it down.*

*Another provision of the scheme would further protect the primary publishers, in that the respondent would have the possibility to join the proceedings by filing an appeal to the court. This would ensure that the court process does not rely only on the submissions of the claimant.*

*What are your views on the proposals that aim to support early resolution of defamation proceedings? Do you favour any specific types of formal court based powers, informal resolution procedures or the creation of the libel tribunal?*

*Global Witness broadly supports any actions that encourage early resolution of defamation cases. There is a significant threat coming from powerful individuals and companies who go to court with unfounded claims and tie NGOs into lengthy and extremely expensive proceedings. We welcome all initiatives that help filter out these claims at an early stage and reduce the chilling effect they have on NGOs.*

*The huge costs of court proceedings were one of the issues we faced in the Sassou Nguesso case, cited above under Clause 2. Regardless of the Judge's ruling in favour of Global Witness' right to publish the information in this case, we incurred £50,000 in legal costs. A substantial portion of these costs was finally recovered from the claimant in 2010, 3 years after the judgment, as a result of extensive investigation and the identification of assets in France. It is worth noting that these costs accrued over just six working days, between 6-13 July 2007, the time that elapsed between the original serving of a court order and the end of the court hearings themselves. Had Global Witness lost the case we would have incurred costs of around £100,000 which, for an NGO, could be crippling.*

*Is there a problem with inequality of arms between particular types of claimant and defendants in defamation proceedings? Should specific restrictions be introduced for corporate libel claimants?*

*There is a serious problem with inequality of arms, in the case of corporate claimants versus non-corporate defendants, and also in the case of wealthy individuals misusing legal threats to achieve a chilling impact.*

*To redress the balance between claimants and defendants, it is vital for the Government and Parliament to continue the work on costs associated with libel proceedings, which has been already started by the Jackson review and a consultation in 2010.*

*Global Witness agrees with the Libel Reform Campaign's view that non-natural persons should be treated differently from natural persons in defamation cases. We believe that companies should not be able to sue for libel. Companies have other remedies for loss of reputation and income, such as malicious falsehood, libel action by company directors in their own names, or remedies available under the Business Protection Regulations 2008.*

### *Overarching issues*

*Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?*

*Free speech and public interest publication have been long obstructed by libel law in the UK and this Bill is definitely heading towards a greater balance between free speech and protection of reputation. The current situation is so skewed towards reputational protection that any move in the opposite direction is welcome.*

*Global Witness is concerned however, that the proposed reform of the libel law in the UK may result in the increased misuse of privacy laws by claimants in order to keep threatening public interest publications. To prevent privacy from becoming the new unduly chilling law in the UK, there needs to be a realignment of privacy law, parallel to the reform of libel law.*

*Will the draft bill and consultation proposals adequately address the problems that are associated with the current law and practice of defamation? If not, what additional changes should be made?*

*The Bill certainly goes some way to address the problems with current libel law and practice. As mentioned previously, costs, however, have not been considered in this consultation, and they - in Global Witness' experience, as showed above - are a huge part of the threat NGOs face. We are looking forward to seeing what solution the Government proposes to regulate costs in defamation proceedings, to be able to assess the combined effect of the changes in law.*

*June 2011*



## Memorandum submitted by Mumsnet (EV 09)

### 1. Background

#### *1.1 Mumsnet as a business*

Mumsnet is an online networking site for parents, giving advice and support to around 1.5 million users per month. It provides some authored editorial content on parenting and other issues, such as childcare providers, pregnancy and travel; but the heart of the site is the talkboard, which takes around 25,000 posts every day.

Mumsnet is a for-profit organisation; our revenue derives mostly from advertising and market research services. We currently receive no funding from government or associated agencies and, despite our media profile, we do not have substantial financial resources.

The majority of Mumsnet content is generated by our users on our talkboards, where parents – often with the confidence of anonymity – can discuss many aspects of their lives, enabling them to offer significant support to each other. We are the single largest talkboard for parents of children with special needs; the single largest talkboard for adoptive parents; and the single largest talkboard offering advice on the establishment of breastfeeding.<sup>113</sup> Our members can discuss everything from mental health issues to child protection, secure in the knowledge that their posts will remain anonymous, and that the free flow of debate enabled by our operating model will ensure that their queries do not go unanswered.<sup>114</sup> In considering the issues raised by internet publishers, we hope that the committee will have regard to the immense benefits offered by peer-to-peer support sites like Mumsnet.

The volume of posts on the talkboard (25,000 daily) allows for no pre-moderation, although we do have a flag-and-report system. We sometimes describe Mumsnet as self-policing, because our members – who often identify with Mumsnet very strongly – are highly motivated to maintain the tone and quality of the talkboard, and actively report posts that might be in breach of our Talk guidelines.

We have a talkboard policy (see Annex 1), to which users are asked to adhere. There is a permanent link to the policy above the box into which new comments are typed.

All reported comments are considered by our community managers, who delete those that contravene our Talk policy. Our community managers will also sometimes contact users whose comments repeatedly breach our guidelines directly via email. Users who continue to repeatedly breach our policy will be banned from the boards.

Posts on Mumsnet's talkboards are frequently frank and direct. It is a characteristic that our members greatly value, and something that sets us apart from our competitor sites. Users are allowed to debate, criticise and disagree. However, we do not allow personal attacks; bullying, racist, disablist or homophobic posts; or those that we

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<sup>113</sup> In a survey conducted on the site in November 2009, 44 per cent of respondents rated the breastfeeding support on Mumsnet as 'excellent', compared with 13 per cent for midwives, and 1 per cent for government websites.

<sup>114</sup> Our mental health board receives 3,500 views on an average day; our special needs board receives 500 views on an average day.

consider to be defamatory, and will delete them when they are brought to our attention.

## **2. Current defamation law as it affects Mumsnet**

### *2.1 Our principle concern with the current state of defamation law is that it curtails freedom of speech*

As an organisation, we are sympathetic to the desire of individuals and companies to protect their reputations. However, the current law, and the threat of costly legal proceedings, means that we must routinely censor constructive commentary, honest opinion or humour.

Some examples of posts that we have removed:

'I sent a foul snippy e-mail [regarding a named company] threatening Trading Standards and they were on the phone the very next morning. I think one individual might be solely responsible for internet orders so it may just be a matter of her being run off her feet. Anyway she was *very* obliging once I sent the e-mail.' [Removed after the named company complained that its business was being misrepresented.]

'I'm sure that Pearl Lowe is, um, creative about her age.' [One of several posts that Pearl Lowe complained about. We deleted under threat of legal action.]

'How ridiculous to claim that a herbal tea could cause you to lose weight. What a load of rubbish.' [From a thread discussing a brand of herbal tea. The company concerned complained about several posts, all of which we removed.]

We delete around 2,000 posts each year as a result of concerns about defamation. This is always a pre-emptive act on our part, rather than the result of legal advice; we simply cannot afford to seek legal opinion on every instance.

### *2.2 Many of the posts that we delete are plainly not serious defamatory statements, but the current law contains no explicit defence of parody, rhetorical hyperbole, ridicule or satire*

The most costly complaints concerning possibly defamatory statements come from high-profile individuals. In these cases, the posts that have drawn complaints tend to be either playful (as in the example given above asserting that Pearl Lowe lies about her age), or out-and-out jokes.

#### 2.2.1 Examples of parodic posts about high-profile individuals leading to threats of defamation suits, or actual legal action: Garry Lace

In early January 2010, the Outdoor Advertising Agency began a poster campaign that was intended to illustrate the impact of poster advertising. The agency tasked with the creative work for this campaign was Lace Campbell Beta, run by Garry Lace. LCB's idea was to produce deliberately provocative posters that would prompt debate and drive public traffic to a website to discuss the issues raised by the advertisements. The traffic to this website would then be used as an example of the power of outdoor poster advertising to attract public attention. One of the slogans used on the advertisement was 'Career women make bad mothers', followed by the URL of the website that was intended to be used for public discussion.

On January 4, a Mumsnet poster started a thread titled “‘Career women make bad mothers’ ad to run on side of buses” (http://www.mumsnet.com/Talk/in\_the\_news/887424-39-Career-women-make-bad-mothers-39-ad-to-run.). Her opening post read:

*Brand Republic, the advertising industry trade mag, and the Independent media section are reporting that the Outdoor Advertising Association are to run ads featuring the slogan 'Career Women Make Bad Mothers' on the side of buses and elsewhere. This is to promote the power of outdoor advertising: gets people talking, innit. Here is the link – bit.ly/4VQ1Z8 – to the Independent item, which itself links through to the Brand Republic item. No doubt the person who thought this catchy campaign up (an 80s adman, one Garry Lace) will even as I type be wetting his pants in glee that someone has posted about it on Mumsnet. But does he really think the mass of the population will suddenly be moved to ruminate on the utility of outdoors advertising when they see the ad ... or will they just think 'ha! career women are bad mothers, I always thought so – it says so on that bus!'. Click here to find out more about Garry Lace and his firm www.guardian.co.uk/media/2009/apr/09/garry-lace-campbell-beta I must say I'm tempted to take a few dirty nappies down to Garry's offices, which are at 36-38 Carnaby Street www.betalondon.com (0) 207 734 2949*

(This post was deleted after Garry Lace reported it multiple times.)

The thread attracted hundreds of posts very quickly. Mumsnet users contacted first the ASA, and then the Lace Beta Campbell offices with emails and telephone calls complaining about the advertisement. They also began to contact Lace Beta Campbell's other clients, asking them whether they were aware that their advertising agency was running a campaign using the 'Career women make bad mothers' slogan. Several representatives of LBC's clients – some of them working mothers themselves – contacted Garry Lace asking him to withdraw the campaign. Mumsnet users also complained in great volume to the Outdoor Advertising Association, which decided, within 48 hours of the thread being started, to withdraw all posters featuring the slogan.

The incident became a moderately well-covered news story in both the trade press and national newspapers. It was presented as a defeat for LCB and a victory for the 'power' of internet users, as well as Mumsnet itself. It's our belief that many of Garry Lace's subsequent actions were based on irritation at the possible damage to his business and reputation – damage caused not by comments posted on Mumsnet, but by the relatively wide coverage of an embarrassing professional episode.

The thread mentioned above, and subsequent threads about the same issue, contained many posts that were insulting about Garry Lace. Lace quickly became aware of the thread and reported upwards of 300 posts to our community managers, who deleted about 170 of those that were complained about, including an entire thread devoted to haikus about him. Some of these were obviously defamatory, in that they were serious attacks on (or speculations about) Garry Lace's character, and we were entirely happy to remove these. Many others were plainly humorous, or expressions of honest opinion. (See Annex 2 for examples.)

Horrible message  
On the side of a big bus  
Irresponsible

*[Haiku about Garry Lace, deleted under the threat of a defamation action]*

It is important to note that when our community managers receive this volume of complaints (hundreds of posts reported), it takes a certain amount of time to work through them. Their failure to instantly (ie within a few hours) remove all of the complained-of posts seems to have inflamed Mr Lace still further.

Within two days of the thread having started, and on the same day that Lace Beta Campbell's poster campaign was withdrawn on the instructions of the Outdoor Advertising Association (a representative of which posted on Mumsnet to apologise, and to thank our users for their campaign), Garry Lace's solicitor sent us an email demanding that we instantly remove all of the complained-of posts, and that we also actively monitor the entire talk site to ensure that no further insulting posts were made about his client. (See Annex 3 for copies of the correspondence.)

### 2.2.2 Examples of parodic posts about high-profile individuals leading to threats of defamation suits, or actual legal action: Gina Ford

Gina Ford is a well-known childcare writer, author of *The Contented Little Baby Book*, which has sold upwards of a million copies. The methods that she recommends are routine-based, and as such are divisive among parents, some of whom feel that imposing rigid routines on very young babies is cruel, and can have a deleterious effect on the establishment of breastfeeding.

Prior to 2006, Ms Ford's book and methods had long been a topic of contention among the posters on Mumsnet. Some were very supportive of the Ford routines, but many others voiced strong opposition to them.

What follows is an account written by Justine Roberts, and published on Mumsnet, after Mumsnet's hosting company had received a lawyer's letter demanding that the site be shut down immediately:

*In January 2006, Ms Ford emailed us requesting that we take down the transcript of a Q&A interview we had conducted with her several years earlier. The reason she wanted it removed, she explained, was that a number of members had subsequently posted negative things about her. "I really have no wish to get into costly legal wrangles," she wrote. "But on the other hand I will not allow the advice, that I gave through sheer kindness, to be misrepresented on a website that spends much of its time printing propaganda about my methods." We wrote back explaining that since newspapers were free to archive and reproduce interviews they conducted, we saw no reason why we should be prevented from doing the same. On March 1 Ms Ford's lawyers, Foot Anstey, got in touch complaining of "vicious libels" against her and*

*suggesting that our archiving of the Q&A interview constituted an infringement of her copyright. If we removed the interview, the lawyers wrote, Ms Ford would be content "to let the matter rest". On April 1st we agreed to remove it as a gesture of goodwill, but the letters kept coming. On April 5, 2006 Foot Anstey wrote with the following demands:*

*1. Mumsnet publish a statement disassociating itself from attacks on Ms Ford by some members and making it clear that such postings would not be tolerated. 2. Mumsnet implement a special procedure to monitor all posts relating to Ms Ford on a daily basis and delete any which are derogatory. 3. Mumsnet delete a specified list of 21 threads. 4. Mumsnet take technical steps to ensure that any potentially defamatory postings already deleted from the site should not be accessible through search engines. 5. Mumsnet pay Ms Ford damages and meet her legal costs.*

*We agreed to the first four of these demands but not the fifth and Ms Ford's lawyers responded that despite being "close to a settlement" they would "issue proceedings as soon as possible."*

*We did not hear from Ms Ford or her lawyers again until last week when Foot Anstey wrote reiterating that they were "preparing for litigation" and complaining of a new "sequence of serious defamatory statements". As in the past, we rapidly reviewed and then removed the posts in question, in line with our abuse policy. But this time Ms Ford's lawyers wrote to DSC, the company which hosts Mumsnet, too. They demanded that DSC "disable the website with immediate effect" or risked legal proceedings, citing three allegedly defamatory postings.<sup>115</sup> Although we do not accept that any of the posts about Ms Ford are defamatory, it is true that some of them have contained personal attacks and have therefore fallen foul of Mumsnet talk policy. That is why we have consistently agreed to remove offending postings as soon as we have been notified of them. This unfortunately has not been enough to satisfy Ms Ford's lawyers: they have repeatedly demanded more drastic - and we believe wholly disproportionate - steps, such as the deletion of whole threads because they contain a single offending post. Their attempt to shut Mumsnet entirely is merely the most extreme example of this kind of sledgehammer approach.*

***As of today we're sorry to say you can no longer discuss Ms Ford on Mumsnet. Even if we were to win the threatened legal action, the cost in financial terms, and just as importantly, time, for us as mothers of young children is not worth the candle.***

Ms Ford's legal action was eventually settled before it reached court, at considerable cost to Mumsnet (Ms Ford had insurance). The terms of the settlement may not be disclosed. Mumsnet members are, to this day, wary of mentioning Ms Ford on the Mumsnet's talkboard.

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115 [In the context of contemporaneous Israeli/Lebanese border skirmishes] I've heard that Gina Ford straps babies to rockets and fires them into Southern Lebanon.

One of three posts cited by Foot Anstey in the close-down notice to Mumsnet's hosting company

In total, several thousand posts were deleted after complaints from Foot Anstey; a total of 27 entire discussion threads were deleted. Some of these comments were evidently abusive. Many were plainly parodic, or contained assertions that no reasonable person could believe were seriously meant. Here are some examples, followed by Foot Anstey's interpretation:

Oi, Mumsnet, why are so many posts about You Know Who – the devil - being deleted?

*...bears the defamatory meaning that our client is a bad person and warrants being described as 'the devil'*

I think Someone's being a vexatious litigant

*bears the defamatory meaning that our client is a vexatious litigant, who is making unwarranted claims of libel, to which your client is acceding only because it does not have the time or resources to defend such claims, despite considering that it would win if it did so*

Testing... what happens if I say that GF is a fart-faced roly fluff-poo?

*...bears the defamatory meaning that our client warrants being described as a 'fart-faced roly fluff-poo'*

[In the context of contemporaneous Israeli/Lebanese border skirmishes] I've heard that Gina Ford straps babies to rockets and fires them into Southern Lebanon

*...bears the defamatory meaning that ... our client warrants being compared with both terrorists and the state of Israel, because of the harm she causes to babies*

The full text of Foot Anstey's letters to Mumsnet and to our hosting company, DSC, is in the attached PDF document.

### 2.3 Dealing with complaints related to defamation results in serious costs to our business

At the moment, complaints or communications relating to potential defamation tend to fall into three broad categories:

- Individual Mumsnet users reporting posts, either their own or other people's. This happens upwards of ten times per week, and each case takes us about five minutes to resolve; we almost always delete.

- Companies (often small businesses) who are alerted to Mumsnet posts that refer to them. These organisations usually have their attention drawn to these posts by automated internet search alerts, such as Google Alerts. This happens between five and ten times each week, and each instance will take about an hour to resolve, as our editors consider whether something would leave us open to legal action. See Annex 4 for some recent examples.
- Serious legal threats from high-profile individuals, such as Gina Ford, Pearl Lowe and Garry Lace (a prominent advertising executive). These individuals usually engage solicitors immediately. These cases occur around once per year, but when they do arise they can absorb around 100 hours of editorial time.
- Ongoing disputes with legal entities, such as the UK Steiner-Waldorf Association, which repeatedly searches Mumsnet for posts relating to Steiner schools and makes regular legal threats whenever certain posters (whom it believes to be malicious) make anti-Steiner posts.

**Estimate of editorial time absorbed by dealing with complaints related to defamation, per year: 1000 hours. This does not include the cost of any legal representation or advice.** As the site grows (as it is currently doing at a considerable rate), we expect these figures to increase.

### 3. The draft bill

We welcome the government's constructive engagement with this issue, and many aspects of this draft bill. As the consultation document notes, the issues that affect internet publishers are, as yet, not adequately covered. We hope that this submission will contribute to the resolution of those issues.

#### 3.1 Clause 1

We believe that there is a need for an effective statutory test of substantial harm. Such provision would enable our community managers, who are not experts in defamation law, to engage with spurious complaints with greater confidence. At the moment, the default position of our community managers is to delete posts that draw threats of defamation action, even where we believe that the post in question is plainly parodic, or merely insulting. An effective statutory test of substantial harm, combined with a definition of defamation that clearly excluded ridicule and parody, would mean that we no longer had to act in such a heavy-handed way.

The existing definitions in case law are manifold, and without statutory clarity we can not be certain that a judge will view mere ridicule as damaging to reputation. In *Berkoff vs Burchill* in 1996, Mr Berkoff was able to successfully sue Ms Burchill and her newspaper for being called hideously ugly. We cannot take the risk that light-hearted jibes or hyperbolic parody might be classed as defamatory on that basis. Please see the appendix for examples from the Gina Ford case where Ms Ford's solicitors claimed that a whole range of parodic insults were defamatory.

We would, of course, continue to delete posts that seem to us to be making serious and substantial defamatory assertions, or that fall short of our own talk guidelines.

We believe that the test of substantial harm should be strengthened so that it clearly excludes weak, trivial or bullying claims, and allows only serious and substantial claims to proceed. Where claims are not found to be serious and substantial, there should be a mandatory strike-out. We would also like to incorporate in statute of the abuse test used in *Jameel vs Dow Jones*, where any possible vindication for the claimant would be disproportionate to the cost of the action (the 'not worth the candle' test).

### *3.2 Clause 2*

We would welcome the inclusion of a statutory public interest defence, believing that it would protect the open discussion facilitated by internet talkboards. The term 'public interest' should be defined using the European Court's definition of 'contributing to a public debate'. There should be a presumption of innocence unless publication can be shown to have been malicious or reckless.

We believe that it would be useful to codify the importance of context, and to require the court to consider the nature of the publication. A mother posting a comment to a talkboard in the middle of the night is clearly going to have a different threshold of what constitutes responsible publication compared to newspaper desk. Furthermore, a 50-post talkboard thread about a certain product might contain several posts that are severely critical; but these will almost always be balanced by other posts from people who found the product in question useful. Taken as whole the thread may not be critical at all, far less defamatory, let alone libellous. It seems to us that this 'wisdom of crowds' approach usually results in a balanced, realistic view that can be of considerable benefit to other users.

### *3.3 Clause 3*

Again, we would welcome the inclusion of a statutory defence of truth. We have regularly been approached by commercial companies asking us to remove product reviews that, they assert, could be defamatory. If one of our members comments that a certain pushchair fell apart after three months of light use, it cannot be right that we should have to remove the comment because we (as the hosts) cannot prove that we know the statement to be true. In combination with a court order establishing liability, a statutory defence of truth would give us greater confidence in dealing with such claims. We believe that it would also discourage speculative claims from potential claimants.

We believe that this defence would be more effective if it were to be called 'substantial truth', which is a better description for what has to be shown and which would further enable the free flow of non-malicious comment.

### *3.4 Clause 4*

We would welcome clarification of what would, under this wording, be considered to be a matter of 'public interest'. It seems to us that an expression of honest opinion, based on a fact that was known to the defendant to be true, should have a defence in law. An example might be: 'The brakes on [x brand] pushchairs are awful. I bought one for my first baby, and the brakes failed within two months.'



Alternatively, the public interest test could be removed from this clause as it seems to exclude little that is not already covered by privacy and common law confidentiality (eg medical records or material related to the children of others).

### *3.5 Clause 5*

We are very much in agreement with this updating of the single publication rule and believe it to be essential if the draft bill is to serve its purpose.

### *3.6 Responsibility for publication on the internet*

3.6.1 We fully support the introduction of a simple court order system to establish liability and issue a formal take-down notice, as proposed by the Libel Reform Campaign. Such an order as it would affect a website like ours – which acts as a host for user (third-party) generated comment – would be granted on the basis that as it seems to the court:

- the claim passes the serious and substantial harm test under Clause 1;
- the material is not obviously privileged;
- a cause of action in libel would not be prevented by virtue of clause 7 provisions regarding non-EU domiciles, the single publication rule, or any other basis apparent to the court;
- the web-host is not exempt from liability under existing law;
- the web-host is not already liable by virtue of being a primary publisher;
- the most appropriate (proximal) intermediary is the subject of the application; and
- that there is no other defence being offered by a primary publisher, or no primary publisher (eg author) is responding to requests to take down the material.

We believe that the inclusion of these tests would greatly reduce the volume of speculative or vexatious claims, as would the prospect of submitting evidence on pain of perjury. Leaving aside the issue of costs, this process would remove some of the most injurious aspects of the defamation process as it currently operates and allow us to fulfil the role on which so many of our members rely: giving authentic and effective peer-to-peer support in many aspects of life.

3.6.2 It is our opinion that it is possible to draw a clear line between internet content for which web hosts such as Mumsnet should be held liable as a primary publisher, and content for which they should not be held liable, other than by court order. That distinction can be found in whether or not the web-host actively commissioned the material that drew the complaint, or edited it before publication. We recognise that we must be held liable for all content we have actively commissioned from outside sources, or content that has been written or edited and published by staff members. However, liability for content that is posted to our site with no foreknowledge or commissioning on our part – such as comments by third parties – should, in our opinion, lie with the person who posted the material. Where such third-party material draws a complaint, and we judge that none of the defences in the draft bill apply, we would – as we do now – remove it expeditiously. We would run this voluntary scheme, which would not bring liability, alongside any formal court process, in order

to ensure that obvious cases are dealt with immediately. The failure to expeditiously remove such material once notified by the court order process – rather than receipt of a complaint – would confer liability.

3.6.3 We believe that the measures outlined in points 3.6.1 and 3.6.2, along with a notice-and-takedown procedure triggered by a court order, would be sufficient to protect the interests of genuine claimants. We would also be happy to consider a statutory ‘correction’ procedure, whereby deleted posts would be replaced with a formal notice indicating that the deleted material was potentially defamatory, and that the allegation should not be repeated on the site.

3.6.4 We would welcome the clarity of a statutory notice-and-takedown procedure. At the moment, we have settled on a period of 48 hours for removing material that has drawn a complaint; this has been arrived at through our experience of being threatened with action by particularly persistent and impatient claimants, and allows for almost no consideration of our legal position, or of whether we believe the material to be defensible. A statutory period in excess of 48 hours – perhaps seven days – would greatly enhance our ability to make judgements about which posts are worth defending. In our view, the notice should: be in writing; specify the date and time that the material was posted, and the posting name of the person who wrote it, if available; quote the relevant material; and give an explanation of why the claimant considers it to be defamatory. We believe this notice-and-takedown procedure should follow an initial consideration by a court, as set out above, to exclude bullying cases.

### *3.7 Court procedure to resolve key preliminary issues at an early stage*

We would welcome such a procedure as providing greater clarity for defendants.

### *3.8 Companies*

We believe there is no reason for companies to be able to chill discussion of their conduct or their products by threatening libel actions. Companies are different from people in that they don’t have feelings under article, and their remedy for reputational damage should lie with the tort of malicious falsehood, declarations of falsity, defamed individuals within a company to sue in person, and regulations governing the claims of business rivals.

Complaints from companies and institutions form the great majority of complaints about defamation on Mumsnet. See Annex 4 for some recent examples.

*May 2011*

## Oral Evidence, 18 May 2011, Q 245–296

### Evidence Session V

#### Members present

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
Rehman Chisti 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  
Lord Morris of Aberavon

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Witnesses: **Sophie Farthing** [Liberty], **David Marshall** [Which?], **Charmian Gooch** [Global Witness] and **Rowan Davies** [Mumsnet].

**Q245 The Chairman:** Can I welcome you on behalf of the committee and thank you very much for being willing to come. We have up to an hour. I am going to invite Dr Huppert to start the questioning, but before I do so, is there anything that any of you wish to comment on briefly before we start asking questions? Is there something that you absolutely feel you have to get off your chest before we start?

**Sophie Farthing:** I will be brief, but I want to thank the Committee. I am Sophie Farthing, and I am policy officer at Liberty. We are very welcoming of this reform.

**The Chairman:** Forgive me. Can I say to whoever is doing the sound that the acoustics in this room are not very good? You will need to speak up, and a little more oomph on the microphones at the witness end would probably be helpful.

**Sophie Farthing:** I am Sophie Farthing, and I am policy officer at Liberty. I wanted to say very briefly how welcoming we are of this reform, and we think that the Bill is very important. There has been a chilling effect for organisations that work in the public interest. Obviously, that is the framework from which we come, and it has been at the expense of the Article 10 right to free speech. We are very welcoming of this reform and we hope that, whatever wrangle there is over the details in the provisions, we get a Bill in Parliament next year, or whenever the programme is tabled in Parliament.

**Q246 The Chairman:** Can I say to all of you that to save time, we know who you are and what you do? We understand why in each case you are here. Take that as read.

**Charmian Gooch:** Very briefly, I welcome the continued focus on this issue through Government and Parliament. One of the matters that I should like to note is that there has been a real evolutionary revolution in the way that this issue is being looked at. I gave evidence to the Culture, Media and Sport Select Committee in 2009. At that time, Global Witness was the only NGO asked to give evidence. I thank the Committee and all those involved in this draft Bill that a lot of input from NGOs has been asked for, and there is clearly an understanding that non-governmental

organisations are absolutely in the media space. We are in the media space and we are here to stay. We are often peculiarly affected in a different way from the media, because we have different goals, timeframes and objectives.

**The Chairman:** I really think we should start asking questions. If you are half as good as we expect, you will be able to get into an answer something that you feel you have to get off your chest.

**Q247 Dr Huppert:** For the record, I should declare that I used to be a member of the national council of Liberty, but I am not anymore. I have two questions to start on which I would like to hear all your perspectives. I shall set out what they are and then address the second one and then the first. To what extent do you think there is a chill? Can you give some helpful examples of exactly what it is that you feel that you cannot do, not because of legal action that was actually taken, but because of fear of legal action? We have had differing information on to what extent there is a chilling effect there. The other matter specifically relates to online publication and how we should deal with that. Between the four of you, I think you have four different proposals for ways of resolving that. What does each of you think of the other proposals? Is there some way of bringing all four of you together to agree on something, whether it is about court authorisations, notices or whatever? Those are the questions I am interested in to begin with.

**Charmian Gooch:** I would be happy to address your first question on the impact of the threat.

**The Chairman:** Forgive me, I should have said, when we have multiple witnesses, it is up to you to decide who volunteers the first answer. If you agree with them, it is not necessary for all four of you to speak on every question. If you disagree, of course you are free to say so. But if you agree we will take your silence as meaning that you are in broad agreement with the question. That way we will cover more ground. I apologise.

**Charmian Gooch:** There is an important element to this question. Perhaps I should not seek specific examples, because it is actually very difficult for campaigning organisations to lay out in public where threats have been effective and where they have been chilled down, because that is giving a route map to any future company or entity to go after those organisations. For example, some of the costs involved—I am referring to Finers Stephens Innocent's Mark Stephens who gave evidence to the Culture, Media and Sport Select Committee in 2009—are around £100,000 to £200,000 to run the Reynolds defence, and figures of around 50,000 to £80,000 to challenge jurisdiction. It is absolutely the case that these are de facto major chilling elements. The free rein that English courts have to date given to bullyboy tactics and reputation mocking has had and continues to have a major impact. At Global Witness, you will probably be aware that we look at corruption and how wars are funded; on a daily basis we are taking very complex and risk-based decisions about whether to publish, what to research, and how to do that research. I can give an example of a report on the looting of state assets in one country. We produced 87 letters putting allegations to the various individuals and companies involved. These were substantial letters that were translated into three languages, and couriered to various parts of the world. We received very few responses but that cost about £17,000—just for one report. The other issue is that often when we do attempt to pursue an informal approach, what comes back is a threat of injunction or legal action, or a threat that if we publish they will come after us. The challenge that a lot of NGOs face here is that they are not publishing a one-off article. They are pursuing a campaign to try and change often deep-seated and deep-rooted

behaviour that is benefiting individuals or companies to the tune of millions and millions of pounds. That makes those individuals and companies really pretty aggressive, in some cases. Sometimes we have been on the receiving end of threats, and a number of people have put up one individual to come after us. Money is not an issue for them, and they are hoping that we will back off. Again, I point out that this is where non-governmental organisations are different from media publications and broadcasters. We do not have a pot to settle with. I do not know whether the Committee has heard from media practitioners and broadcasters about the quantity of settling that is going on the figures that they want to reveal, but if you look at that and then you look at the fact that NGOs cannot afford that and that funders would have a reasonable question to ask about that, we as a sector clearly have to behave very differently.

**David Marshall:** I would like to echo Charmian's views on what happens when we approach people pre-publication. It is generally the case that in our research into consumer issues—whether it is the sale of double glazing or the mis-selling of some particular product, whether it was cavity wall insulation or whatever—we act as a responsible publisher and when we write to the people or companies concerned, very often, rather than a short statement for publication or a denial of the allegations, we are met with a several-page letter that simply says, “If you publish this we are going to sue you for libel. What you are saying cannot possibly be true”, despite the fact that we have research to the contrary. It is a bit like a war of attrition, but it is incredibly wearing to compile report after report, knowing that our journalists, who are busy enough with doing the research itself, get the threat every time.

**Q248 The Chairman:** So tell me Mr Marshall, what is it that you would like to happen? Do you envisage anything that can stop that or mitigate it?

**David Marshall:** The Bill has to be approached as a package of reforms, because they are all important to achieving a proper balance. As far as Which? is concerned, the crucial points are: there needs to be a robust defence of responsible publication in the public interest; there needs to be an effective substantial harm test for libel; and there also needs to be a restriction on the ability of companies to bring or threaten libel claims when there are already other more appropriate legal remedies at their disposal.

**Q249 The Chairman:** I have one other clarification question. Does responsible publication in the public interest mean that you differentiate between responsible publication on the one hand, and public interest on the other?

**David Marshall:** I think for the purposes of the Bill, we would support the defence as it is termed at the moment—responsible publication on matters of public interest—but not just in the form of a codification of the Reynolds defence. If you take the Bill as a package of measures, it is important to differentiate those publications that are manifestly in the public interest, and state that the concerns of those who have acted responsibly in a Reynolds sense will be met by other tests in the Bill.

**Charmian Gooch:** I think that one would also look at a proposal that is not included in the Bill—removing the right of companies to sue for defamation if they are not natural persons and they have recourse in other arenas, including malicious falsehood, commercial loss and, I understand, new EU business guidelines that are coming in. This is something that Global Witness and other organisation would ask the Committee to give serious thought to.

**Rowan Davies:** I would like to come back to Dr Huppert's further point, which in our experience is the extent to which claimants are using the current law to launch

claims which they and we know are utterly without merit. They are essentially using that as redress when we have embarrassed them, or members of our site have done so. It is a revenge tactic more than anything else, and has nothing to do with serious defamation. One of our main points is a need for clarity in the law, so that we can pick up a Bill, read it and know where we stand, and the claimant knows where he stands, and we can simply shortcut the whole process. Secondly, there is a need for a definition of defamation that excludes simple ridicule and parody, and claims that are plainly not serious assertions. The biggest effect on our business is vexatious claimants.

**Sophie Farthing:** Perhaps I should go back to back to Dr Huppert's question on online issues and, to add support, I imagine that you were referring to the models that have been put forward. I should add that Liberty has not yet put in a written submission, so we have not yet put forward a model to which I can speak. However, I can certainly support what Mumsnet has put forward in terms of having a judicial process. We certainly see a lot of merit in that. I believe this has already been put to the Committee by the Libel Reform Campaign. We see merit in having a judicial process to deal with that issue. We certainly support a special process, as opposed to special exceptions. I know that some of the questions we were sent yesterday asked whether there should be exceptions for Twitter, for example. We do not think that that is necessarily the right route. I do not wish to draw on extraneous events, but we saw last week how a Twitter story became a mainstream story instantly. So we would support that kind of approach and go for a special route to deal with those issues, as opposed to creating exceptions to being a claimant for defamation.

**Q250 Sir Peter Bottomley:** I ought to say that a close friend of mine works for Google and has been involved in a dispute between the Consumers Union in the United States and a motor company. I shall not raise that directly. I ask Mumsnet, did Garry Lacey actually issue legal action.

**Rowan Davies:** No.

**Q251 Sir Peter Bottomley:** Did he say in the end that he was not going to, or did he just—

**Rowan Davies:** I think it just tailed off at the point at which we had removed 170 comments that he had complained about.

**Q252 Sir Peter Bottomley:** People can say that "Someone has put something up there which we disagree with. Do you think it is fair? Do you think it should stay there?". You are then prepared to look at it and say whether it should come down or not.

**Rowan Davies:** Yes, absolutely.

**Q253 Sir Peter Bottomley:** When people start to threaten legal action, is it perfectly reasonable to start putting up openly that they have made this threat against you?

**Rowan Davies:** I think so, yes. That is effectively what we did. Our CEO went on to the site and said "We are starting to receive complaints. Can you please be careful about what you say?"

**Q254 Sir Peter Bottomley:** And your responses were not confidential, so anyone could publish them.

**Rowan Davies:** Yes.

**Q255 Sir Peter Bottomley:** It seems to me—and I offer this as a reflection—that if people knew that the response to what they had put was in the open, very few of them would go out in the open. For example, when Trafigura started saying, “We object to people reporting that we may be dumping toxic waste in some poor benighted country in Africa”, if that was in the open, neither the threat nor the injunction would be effective. Is that right?

**Rowan Davies:** It would put a different slant on it. Certainly, some of the responses that we were getting from Garry Lace that we were not permitted to publish were very much at odds with his public statements, in which he was apologising and offering to donate money to charity, and saying, “We completely understand your position”—and then behind the scenes he was saying, “I am going to take you for everything you are worth because you have caused serious damage to my company”.

**The Chairman:** We need you to speak up.

**Rowan Davies:** I am sorry. Yes, there can be quite a big lacuna between what people are saying in public about their stance and what they are saying to us in privileged lawyers’ letters. They would obviously look foolish if they were exposed.

**Q256 Sir Peter Bottomley:** Can I switch to a hypothetical commercial example. Suppose I was not necessarily a charity but a consumer magazine, and I said that a particular vehicle was the most dangerous on the road, it should not be sold and the authorities should not allow it to be sold. Is that something where the commercial company could say, “Either show us evidence or please stop saying this because you cannot prove it; and we can challenge it”?

**David Marshall:** It seems to me that under English law, the example you have given ought to be one of malicious falsehood. The company ought to prove falsity, and the way it would do that is by witness statement evidence to be examined by a judge, together with evidence of compliance with relevant safety standards, and that the allegations were made maliciously. It would seem a strange claim for a consumer magazine to make unless it was reasonably sure of its grounds.

**Q257 Sir Peter Bottomley:** It needs to be reasonably sure, but do you think that action should be taken under malicious falsehood or a declaration of falsehood, rather than using defamation?

**David Marshall:** I do, and the reason for that is because, if you are writing about products and services, you are criticising those rather than the essence of the brand of the company. It is often the case that, in our view, companies’ goods and services at the lower end of the market are not necessarily great products and services for the consumer, but the same company can produce things that we think are best buys. We are not saying that that company as a whole is a bad or evil. We are not writing about the management or the way that the company is run, or their controlling mind; we are writing about products and services.

**Q258 Sir Peter Bottomley:** Coming to the Liberty and Global Witness areas, is there any reason why any significant company should be able to use defamation for any purpose at all?

**Sophie Farthing:** I can certainly offer an opinion from a human rights perspective, and one that I hope will assist the Committee from our perspective. We obviously work within a human rights framework. Within the convention, corporations and individuals are always going to be treated differently, because the convention is about humans and individuals. There is certainly an argument that corporations can

attract the Article 8 rights. Our perspective is that they can be limited whether that would be limited by the proposition that has been put forward whereby corporations are excluded from bringing a defamation action, or whether you have something like Lord Lester's Private Member's Bill where there is a limitation of having to show substantial financial loss, rather than excluding the claim altogether. Article 8 is a right that can be limited and we see that there are arguments for those kinds of limitations, of which the Committee will well know, but obviously a public-interest example could justify a limitation on an Article 8 right, as exercised by a company. The main issue is that the corporation point is not dealt with in the Bill, and we would like to see it dealt with in the Bill. We think that Lord Lester's approach is sensible because of the obvious inequality of arms issues Charmian has spoken to and can speak to.

**Charmian Gooch:** I am in full agreement on that. Shifting defamation away from companies, as they are not natural persons, would not preclude individuals within those companies bringing defamation cases. They would still have all the protections that they would have every right to under defamation law as individuals. In some cases, sole trader companies might be turning over £5,000 a year or £10 million a year, but if they are clearly identifiable as individuals or sole traders, they would definitely come under defamation. For actual companies, there are so many other recourses. Defamation at the moment is used mostly because the costs, timeframes and threats are so big that companies find that to be more effective. They also know that they can start to bandy around threats, of which we are regularly on the receiving end. They usually come as a cocktail, involving defamation plus commercial loss. In one issue that did not in the end go to court—they did not settle, but they went away—one of the six individuals involved was claiming loss of \$600 million. Of course, he could not stand that up. That is the kind of threat we receive. There is an issue in the draft Bill under privilege, where there should be an extension of privilege regarding companies. Generally, the clauses on privilege are excellent, but the section on companies has a very narrow definition which is under the Companies Act 2006 and covers only quoted companies that are on the New York or London stock exchanges, or any other stock exchange within the European Union. It does not even include AIM in London or, for example, the stock exchanges in Beijing, Shanghai or Hong Kong. I know that we have raised this with the Ministry of Justice and I again ask the Committee to have a look at this. We would propose a wider coverage that includes any company or entity that is trading, whether that is an LLP, a limited company or a quoted company.

**Q259 Sir Peter Bottomley:** I do not want to sound as if I am getting at Trafigura, it is something that most people know about. What kind of law would make it impossible for a company to cover up what a subcontractor may have done that was clearly against the public interest and ought to be reported?

**Charmian Gooch:** There is a range of remedies in place. Perhaps David might also comment on this. The remedies are around falsehood and commercial loss, and possibly for individuals within the company on defamation. One of the reasons why they were able to pursue the course they did was because they know that in the UK, until now, it has been much easier to bring cases such as that in the UK than anywhere else. This is one of the issues around appropriate areas of jurisdiction. Again, under jurisdiction, it is excellent that non-EU residents are covered and referred to in the draft Bill, but EU residents are not covered yet. I urge the Committee to look at this, because they are not covered. If hypothetically we were to publish a report on a Ukrainian businessman, and most of the coverage went into the



US and the Ukraine, we would probably all be happy to take a bet that the case would end up in the UK. That, in a modern globalised media world, does not really reflect the reality of what is needed.

**Q260 Mr Lammy:** To what extent do you accept that we are living in more litigious times? There is a difference between the threat of action and the actuality of action. It would help the Committee to get a sense of the breadth or scope of the problem. How many threats of action do you get? How many are settled? How many have gone to trial?

**Charmian Gooch:** We have never settled. I would like to reinforce what I said earlier. NGOs, unlike the media, do not have money, funding and income with which to settle. That is a very good question to address to newspaper editors, publishers and broadcasters about how much settling they are doing. Certainly, I hear informally that the levels of settlement are very high and a lot of it goes on.

**Q261 The Chairman:** It would be helpful if you told us your perspective and leave us to deal with other witnesses.

**Charmian Gooch:** Absolutely, but I will talk from my perspective and from the perspective of one or two tiny entities and a small NGO that are crusading away on a particular issue. I am thinking back to the 1980s when a campaigner worked for years to highlight risks around sheep dip and its long-term health issues for farmers who used it. I agree that in the current age, the company would have tried to chill her down and shut her up. The problem is that it is not really safe to start revealing the number of threats we get. Suffice to say, it is a pretty regular occurrence, and I think that you would find that to be the case with a lot of NGOs that are publishing, naming names and taking on particular issues.

**Q262 The Chairman:** What about the rest of you in terms of numbers?

**Sophie Farthing:** I just want to support what Charmian said. The threat is enough. We are an organisation that makes a lot of public comments about issues that we believe are in the public interest and are an important part of our democracy. I should add that we recognise that a lot of duties and responsibilities come with that right, as expressed in Article 10. But the threat is enough and, hypothetically speaking, if an organisation as small as Liberty, with limited resources, is threatened with a libel action, that could bankrupt it.

**Q263 Mr Lammy:** Forgive me, I am sympathetic. However, all of you are in the business of public profile and really going after people out there. It is the business you are in. So you have to do more to demonstrate your point. Threats are probably expected in the business you are in. The question is: why are the threats excessive?

**Rowan Davies:** Can I interject? I can give you a quick answer in terms of quantity, which is that we get between 50 and 100 threats a year. We have settled once in our history and we have been in business for 11 years. As regards everything else, we have taken things down without even involving lawyers on our side. We are not in the business of going after people, and in this respect we are probably different. We are not arguing for the right of our members to abuse people or to make serious defamatory assertions. We are arguing just for the right to freedom of expression. Online communities are serving a new but valuable function in terms of the crowd-sourcing of wisdom—what is this school like or what is that nursery like.

**Mr Lammy:** We are used to it. Do not worry.

**Rowan Davies:** It is a different thing and we are not arguing for the right to go after people and to make horrible assertions about them. As a responsible website, we will always take a seriously defamatory assertion down if we know that the person cannot stand it up.

**David Marshall:** Perhaps I can add a bit of context. We spend six figures a month<sup>116</sup> on libel reading, and that is a significant business cost over the course of a year. Without that libel reading, I am confident that the libel threats would come thicker and faster than they do at the moment.

**The Chairman:** One more quick question, and then we must move on.

**Charmian Gooch:** Can I clarify my answer? One of the key points here is that very small numbers of case law set the legal advice going forward. I would agree also that a lot of money is spent on libel checking and legal checking all the way through the process. Global Witness takes its responsibility as a responsible publisher very seriously. We have very detailed and careful processes. There are very thorough research processes. We probably go over the top in terms of checking allegations and making sure that people have the right to comment. The issue is that the interpretation of case law means that every single time you sit down with a lawyer, even at very early stages of research—before anything is even written—they are interpreting the case law. So you are at risk of being chilled down, even at that stage. One of the first standard questions that any lawyer will say is, “Okay, how litigious is this individual? How litigious is this company?”. It is the first question you are asked.

**David Marshall:** I endorse that view, but I should first correct my answer. We spend six figures a year on libel reading—not per month.

**Sophie Farthing:** I would like to put on record that Liberty does not go after people. We believe that what we do is very much within a human rights framework and is in the public interest. We comment on legislation and we litigate in courts. We are a campaigning organisation.

**The Chairman:** Just before Mr Lammy asks his final short question, I remind you of the guidance that I gave at the beginning, which is that the more you talk, the less we will get to ask questions, and the less we will be informed when we come to reflect on whatever it was you said to us.

**Q264 Mr Lammy:** Can I just clarify? I am not suggesting that you go after people.

**The Chairman:** Mr Lammy, you do not need to clarify; you have a question.

**Mr Lammy:** I need to for the record. I am not suggesting that you go after people; I am suggesting that the business you are in in relation to the public will obviously attract concern and criticism. What does Which want to restrict further in relation to libel over comments on goods and services? Can you say more about that?

**David Marshall:** Part of my answer to one of the earlier questions was that I thought there was an existing basis for potential claimants to obtain redress for criticism of goods and services. The rationale for that is that malicious falsehood already provides that avenue, and the courts have supported the view that that is the right approach. We endorse that. The reason I think it is the right approach is because we do not write articles that simply target company X as being a bad company in everything it does. The public have to be accorded a certain amount of common sense in what they read. That common sense dictates that they are just reading about a particular product, good or service. Many brands sell goods or services at many different levels in the market. Some brands sell goods at the budget

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<sup>116</sup> Corrected to “six figures a year on libel reading—not per month” as stated in David Marshall’s next response to the Committee.

end and at the luxury end, and it does not mean if you criticise something at the budget end that the luxury end is affected.

**Q265 Lord Grade of Yarmouth:** In putting in place a number of hurdles in the way of corporations suing, assuming you allow them to sue for libel, are you at all concerned that, for example, if a disaffected employee starts trashing the company he used to work for with a lot of absolutely scurrilous inventions and imaginations, the corporation itself is then precluded from defending its reputation in that way? Are you not moving the needle too far the other way?

**David Marshall:** In order to strike the right balance, perhaps the appropriate formulation would be for flexibility in the form of judicial discretion, so that the presumption is that companies cannot sue for libel, unless they prove falsity and likelihood of substantial loss, or actual substantial loss; but the judge would have discretion based on evidence to disapply or modify it, as they saw fit. But I still think that the general presumption is the right approach.

**Charmian Gooch:** I am not sure that we would fully agree with that. Corporates either are or are not a natural person, and should be treated accordingly. We need to look at this further. Our submission also is not yet ready, and we are looking at this in more detail.

**Q266 Lord Grade of Yarmouth:** Coming on to online, it seems that there is a real dichotomy for online operations. If you take an editorial interest in what you are enabling to be published, you become complicit, as it were, in the publication. You become a publisher. On the other hand, if you distance yourself and deem yourself—in the American parlance—a common carrier, just let it all hang out and take no responsibility, that is equally undesirable, it would seem. Would you like to say a bit about that?

**Rowan Davies:** It is possible to draw a clear distinction with content that a website has commissioned—content that is there with the website owner's foreknowledge. You have e-mailed this person and asked them to write an article for you, or you have read their piece and made editorial changes to it before it is posted on the site. It is probably quite right that web hosts should be held liable in those circumstances for their content. On the other hand, you have user-generated content, on which you have no foreknowledge, you have not commissioned it, and that is where I think liability should be either restricted or absent from the web host—provided they take responsible steps.

**Q267 Lord Grade of Yarmouth:** To what extent do you currently label that distinction on the screen? How important is it?

**Rowan Davies:** It is kind of intuitively obvious.

**Q268 Lord Grade of Yarmouth:** Is it?

**Rowan Davies:** Yes it is. You probably have not been on Mumsnet, but the talk board is a separate area of the site. Talk threads are all user-generated content, except for the posts put there by our staff. They have a different background colour, so it is obvious that they are staff posts. Everyone who uses the talk board understands that distinction. There are other areas on our site that are completely separate and consist of content that we have posted, which we have commissioned, written and published ourselves.

**Q269 The Chairman:** Just to clarify something that you said, if someone is seriously libelled in the process, what should the remedy be?

**Rowan Davies:** First, do you think it is possible for “fluffymummy123” posting at 3 am on Mumsnet to seriously libel someone?

**Q270 The Chairman:** Forgive me. My question was: if someone is seriously libelled, what do you think the remedy ought to be?

**Rowan Davies:** We absolutely support the rights of individuals to have remedy. Our approach is that we would use our common sense. If something is complained about, and we believe it to be obviously a seriously defamatory assertion, we would take it down. We would not wait for a lawyer’s letter.

**Q271 The Chairman:** One of the things that we are all told is that it has to be there only for a very short time and it wings its way around the world. By the time you have had a look at it and you have taken it down, what remedy should the person who has been seriously libelled have?

**Rowan Davies:** We would be happy to put up a notice of correction on the site, saying that “What has now been removed from this space was a seriously defamatory assertion and it must not be repeated on the site”. But I do not believe that there is any justice in making us, as the hosts, pay a financial penalty for material of which we had no foreknowledge.

**Q272 The Chairman:** Yes. I am sorry; I am not taking over the questioning. Do you wish to add something?

**David Marshall:** Perhaps I may add by way of a partial answer to Dr Huppert’s question at the start of the session. It is on the same issue. I take your point about comments winging their way around the world, and that it is very difficult to put the cat back into the bag once it is out. However, I would expect that claimants want some sort of clarification or notice on the original posting, so that subsequent users can read the two together, rather than just the allegation being taken down from the original site, but still being copied and featured elsewhere.

**Q273 Lord Grade of Yarmouth:** I have one further question on jury trials. I was not clear from your submission or those of any of the witnesses what circumstances you think would demand a jury trial and in whose gift it should be to make that decision. On what basis would you want a jury trial? Is jury trial appropriate?

**David Marshall:** By way of clarification, my submission gave broad support for a presumption against, but—

**Q274 Lord Grade of Yarmouth:** But you mention certain circumstances, for example, when the statement in question relates to public figures, officers of the state. I did not really understand that.

**David Marshall:** Where the statements or allegations concerned are of fundamental public importance, and the claimant thinks it is appropriate for a jury to look at the meaning—

**Q275 Lord Grade of Yarmouth:** You would leave it with the claimant? If the claimant demands a jury trial, they get one?

**David Marshall:** Not if they demand it. The parties would be free to apply to court to vary the presumption.

**Q276 Lord Grade of Yarmouth:** Why is that important for public figures?

**David Marshall:** Because I think there is a greater need for scrutiny of the allegations and the evidence.

**Q277 Lord Grade of Yarmouth:** Are you saying that a judge is not capable of making that decision?

**David Marshall:** No, I just think it is an extension of the public interest in doing it.

**Sophie Farthing:** Perhaps I should mention that this is a point on which we disagree. Liberty has objected to the reversal of the presumption of jury trial. We understand that there are costs involved, and we still think that it is a very important principle and that there are certain elements of litigation that are worth keeping, despite the cost. We would object to the reversal of that presumption contained in the draft Bill, and the continuation of what we see as a trend of removing jury trial.

**Q278 Lord Grade of Yarmouth:** But you are arguing on the one hand against the chilling effect of the costs of libel, but are now arguing for increasing the cost.

**Sophie Farthing:** Perhaps I may clarify. Litigation does involve costs. That point was made earlier by Mr Lammy, and there are certainly costs involved. However, we think that this element of jury trial and the way that it has been approached in the consultation is on the basis of a system that needs reform. We would look to substantial harm, although welcoming Clause 1 in the draft Bill, which will look at increasing the threshold and reversing the presumption that there is harm if a defamatory statement has been published. We think that if there are stronger defences, or we have the kinds of reforms that are being made in the Bill, a jury trial should be looked at in the context of a reformed system, rather than the system we have. Understandably, costs are trying to be reduced everywhere because of the chilling effect.

**Q279 Lord Grade of Yarmouth:** I am trying to get to the specifics. Where would the onus of proof be in terms of, “I would like a jury trial” or “I would not like a jury trial”? What are the criteria? Yes, it would be nice to have a jury trial, which would escalate the costs, but on what basis do you decide to have a jury or not have a jury?

**Sophie Farthing:** We would be happy for the position to stay as it is, whereby if either party applies for a jury, there is a presumption in favour a jury trial.

**Q280 Lord Grade of Yarmouth:** Yes, but what guidance do you give the judge to make that decision?

**Sophie Farthing:** There is no decision made under the current system, because there is a presumption in favour of a jury trial, when an application is made. It is the reversal of that presumption that we are objecting to. It is not that the jury trial is being removed altogether. We are not saying that at all. It is the danger that there will be fewer and fewer jury trials, and we think that it is important that that element remains.

**Q281 Baroness Hayter of Kentish Town:** Part of the point of jury trials is to get non-lawyers—ordinary people—involved. My question is to Mr Marshall. When you are talking in the submission at page 8 about the specialist libel court with a specialist circuit judge, you do not seem to make any allowance for any lay input at that stage. Elsewhere, in the system of magistrates, for example, in a criminal case there is some lay involvement and the case can then go up. However—and I know you are a

lawyer—you seem to exclude any non-lawyer other than on these rare cases that go to jury. I am slightly surprised.

**David Marshall:** The reason for that is really to try and deal with the practice and procedure of libel. I know that costs are not an issue for the Bill. The establishment of a specialist tribunal with specialist judges is the right approach, with something similar to the way there might be matters of certain size litigated in the Patents County Court. Because my view on that really relates to practice and procedure, I have not included a reference to juries in that regard, because of inherent cost reasons.

**Q282 Baroness Hayter of Kentish Town:** The Patents County Court is not taking a public-interest layer of involvement. Do you not see that this tribunal could involve lay assessors or any public interest—

**David Marshall:** Getting back to an earlier question, if a case merited it, it would be in the parties' gift to apply with evidence as to why they should be entitled to those lay assessors or a jury. Using the Patents County Court as an example, I am not convinced that having lay assessors, when you are trying to dispose quickly of claims to which both parties have very opposing views, is very helpful, because I think it would just lead to appeal.

**Q283 Lord Morris of Aberavon:** On the criteria for judicial decision for a jury trial, as the situation has developed, it is now in extremis only and is very rare; but it is still there. How would you define it? There must be some criteria for the judge to exercise this extreme form of trial, given the chilling effects. Surely it is less to do with a public figure or personality, but rather with the substance of the issue—such as dishonesty.

**David Marshall:** I absolutely agree with that. Although it is probably a point that still needs work, the sorts of circumstances for judicial criteria are abuses of public office, offences of dishonesty by public figures performing a public function and that sort of thing.

**Q284 Lord Morris of Aberavon:** It comes back to public interest, which is undefinable in my view. Is it for the judge to decide whether it is in the public interest to have a jury trial? A personality is only one factor in that.

**David Marshall:** I agree it should not be related to the personality involved, but where you have serious allegations of impropriety in running for election, for example, or a particular ward or postal voting, or something of that kind, those are the sorts of cases in which it would be appropriate for an application.

**Charmian Gooch:** I think there is also an issue here. NGOs are a very broad church, and as you are hearing, there are different views. We actually really welcome the removal of the presumption of a trial by jury, because, at the moment, the harsh reality is that claimants use this as part of their bullyboy threat tactics, and the costs involved are one of those elements. Often we are seeing a very early threatening letter which says, "We want to pursue this to trial". They know that the costs involved mean that, whether it is an editor or an NGO, frankly, there is much more likelihood of either stepping back and apologising, or settling. That is the harsh reality. That is the way it has been used. The excellent work that has been undertaken in looking at costs and trying to address the typically high level of costs in the UK is a really important corollary to this work on defamation.

**Q285 Rehman Chishti:** I wish to address this to Mr Marshall. In terms of the issue about public figures and a case going to a jury, rather than—say, for example, you

have a former Minister such as Jonathan Aitken—a case being determined by a judge, you may then give the impression of an old schoolboy trying another old schoolboy and, therefore, in the public interest you would then go before a jury. Is that one of your arguments?

**David Marshall:** No it is not. My argument really relates to the jury deciding whether or not the meaning of the words is defamatory and what the single meaning of the words is, and then looking at the defences.

**Q286 Rehman Chishti:** In terms of reversing the presumption—say, the presumption is for the judge, rather than the jury, to determine at the outset—what would be the exceptional circumstances in which you would then want a jury panel to determine that? At the moment there is a presumption that you can have a jury. If you reverse that to say that the judge would have to make a finding at the very outset, but have a jury only in exceptional cases, what would those exceptional points be?

**David Marshall:** I tried to clarify that in my earlier answer. There would be a range of statutory criteria that would need detailed consideration.

**Q287 Rehman Chishti:** But you do not have any ideas with you at the moment.

**David Marshall:** No, I do not.

**Q288 Rehman Chishti:** I have a brief final point for Liberty. I am sorry to use this phrase, but you used the words “a reformed jury system”. It is bizarre. You said that there needed to be a trial under a reformed jury system if you do not want to reverse the burden. Is it not the case that the whole ethos is that if you want simplicity, earlier resolution, and the striking out of cases by a judge—a point of view expressed earlier by Ms Gooch—it would be far better to have a judge to determine that at the very outset, rather than going down this litigation system of a jury?

**Sophie Farthing:** I did not mean to say that there should be a reformed jury system. If I did, I apologise; I meant to say there should be a reformed defamation system. Trial by jury should remain an important element, but the point I was making was that when you are looking at a flawed system which you are trying to reform and to cut costs, a jury trial falls. But you can reform that system, and look at the threshold and substantial harm. The point that Charmian made about the threat of going to trial could be tempered by having that threshold in Clause 1. I may have mis-spoken, but it is important to look at how the reformed system would work when you have a threshold—whether that remains at substantial harm or whether the threshold should be increased. There are arguments to increase that threshold to serious and substantial harm, for example. You need to look at jury trial and we would ask the Committee to look at the concept of jury trial and its importance, and the history of defamation proceedings in what would be a reformed system that would have more thresholds and safeguards by, for example, clearer defences. I hope that that clarifies my point. We will certainly clarify it further in our written submission.

**Q289 Lord Marks of Henley-on-Thames:** I want to move on to the responsible journalism defence, which all of you have criticised in different ways. I should like to ask each of you what is wrong with the proposed defence, which more or less codifies relatively different factors. What would improve it and why would it improve it? How would you like to see the defence formulated?

**Charmian Gooch:** We would like to see a clarification that the guides should not be used as a prescriptive shopping list, because that is the tendency whereby the court will simply apply it as a tick list. It is really important that that does not happen with this. It is not in there, and I should say that there is no inclusion of professional association guidelines, because, again, that does not reflect who and is publishing and what is being published in the modern era. It is no longer simply about broadcasters or newspapers; it is about citizen journalism and a whole range of publication that is going on. For that reason codification would not be appropriate.

**Sophie Farthing:** We were critical. I imagine you might be referring to the submission we put forward on Lord Lester's Bill in relation to the common law defence that we were commenting on in Reynolds, but we are very happy with what Lord Lester has put forward in the Bill. We support re-inserting the provision in Lord Lester's clause that would put the circumstance consideration back in. We think that would assist the defence. We are happy with having the concept of responsible publication as it is articulated in Lord Lester's proposed clause. As I have said, there is a recognition in the Article 10 right to freedom of expression that there should be responsibilities and duties, so we can see the basis for it. We are happy with what Lord Lester has proposed, but we would like to see that provision in his clause put back in. It has been taken out of the MoJ draft Defamation Bill.

**David Marshall:** I think a different approach needs to be taken. A codification of Reynolds at a statutory level is not going to help matters very much, even with slightly different factors. Reynolds is very difficult to gauge for publishers, whether they are publishers in the conventional sense or even private individuals. It is applied in a fairly haphazard way by the courts. It usually fails at first instance. It is very expensive to run and it does not address the fundamental importance that lies behind the defence. As you will have seen from my evidence, I think a better approach is to have something akin to the exception in Section 32 of the Data Protection Act, which is about reasonable belief. I know that is a huge departure, but in relation to the Data Protection Act there are very serious issues at stake. It is a European obligation that we have a data protection regime, and yet Parliament saw fit before to accord the special purposes in that section the appropriate weight to believe that reasonable belief ought to be sufficient. Reasonable belief can be an objective test. Was it reasonable? Could the reasonable person have had a reasonable belief that it was in the public interest to publish?

**Rowan Davies:** I just wanted to emphasise from our point of view the importance of context. There is a difference between a special investigation centrepiece in the *Sunday Times* and an assertion that is made at 3 o'clock in the morning on a talk board that is maybe going to be seen by a couple of thousand people. Context is very important. Also, one person on an internet discussion board might make an assertion, but it will be met by responses putting the opposite point of view by three or four more people. The encapsulation of the supposed defamatory statement needs to incorporate what is around it.

**Q290 Lord Bew:** Thank you for the last answer. The consultative document specifically raises issues of the impact of the Reynolds defence on NGOs. That was very helpful. I wanted to ask a question just to get formally on the record something that is implicit in your earlier answers. We are told by many senior legal figures that libel tourism is an issue of the past. It might have been significant some years ago. I wanted to get on record formally your view on whether that is true.

**Charmian Gooch:** It remains an issue and I do not think it is a thing of the past.



**David Marshall:** I share that view, although not from my practical experience at Which?, because it is not the sort of thing that is normally an issue for us, because of the nature of our publications.

**Q291 The Chairman:** I would like to conclude this by asking you two questions. The first is a general one. We have had quite a bit of evidence around malicious falsehood. The phrase has been mentioned from your table this morning. Why is “malicious” so important? Why is the issue not the effect of what is said rather than the state of mind of the person who said it? Is falsehood not sufficient by itself? What does “malicious” add that is significant?

**Sophie Farthing:** It is not something that we have been arguing for. I mentioned it earlier because I knew the proposition had been put forward. I see your point. The Article 8 right to reputation does not involve that malicious element. We see how that could attach to a corporation, if that is the context in which you are asking the question.

**Q292 The Chairman:** What is your view?

**Sophie Farthing:** I would have to come back to the Committee on that.

**David Marshall:** The law needs to take account of the changing state of morality and the way that people express and publish themselves. The result of that is that where statements are untrue but not necessarily defamatory, malicious falsehood is the right approach because the state of mind of the person making the statement is relevant to whether there should be a remedy.

**Q293 Lord Marks of Henley-on-Thames:** If we come to the conclusion that we ought to limit or exclude the right of corporations to sue for defamation, and part of the grounds for that is that malicious or deliberate falsehood is actionable, is it your view that it would add to the clarity of the law generally and the ease of appreciating your position if the Bill incorporated an updated version of malicious falsehood applicable to corporations?

**David Marshall:** I can answer that quite simply. The answer is yes.

**Q294 The Chairman:** My last question is for Ms Gooch, but any of you can chip in. Three or four times you have educated us on the chilling effects of letters and threats and, to use your phrase, bullyboy tactics. I am unclear about what sort of law you would like that would remove that possibility. Can you help me?

**Charmian Gooch:** I think a lot of what is in this draft Bill would go a very long way to achieving that. There are a number of issues still to be addressed.

**Q295 The Chairman:** Specifically?

**Charmian Gooch:** Clause 1 is strengthened to include serious and substantial, as opposed to just substantial, which provides less protection than currently exists. Responsible publication reinforces public interest, which is excellent. The geographical and subject area extension of privilege is very positive, with the caveat that corporates need a closer look and need to be extended. I do not know if there is time to go through them all. One of the biggest points is that it is a piece of sanity to bring in the single publication rule.

**Q296 The Chairman:** The difficulty I am having is around your concept of chill. If all of this was the law of the land, do you really believe that you would not get letters

and threats and bullyboy tactics? If you believe that you would, what would you like to do about that?

**Charmian Gooch:** Part of the provisions here address some of the inequality of arms issues. A lot of it is about the scale of the threat and the possibility of winning. How real is the threat? There are elements in here around responsible publication and public interest, the definition of defamation and the substantial harm test. They will go a long way to addressing the scale and depth of some of these threats. Of course there is going to be a period of case law around all of this and a lot of this will then be tested out. That is par for the course.

**The Chairman:** It is my job on behalf of the Committee, which I very happily discharge, to thank you very much for your time. Thank you for the submissions and for any future submissions that may be winging their way to us. Thank you for the obvious hard work that you put into preparing for this morning. We are most grateful.

## Lord Mackay of Clashfern and Lord Wakeham Oral Evidence, 18 May 2011, Q 297–325

Witnesses: **Lord Mackay of Clashfern** and **Lord Wakeham**.

**Q297 The Chairman:** My Lords, we are grateful and in your case we are honoured that you should have come. Thank you both very much. In our private deliberations we wanted to have evidence from a few people who were experts, who had been in the parliamentary and legal systems for a long time and who brought an element of wisdom and experience to special pleading evidence and the rest of it. We could think of no one better than the two of you, so we are extremely grateful to you for coming. I should tell you that Baroness Scotland was to have been with you, but she called me last night to say that she was involved in a Supreme Court case and late yesterday afternoon or early yesterday evening, two other parties became involved in the case and she was going to have to spend the whole evening and maybe part of the night reading the papers before appearing today. She said that she thought it was probably not a great idea to go to the Supreme Court and say, “I’m sorry, I can’t argue the case today; I spent yesterday evening preparing for a Joint Committee evidence session”. I took the view that that was eminently sensible. We will reschedule her and I hope you will accept that, in the circumstances, that was an appropriate judgment.

**Lord Wakeham:** I am sure she is right, but there is an element even in that about which is the more important—Parliament or the courts. We might come on to that.

**Q298 The Chairman:** In due course. I do not often do this, but I am going to exercise the prerogative of the Chair and ask the first couple of questions. Lord Mackay, do you think that a draft Bill that seeks to place on a statutory basis certain aspects of the common law would be helpful?

**Lord Mackay of Clashfern:** In a way it depends on the success with which the statute manages to do that. There is an element of outlay to be considered. Whenever you change the law, making it statutory, the words used in the statute are necessarily subject to interpretation. Therefore the early litigants immediately after the change may have the burden of financing litigation to establish or clarify the meaning of the words in the Act of Parliament. On the other hand, a clear statement of the common law in an Act of Parliament has proved to be useful in making it simpler for people thereafter to find out what the law is, instead of having to look through a body of common law that has been developed over quite a long period. On balance, I would think that the sort of changes that are proposed here are ultimately likely to be beneficial.

**Q299 The Chairman:** My second question to you if I may—I am touching a number of issues that I imagine colleagues will want to pursue—is about jury trials. What do you think should be the role of a jury trial in a defamation case, if any?

**Lord Mackay of Clashfern:** As you know, hitherto jury trials have been much in use in defamation actions. There was a big problem for a time in connection with the damages that could be awarded, because if the Court of Appeal thought that the damages were too large, the only remedy they had was to order a new trial. That could sometimes produce a smaller award and sometimes a larger award, and

anyway there was no guarantee about what the award might be, because there were no criteria. The judge tries to estimate something in connection with the reputation of this person, but reputation is rather difficult to measure in financial terms. We were able to modify that somewhat by giving the Court of Appeal power to substitute its award for the jury's award. That has had a beneficial effect, in that criteria have had to be articulated by the Court of Appeal for the purpose of considering awards of damages in defamation actions. So there is an element of considerable improvement in the law already, modifying simple jury trial.

On the other hand, jury trial has been thought to be of use in connection with public figures and that kind of thing, where it might be thought that the establishment—I do not for a moment accept the existence of such a concept—might want to support somebody who was thought to be perhaps a distant member of it. Therefore, a jury was a better tribunal to get rid of that possibility. I think that is no longer a tenable point of view. I am very content that it should be left to the discretion of a judge, the presumption being that a judge alone, giving full reasons for his opinion, is a better tribunal than a jury in this case. I make no comment about juries in other situations, of course, but simply in connection with defamation. Obviously if a judge thought that there was some reason of the kind that I have mentioned or some other complication that might suggest that a judge would be favourable to one side or the other—I believe that that is very unlikely to be the case, but even if there was a suspicion or thought of it that could be adumbrated in a particular case—a jury trial would be ordered. Otherwise, it seems to me a useful improvement in our procedure to eliminate jury trials, generally speaking, from the defamation field.

**Lord Wakeham:** Looking round the world, I am not sure that establishment figures are doing that well in the courts just at the moment. Leaving that on one side, I am no lawyer, but I think the attempt to put it in this particular Bill is very fair and would have my support. It has just one major difficulty, which is the defence of reasonable and responsible journalism, which I twice persuaded the last Government to change. The first time was to put exactly that in the Data Protection Bill. It was not in the Bill when it started. I also persuaded them to do it in Section 12 of the Human Rights Act. The first has worked pretty well, I think, and the other has not. Maybe we will touch on that later on. I am not clever enough to tell you whether it is the general thing, but I think it is right in this particular case.

As far as jury trials are concerned, I am very doubtful indeed about where there should be a jury in these cases. I would leave it entirely to the judge. I would have thought that we have a pretty good record in this country of a judge making sure that he does not sit if he has any sort of relationship with any defendant in the box. I do not consider that to be a serious worry. Their own reputation would require them to stand down if it turned out to be their cousin or something like that. I am not worried about that.

**Q300 The Chairman:** One final question and then I will let colleagues ask their questions. Lord Wakeham, we have talked to some of the national newspapers—or they have talked to us. They rather like the Press Complaints Commission. They indicated that they would be willing to consider financing a parallel early resolution mediation service, not in the PCC, and they adopted a fairly negative attitude to suggestions such as equal location and prominence of apologies, as opposed to what they do at the moment. They tend to trumpet the problem and put a correction on page 37, line 59. I think this Committee needs to give some thought to whether the balance of holding free speech to accountability is right. We would very much welcome your guidance.

**Lord Wakeham:** The first thing to say about the Press Complaints Commission is that it is entirely free. That is a very important factor. I dealt with something like 3,000 or 4,000 cases a year when I was the chairman, which is a good time ago now. That is a big factor in the scale of things, because the whole elephant in the room on this Bill is what is going to happen about costs.

The second thing is that it only deals with cases where the person who feels aggrieved wants to complain. I was told many a time by others to investigate a certain thing, but it is no good when the person who has been aggrieved knows perfectly well that there is a hell of a lot more in the locker and if we start complaining they will bring the rest of it out. The absolute right of the person who does not want to complain should remain with the Press Complaints Commission. The Press Complaints Commission got many criticisms for not investigating this or that, but the fact was that the person who was aggrieved did not want to complain.

The other thing is that when I was there I changed the rules regarding publication of apologies. If a newspaper had wronged somebody on the front page of the newspaper and the simple answer was to say that the apology or correction had to be given equal prominence, the newspaper would say, "Well, what happens if the Queen dies? Do you put that on page 2?" You have to leave the editor some discretion on how to do it. I made it a rule with the editors that it had to be done in a way that I was satisfied was reasonable. I found out what they were doing and in the circumstances I used my judgment on whether this was adequate prominence for the apology. I had some fairly good rows behind the scenes when they did not want to do it, but that was the way that I dealt with it. This Bill has the potential for a substantial improvement in the situation. I would expect judges under this Bill to ask litigants whether they had tried the Press Complaints Commission, or why they had not. Why are they bringing a legal case to court when there is a perfectly reasonable way of getting some resolution to this matter at no cost to anybody? I heard your witnesses talk about NGOs and the threats that are made to them. They gave you their evidence and I am not adding to that. These sorts of things happen, as I know perfectly well. I want to lessen them.

**Q301 Lord Bew:** Lord Mackay, at the heart of our dealings is the substantial harm test. I wondered whether you had any views on that. It would be of value of the Committee to hear them.

**Lord Mackay of Clashfern:** As it happens, I was thinking of making a comment on that. In the Bill, "substantial harm" is followed in Clause 2 by responsible publication. Clause 2(2)(b) talks of the seriousness of any imputation. I think I am right in saying that this level of seriousness is the criterion that is used in the judgments in this area. One of the problems is that there is a distinction in my mind between the seriousness of the allegation and substantial harm, because substantial harm depends on what reputation you have before you begin. That is a matter of fact, not just of the seriousness of the imputation. Therefore there is a distinction between these two that is important from the point of view of the procedure that is to be used in determining the issue. For example, if the issue is a defence of truth, the burden of proof at present rests on the defendant, once it is established that there is a defamatory statement made by them. I would be perfectly content, in accordance with the present law as I understand it, that the test should be whether the imputation is sufficiently serious. If it is, then the onus would shift, assuming that is the law that we are going to continue with. As you know, there is quite a lot of momentum behind the view that that should be changed. Assuming that the law is as I have said, I think it would be better to have the seriousness of the allegation as the test in Clause 1,

rather than substantial harm. As I say, that involves a question of fact in my mind, whereas the seriousness of the implication is a question of looking at what the actual words are. A judge could determine that perfectly easily without any inquiry into the facts.

**Q302 Lord Bew:** Thank you very much. That is very helpful. Those who defend the wording we now have would say that without it you are opening the floodgates to cases where trivial harm only is involved.

**Lord Mackay of Clashfern:** Or where it is a completely trivial remark. The problem is that harm has a slightly wider implication than simply the seriousness of the nature of what is being said.

**Q303 The Chairman:** Just to clarify, how would you try to prevent an avalanche of trivial claims?

**Lord Mackay of Clashfern:** Instead of causing substantial harm, I would say that it should be a serious imputation on the reputation of a claimant. That would be a threshold limitation on the action. A judge could throw out an action on the basis that an imputation was trivial, or not serious, whereas if it is substantial harm, the judge might not manage to throw it out considering the nature of the imputation, because he would have to look into the existing reputation of the claimant, if any.

**Lord Wakeham:** I do not think my conclusion is very different, but I come at it slightly differently. The thing that worried me about substantial harm is whether that would then create a whole bunch of legal activity, which costs a lot of money, fighting the question of whether it was substantial. I would much sooner have a judge able to determine that and say that in this case there is no substantial harm and you had better appeal to somebody else. It should be part of extending the triviality side of things to stop some of these cases coming before the courts, because I think there are far too many.

**Q304 Rehman Chishti:** I have a question to Lord Wakeham and another to Lord Mackay. The first is about corrections that are made in a national paper. We have heard evidence that a certain national newspaper has a certain page where all the corrections take place, but another editor said that it was up to them where they put it. Would you like to see a system that others would follow where, irrespective of the national story on the front page, there is a certain page where all the corrections take place and people know where to go? My second question, to Lord Mackay, is with regard to judges having the discretion to order an apology to be made. I understand that at the moment they do not have the power to ask that an apology is made in certain cases. Would you like to see a discretion where judges do have that power to ask that an apology is made?

**Lord Mackay of Clashfern:** The difficulty about an apology being required is that you have to believe in it. If you do not think that you have in any way wronged a person, even if a judge thinks you have, you still have the point of view that you are right. You only have to think of the number of court cases that you come across in which the unsuccessful party thinks that he was right. In an appeal, the judge who has been overturned has much the same point of view. You have to think of that. That is the reason, as far as I understand it, why a judge does not have power to order an apology under the present system. I believe on the whole that that is a reasonable point of view.

**Lord Wakeham:** On the prominence, or where you put the apology, I would not be in favour of saying it is on the bottom of page 7 or page 2 or wherever it is.

There was a time when I used to look at engagements in the paper, then I looked at births and now I look at deaths. I do not know who is going to be busy looking at apologies in a paper. The plan that I had and instituted in my day—I do not know whether it continues now—is that in seeking its adjudication, the Press Complaints Commission made it clear to the newspaper what they would accept as an essential rectification and a publication of the judgment. That is the way I would do it. The second thing is that apologies ordered by the courts seem to be one more thing for which costs can be incurred, because there is going to be an enormous great debate about whether it is a proper apology or not. That is one of the advantages of self-regulation. That can be negotiated behind the scenes at no cost to anybody and a satisfactory settlement can be reached.

**Q305 The Chairman:** Just for clarification before I call Mr Lammy, twice or three times you have used the phrase “behind the scenes”. Why is that so significant in your mind? Why could it not be in front of the scenes as part of the public handling of what was potentially a public defamation?

**Lord Wakeham:** Because almost certainly, in the realities of the world, the newspaper would say that they had to be represented by counsel, then there would be questions of costs and the poor devil who has been wronged in the newspaper would be sitting there with all these legal beagles tearing them to bits. In these cases, which we are trying to avoid going to court, it is far better for somebody of some real standing and position to go behind the scenes and find out what went wrong as best he can and then get an agreed position that is fully publicised. Of course it is public and both sides have to agree to it. There is nobody forcing anybody to go to the Press Complaints Commission. If they think they can do better in the courts, good luck to them. When I was there I did my level best to find out first whether the person wanted to go to court or whether they wanted to go to the Press Complaints Commission, because I was not prepared to allow a free service, financed by the newspapers, to be used as a trial run by complainants to see how they got on, and then subsequently take the results of that and say that it is the evidence for the court. That was not satisfactory. Self-regulation does work, but of course it has limitations.

**Q306 Mr Lammy:** As you have just said, self-regulation does work. I would like to understand more about whether you think it is working. What is your assessment of self-regulation in relation to the press in this country?

**Lord Wakeham:** When I took the job on, which is a long time ago now, both major political parties had made noises about bringing in statutory control of the press. I was a member of a Government that said it was going to do it, and the Opposition at that time said they were going to do it. During my time, I took it as my task to remove that from the scene and get a free press that was sufficiently responsible. During my experience, the newspapers fought like fury if they thought that the Press Complaints Commission was going to come to a finding that was critical to them. They did not in any way ignore the Press Complaints Commission. They fought very hard to get it right. I think that by and large that is still true. I do not know whether people complain enough to it. There are various things. They need to continually look at the editors’ code. I am not much to do with it these days, but, for example, when newspapers were defending their story, as they are perfectly entitled to do, I would seek from them an undertaking that none of the story had been obtained by telephone hacking, for example. The world keeps moving on and I would keep bringing it up to date, but I am not running it any more. I think he has done a pretty good job.

**Q307 The Chairman:** Lord Mackay, do you have any thoughts from a legal point of view on the Press Complaints Commission?

**Lord Mackay of Clashfern:** I have some thoughts on the possibility that you mentioned about procedure for trying to settle matters, even after litigation has started. I thoroughly believe in mediation as a simple way of proceeding, but in order to be successful it requires both parties to be willing to mediate with some independent person doing the mediation. That has proved very successful in other areas. There is a feeling in some quarters—I am not sure how justified it is—that the newspapers are so powerful that you are rather at a disadvantage in trying to negotiate with them. They put out their story and they may or may not have told you before that they were going to do it. Then they feel pretty strongly the need to defend their story and they have pretty strong resources, which most people on the other side do not have in that connection. I am entirely in favour of any system of mediation that produces results. I do not think it is necessary to have it in statute. The precise form of the mediation and how it is done should be a matter that the court authorities and others could set up. As Lord Wakeham said, it is possible to have a condition that would require mediation to be attempted before you proceeded with litigation, but that has a certain compulsory effect about it which, from my point of view, is slightly different from mediation. If you have to mediate and do not really want it, you would be going into it as an unwilling party. That is not a particularly good way of starting in any kind of voluntary or agreement process. I would be in favour of any sort of mediation that would work being tried, but I do not think it should be statutory and in my view, to be successful it cannot be compulsory.

**Q308 The Chairman:** Lord Wakeham, when the newspaper people were here, they were quite positive about mediation, but they were quite negative about doing it under the auspices of the PCC.

**Lord Wakeham:** I would be a bit shocked if they said that when I was chairman of the PCC, because I used to mediate and I found solutions to these things as best I could. I think they would be concerned about compulsion. I want to see a judge saying to a litigant, “Have you gone to the PCC and if not, why not?”. I am not saying it should be compulsory to go, but most people would get the message that if you should have gone and you have not, that is not going to help you too much in this case. I would use voluntary persuasion. Newspapers are always a bit cautious about things. The trouble is that the newspaper industry pays the costs of the whole PCC and newspaper finances are not what they used to be. That is part of the problem.

**Lord Mackay of Clashfern:** If the PCC makes it a condition that you cannot go to court, the person who is seeking to make a claim is being held to a certain degree of ransom.

**Lord Wakeham:** I agree. That is absolutely right.

**Q309 Dr Huppert:** We have had various discussions about the role of declarations of falsity and malicious falsehood. Do you think they work as they currently are? Are they useful? Should we be reviewing them more carefully?

**Lord Mackay of Clashfern:** The present system, so far as untouched by this Bill, on the whole is reasonably satisfactory. As Lord Wakeham said, there is the cost question, which is not dealt with in this Bill, but everybody I have spoken to about it recognises that there is a big problem in the costs area and Lord Justice Jackson’s proposals will deal with that. The Government have indicated that they intend to



accept the thrust of Lord Justice Jackson's proposals and to modify the no win, no fee arrangements so that the additional costs involved in that procedure do not fall on the defendant in any event.

**Lord Wakeham:** I have nothing to add to that.

**Q310 The Chairman:** Can I ask a question that I think you heard me ask earlier? If I am defamed, why should it be important to me what was the state of mind of the person who was doing the defaming? I am defamed; why should I be concerned about whether it was malicious?

**Lord Mackay of Clashfern:** The principal relevance of malice is in relation to defences. It is in relation to whether the person who made the admittedly defamatory statement should be protected. As a matter of morality, perhaps, that question involves his or her state of mind in making the statement. If they had reason to believe it, that is a much less offensive type of defamation from his point of view than one that was deliberate in order to harm the other person. Therefore, it is a relevant question in connection with whether the person doing the defaming should have a defence.

**Q311 Dr Huppert:** Can I be absolutely clear? We have had a lot of discussion about the role of remedies for non-natural persons in particular. Do you believe that the malicious falsehood and declarations of falsity routes currently work fairly well and provide adequate remedies for people? Is that what I should read into what you have just said?

**Lord Mackay of Clashfern:** I think that on balance, as I said at the beginning, replacing the present system of common law—the defences are to some extent common law and to some extent statutory—and substituting for it the defences here, with the modifications that that involves, seems on the whole to be a step forward.

**Q312 Lord Marks of Henley-on-Thames:** I have a number of fairly short questions. The first is to Lord Mackay, about what you said about the substantial harm test. I was wondering whether a serious imputation test is not equally capable of calling for a resolution—an imputation that when you say something about a gangster with criminal convictions it may be far less serious than the same thing said about a vicar.

**Lord Mackay of Clashfern:** I do not agree with that, with respect. The seriousness of the allegation depends on the allegation. Whether or not it does harm depends on a lot of other circumstances, including the previous history of the claimant.

**Q313 Lord Marks of Henley-on-Thames:** The next point is that we have heard a great deal about the chilling effect of threats of libel. There seems to be general agreement that the modification of the defences proposed to the substantive law contained in the draft Bill will do a great deal of good. But there is another widespread area of concern about procedure and cost, which you have touched on. You have pointed out that that is a matter for changing the rules and the procedure and for changing the court system. One possibility is for this Committee to produce a blueprint of the purposes that we would like to see achieved by changes in the procedure and in the costs rules. As Lord Chancellor, you had the power to direct the purposes for which the Rules Committee should change the rules. Would you regard that as a sensible way of proceeding, as an adjunct to the substantive changes that are proposed in the Bill?

**Lord Mackay of Clashfern:** Certainly, if you felt able to do that, the Lord Chancellor and the Rules Committee would probably welcome that as a helpful start. After all, you have heard a good deal of evidence and will have heard more before you have finished, and you will have had representations made to you, and so on. I think that would be very useful. As far as costs are concerned, in many ways there are just principles involved, which the Government have now accepted. I am sure that they would welcome your views on the detail of it. If I was in that position—fortunately I no longer am and I am glad to say it has been a good long time—I would welcome help from any quarter. A Committee of this kind would seem to me an eminently influential quarter from which such help could come.

**Q314 The Chairman:** Can I just ask Lord Wakeham, from his knowledge of both ends of the corridor, whether he thinks that both Houses would welcome a report that offered some guidance on procedure over and above substantive comment on draft clauses?

**Lord Wakeham:** I think that most people—Members of both Houses are fairly representative of this—look at all these things very much at the cost end first. That is the first thing that people consider: “What can we do about this? It’s terrible. What is it going to cost us? Would it be better just to let it ride?” and so on. If you presented your proposals with the purpose not, if I may say so, of telling the courts how they could run themselves better, but saying that you believe these proposals would significantly help potential litigants to get a fair settlement without massive extra costs, people would look at it sympathetically. I recommend that you have a go at doing that.

**The Chairman:** That is very helpful, thank you.

**Q315 Lord Marks of Henley-on-Thames:** One of the proposals we are looking at is the suggestion made by some that we should have a separate defamation court or tribunal with its own specialist judge and specialist procedures. Would you regard that as a sensible way forward?

**Lord Mackay of Clashfern:** I have to say that in my view, specialisation in the law, on the whole, is not a particularly good development. Sadly, it has happened. I have experience of listening to people in a room not very far along from here, in answer to a question from the Bench in a particular case, saying, “That’s not my area”. There used to be an idea that everyone was supposed to know the law. If that was ever anything like a fact, it is certainly very far from being a fact now. People who specialise in one part do not know much about other parts. I think that just adds to cost and difficulty. If you have specialists in the defamation area, they may have to consult people in connection with, for example, the tax situation in relation to damages and that kind of thing. You know the effect that has. It just multiplies the costs that Lord Wakeham is anxious should be reduced. I am not much in favour of specialist courts of any kind. Admittedly, tax law is very complicated and is quite a separate area from other parts of the law, to some extent, although the trust law and all that sort of thing comes into it, too. I have been in favour of a tax court for a while, but I am not very much in favour of other new specialisations in this area.

**Lord Wakeham:** I absolutely agree with what Lord Mackay has said and it is very easy to illustrate the dangers of going down that road by looking at the Human Rights Act. On Article 8 and Article 10, everybody said at the time that it would bring in a privacy law. Some people thought that would be a good idea and some people said it would not be a privacy law. I was very much opposed to it. When it left the House of Lords, the last thing I said was that I stood ready to have discussions about

it. I then did have discussions with the then Home Secretary. Section 12 of the Act was added in the Commons on 2 July 1998. If you read it, they kept saying that this was with the agreement of Lord Wakeham. This was in order to say that the judges had to recognise the primacy of freedom of expression in balancing privacy law. The fact of the matter is that judges have probably interpreted the law correctly—I am not criticising them—but the result of what they have done is totally different from what Parliament intended. The Home Secretary said that there would be no injunctions, or extremely few, and there would be no super-injunctions. I have the reference somewhere, but I cannot find it. One judge after another, who specialised in these issues, made their interpretation of the law and the next one fed off the last one. The result is that we now have what we have in this country, which in my view is a misinterpretation of Section 12, but they are the judges and they did it. It is our fault that we did not get the law clear enough, but that is the danger of specialised courts. You end up getting it wrong if you are not careful, because one feeds off the next.

**Lord Mackay of Clashfern:** That it is part of the function of the Court of Appeal. There has been a recent case in this area in the Court of Appeal in connection with the anonymity of a plaintiff. The judge refused to grant the plaintiff anonymity and the plaintiff took it to the Court of Appeal. It was open to judges who were not specialists in libel law, although they were all highly competent. This is the law of privacy rather than the law of defamation, but one of the problems is that very few of these cases have gone to the Court of Appeal. That is to do with people preferring to fight it otherwise than in the court.

**Lord Wakeham:** The law of privacy and the law of defamation, as the judges have tried to interpret reputation as part of privacy, are getting closer and closer together, so it is relevant. My learned friend is absolutely right about the press and the Court of Appeal. In one case—I will not quote chapter and verse, but I could if I needed to—the first court ruled against the newspaper because the judge had sought to interpret the Press Complaints Commission, which he was asked to do, but did not do very well. The newspaper group, which was in favour of a privacy law, decided that the result suited them frightfully well and did not appeal against it. I am sure the Court of Appeal would have thrown it out if they had appealed, but the newspaper concerned decided not to appeal because it moved things in their direction. That is why we have to get the law right.

**Q316 Lord Grade of Yarmouth:** The issue of mediation is tricky because most people who have been defamed would really welcome speedy redress and a quick apology. The timeline is crucial. Others who sue for defamation are seeking to spin it out for as long as possible in order that the issue should be closed down and it should be very difficult to go on reporting it. To what extent do you think it would be possible for judges to use the knowledge of what attempts there have been at mediation before allowing a case to be heard in court? All kinds of hurdles are put in the way of cases getting to court. Given those two different timeframes, does the mediation issue have to be left entirely to the discretion of the judge, or can we help the judge?

**Lord Mackay of Clashfern:** The judge could take account of whether attempts have been made at mediation, but one of the things that is open to the judge is to put a time limit on any interim order that he or she makes. One of the games that I have come across occasionally is that somebody who knows perfectly well that it is not defamation at all, in the sense that there is a defence of truth or justification, decides that the best thing to do is take out an interim injunction if he can and then leave it standing as long as it will last. Of course, an interim injunction lasts

as long as the litigation lasts, unless is it conditioned by some special provision that says you have to come back at a certain time. There is scope in that area for a degree of enforcement or limitation on interim injunctions, at least in the appropriate case. I am not telling judges what they should do, naturally, but at least it is something to think about. Some of the matters that have become rather subject to public concern recently may have a flavour of that in them.

**Lord Wakeham:** I am sure that is right. It is not unknown in self-regulation cases for there to be a delay. The editor decides to spin it out. I am afraid to say that in maybe four cases that I can think of in my time, I got straight in touch with the proprietor of the newspaper and said, "Your group stands by the principles of the Press Complaints Commission and what am I going to say if you don't get your man on with his job fairly soon?" There are a number of statements on record by senior press proprietors backing that up. It happens across the board. The injunctions and the stopping of it needs to have a purpose. It is not to decide the case; it is, to my mind, to make sure that if a case comes there is not a lot of biased publicity beforehand. There are a limited number of cases where I would have thought that that was appropriate.

**Lord Mackay of Clashfern:** The damage has already been done. When you are trying to keep it private, if the thing becomes public at all then the case is not worth having. An injunction may be necessary to protect the existence of the case at all. It is sometimes possible that the existence of the case will not in the end prove to be justified.

**Q317 Lord Grade of Yarmouth:** I have another very quick question, if I may. We have had a lot of evidence supporting the notion that corporate entities, whether they are limited, listed companies, NGOs or whatever, should not be able to sue for defamation because they have other means of legal recourse. Do you have a view on that?

**Lord Mackay of Clashfern:** I think the Derbyshire decision of this House, as it was then, is a good principle.

**Sir Peter Bottomley:** For clarity, that is the council?

**Lord Mackay of Clashfern:** Yes, Derbyshire County Council. It sets out the principle that bodies concerned with governance should not be able to sue for defamation because, in a sense, it is part of governance to deal with the characters of people. It was expressed more elegantly than that by Lord Keith. There is quite a lot to be said for leaving that to develop in the law. That principle does not apply to big corporations. There is a question about whether a corporation has a reputation, apart from a reputation for making money. Some views have been expressed that unless a defamation has damaged a corporation financially, it should not be allowed to sue. That really depends on the view that a company is only there for making money. Companies that are limited by guarantee or charities might well be put out by that kind of restriction. Looking at issues raised in the paper, apart from the Bill itself, I would wish to leave that alone.

**Lord Wakeham:** My instinct is to be very cautious about companies being able to sue, but I do not think I am clever enough to say that it should never happen in any circumstances. I would want to restrict it and I would certainly want to feel that any other remedy that is legally available to the company should be used before they bring an action for defamation.

**Q318 Baroness Hayter of Kentish Town:** I should like to go back to one of the overlaps between privacy and defamation, which is about spent convictions. In a

sense, they affect your reputation. You do not expect them to be in the public domain, but they are true and with the internet they are becoming more available. Although the issue is true—you shoplifted when you were a child, or something—do you think this issue should be dealt with under defamation if it is brought into the public domain?

**Lord Mackay of Clashfern:** I think there is a great deal of wisdom in letting bygones be bygones after a certain time. I remember long ago appearing in a case where a man had been in prison for some time and had then gone straight. He had then offended again. I remember a very wise Scottish judge saying, “When you come out of prison, to go straight is pretty difficult”. Therefore, I would not be in favour of putting any impediment in the way of trying to go straight. There is a question of when that might happen. There is a reasonable time in the Rehabilitation of Offenders Act. Unless the person was trying to represent himself as something different from what he was—

**Q319 Baroness Hayter of Kentish Town:** Can I clarify? I think it is being used as an excuse by what I would call irresponsible journalists, who impute a person’s reputation. The defence is given that 20 years ago they had a conviction. In a sense, they are bringing into the public domain something that, I agree, I had thought was spent.

**Lord Mackay of Clashfern:** I am trying to say, perhaps with too many words, that that is an area where limitation of using the previous history of the person is very justified.

**Lord Wakeham:** I do not know whether we are going to have any questions about the internet, but it was implied in that. As far as I was concerned, I had the first example of newspapers putting their papers on the internet. There was no way that I felt able to extend the role of the Press Complaints Commission to supervise the internet. But I persuaded those newspaper companies that they would voluntarily agree that anything they put out on the internet would be covered by the Press Complaints Commission code of conduct. That worked reasonably well, to the point when—those around here who have been in politics for as long as a number of us have will remember—there was an occasion when the son of a very senior member of the Cabinet got into difficulties. For nine days, I managed to persuade newspapers not to mention who this boy was, voluntarily. I said, “Look, his father is famous, but he is not famous. He is only famous because he is the son of a famous person”. It was quite wrong that his actions should be reported in the newspapers as they were. Somebody went to court and tried to get an injunction. The judge perfectly reasonably said, “How can I give an injunction against the newspapers stopping reporting of something that is freely available on the internet? It is simply not reasonable.” The name of the person appeared the next day in all the newspapers as well. It is amazing what can be done by persuading people that a code of conduct that is satisfactory should be adhered to. It has worked.

**Q320 Mr Lammy:** In relation to that point on prominence, we recently had the Yeates case, where a member of the public was quite badly treated in the media. There is a sense that there is more gratuity and coarseness in our media. Do you accept that? I was surprised that you were not so keen on prominence in relation to apologies previously.

**Lord Wakeham:** I am not against prominence, but I do not believe that a judge or someone else should decide it. It has to be dealt with in the context of the position of the editor and the newspaper. If he is ordered to put it in the paper, maybe

he puts it in the next day because there is big news. I believe that the chairman of the Press Complaints Commission seeing that the adjudication is given appropriate prominence has happened. I have had some frightful rows about it, but it can be done.

**Q321 The Chairman:** It is a compliment to you two gentlemen—which does not surprise me—that we are in danger of running over a little bit. I need your permission just for an extra five or seven minutes, if you are willing. We cannot do more than that, because Commons colleagues have to get down for Prime Minister’s Questions. Would you be willing to grant us a small indulgence?

**Lord Wakeham:** In my day that was free. In his day that was a very expensive exercise.

**Q322 Lord Grade of Yarmouth:** Very briefly, on this issue of prominence, as I understand it from my induction at the PCC, which I have declared, in the event that there is a disagreement between the PCC and the editor over the level of prominence, if the PCC is not satisfied with the end result it can require the newspaper to repeat the apology a second time, so there is a really good sanction against the newspaper, which ensures that an agreement is reached. Reaching agreement always depends on the sanction.

**Lord Wakeham:** I would think that was right. In practicality, the way to deal with that is to pick the phone up and tell the chap what he has got to do, not too much bureaucratic writing and argument.

**Q323 Lord Morris of Aberavon:** I will be brief, too. I am mindful of the comments of Lord Mackay that Clause 1 on substantial harm is not sufficiently comprehensive. In Lord Lester’s Bill, there is a power to strike out. Is that not inherent in the words of the purported clause? Lord Mackay was suggesting that one way or another, “the seriousness of any imputation” in Clause 2(2)(b) could be combined with substantial harm. It would be some assistance to us if Lord Mackay would kindly elaborate on that. What would it add to substantial harm and how would it be done?

**Lord Mackay of Clashfern:** I would take out substantial harm and replace it by the seriousness of the imputation. That is a test that I think a judge can apply on the basis of the imputation, whereas substantial harm involves factual material about the history of the claimant, for example.

**The Chairman:** The last questions lie with the senior Member of Parliament.

**Q324 Sir Peter Bottomley:** Having something in the law does not stop it happening. There would not be 2 million people in jail in America or 80,000 here if people always obeyed the law, so we should not think that the law is going to change everything completely. I have two quick questions. Blackmail is when someone comes to me and says, “Give me £20,000 or I will go and tell *The Sun*” and I get anonymity. If they cut me out and go straight to *The Sun*, does it matter that there is no proper redress or anonymity?

**Lord Wakeham:** It depends whether it is true.

**Sir Peter Bottomley:** Let us say it is true.

**Lord Wakeham:** If it is true, I am very much in favour of a free press. I would need a lot of persuasion to say that people should not be able to say things that are true.

**Q325 Sir Peter Bottomley:** The second thought is rather different and is built on a personal experience that I had some time back. When a newspaper printed something basically saying that I was a sexual criminal, the Press Association kindly put out something saying, "Watch out. There will be action for anyone who even repeats the allegation. There is not going to be a denial, but if you repeat it, it will be actionable. You have been warned." I am not sure that that is their normal practice. The BBC very kindly decided that unless they thought there was something in it, they would not even show the newspaper that had it. A newspaper with a circulation of 2 million published something, but the whole thing stopped dead. There was no repetition and things got sorted out later on. What kind of process might there be on that, or is it just something that you should not be able to do?

**Lord Wakeham:** When I was running the Press Complaints Commission, Lady Howe was running the Broadcasting Standards Commission. She was, reasonably, very concerned that there would be judicial review of what she did if she intervened before the fact. She took legal advice on what to do if she knew something awful was going to happen and she rang up and said, "Look, you should not do this or should not do that". At the Press Complaints Commission, I decided not to seek legal advice and decided to be practical. I did ring up and say to people, "Do you realise what is going on? This is an extremely... whatever" to try to stop it. There are constraints on doing it in advance, but it had a beneficial effect. At one time I was taken to judicial review. Lord Pannick, who is a Member of the House of Lords now, sorted them out very quickly and we won the case easily. There were two lines of defence. We lost the first one, which is that there was not any justification for it. The second one was that we were on a par with the Jockey club, which was not a public body and therefore we could not be had. But we never had to use that argument.

**The Chairman:** It has been extremely helpful and extremely pleasant and we are very grateful. Thank you very much indeed.

**Lord Mackay of Clashfern:** I hope you have great success.

## **Internet Service Providers Association, Yahoo and Professor Ian Walden**

### **Written Evidence, The Internet Services Providers' Association (ISPA) (EV 56)**

#### **About ISPA**

*The Internet Services Providers' Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.*

*ISPA's membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA, the European Internet Services Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.*

#### **Introduction**

*ISPA welcomes the opportunity to submit written evidence to the Committee's inquiry into the Draft Defamation Bill. We hope that the views expressed in this document complement the oral evidence that Nicholas Lansman and Mark Gracey gave on 23 May 2011 and help the Committee to provide the Government with a set of balanced recommendations and contribute to making UK libel law fit for the Internet age.*

*ISPA generally supports the proposals made in the MoJ's consultation document, particularly the introduction of a single publication rule and the increased protection for responsible publishers, such as the new public interest defence. However, our response focuses on those aspects that are most relevant to ISPA's members and we hope our views are of value to the Committee.*

#### **Background to ISP liability and defamation online**

*Before answering the questions provided to us by the Committee we would like to use this opportunity to provide the Committee with some background information on the various types of providers of internet services. We hope this will help to clarify there are different types of Internet Service Providers which was the source of some of the misunderstanding that may have occurred during the oral evidence session of the Committee.*

*During the oral evidence session the Internet has been described as the Wild West<sup>117</sup> and questions were asked whether the Committee "should recommend to Government that internet service providers should have some legal accountability for what they put on the internet?"<sup>118</sup> ISPA believes that these descriptions do not accurately reflect the current state of play and fail to take into account the existing legal framework that assigns different levels of liability to different types of ISPs.*

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<sup>117</sup> Jeremy Clarke-Williams in HC 930-iii, p.39.

<sup>118</sup> Lord Mawhinney in HC 930-xi, p. 63.



Unlike the Defamation Act, which was developed at a time when the Internet did not play the same role that it is playing today, the e-Commerce Regulations 2002 – the principal regulatory framework for ISP liability – differentiates between three types of ISPs (access provider, cachers<sup>119</sup> and hosting providers).

**Access providers** are commonly referred to as an ISP. They connect customers to the Internet – either through fixed or wireless connectivity – which enables users to communicate online (for example by transmitting an email). As the ISP does not initiate or modify their users' communications and is only passing traffic across a network, they are deemed mere conduits under the E-Commerce Regulation 17 which grants limited liability<sup>120</sup>.

**Hosting providers** store others' content online – from the website of large corporations to an individual's personal website or user generated content posted on a website. Under the e-Commerce Regulation 19 hosting providers are not liable for the content they host as long as the service provider does not have actual knowledge of unlawful activity or information. However, upon obtaining such knowledge, hosting providers become liable if they do not act expeditiously to remove or to disable access to the information.<sup>121</sup>

In the context of defamation and libel, hosting providers are the relevant type of ISP as they actually host the allegedly defamatory content. However, as outlined above, they can already be held liable and we would therefore argue that they are sufficiently accountable for what their customers put on the Internet. If a person claiming they have been defamed is unable to remove allegedly defamatory content by contacting the person who put the content online, then they can contact the hosting provider of the websites where the content was made or, in the case of user generated content and chat rooms, the operator of the webpage and/or the host of the page. We believe that the purpose of the current consultation exercise should be to identify the best possible way to ensure that defamatory content is removed quickly without infringing on the rights of online publishers.

## Response to questions

Q1. To IPISA and Yahoo initially] Does the current law provide adequate protection to internet service providers, hosts, online forums, and bloggers? What practical problems do you encounter?

ISPA members feel that the current law does not provide adequate protection to ISPs as

- The e-Commerce Regulations and the Defamation Act are insufficiently aligned
- Current libel law effectively relies on a voluntary notice and takedown regime

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<sup>119</sup> Cachers are less relevant in the context of defamation and subject to the same rules as hosting providers. The response will therefore only describe access and hosting providers in greater detail.

<sup>120</sup> As mere conduits access providers “shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as result of that transmission.” (e-Commerce Regulation 17).

<sup>121</sup> It is important to note that under the e-Commerce Directive, ISPs are not obliged to monitor the information which they transmit or store and that member states are indeed barred from imposing general monitoring obligations on ISPs.

## **Insufficient alignment of e-Commerce Regulations and the Defamation Act**

*While liability for ISPs is principally regulated by the e-Commerce Regulations 2002, the specific area of defamation is principally regulated by the Defamation Act 1996. We feel that these two regulatory frameworks, especially section 1 of the Defamation Act 1996 and the e-Commerce Regulations 17-19 are insufficiently aligned and contrary to, for example, the statement made in the MoJ's consultation paper do not "provide[] protection along broadly similar lines [...] to certain types of online intermediary services (namely hosting, caching and mere conduits)."<sup>122</sup>*

For example, the 1996 Act offers a defence to a secondary publisher if it "did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement." The e-Commerce Regulation 19, however, offers a defence to a hosting provider if it "does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful. The trigger for Regulation 19 is the unlawful nature of a statement and accordingly, it can be argued that Regulation 19 offers a broader defence than section 1 of the 1996 Act which just relies on the claim that a statement is defamatory.

Under the current legal framework difficulties arise because ISPs feel that there is a lack of clarity with regard to how the current legal framework is applied to ISPs. This ultimately undermines the level of protection that legislators initially intended to supply to ISPs. ISPA would welcome a change to the law to clarify the legal framework and accommodate the online world.

As a minimum, ISPA members would therefore welcome the defences contained in the e-Commerce Regulations being replicated in the Defamation Act as far as possible. This would make the regulatory system more accessible, streamline the process for all parties involved and would remove the need to consult multiple sources of law.

## **Current libel law effectively relies on a voluntary notice and takedown regime**

Aside from the insufficient alignment of the Defamation Act and the e-Commerce Regulations, ISPA feels that current libel law effectively relies on a voluntary notice and takedown regime that does not sufficiently define key terminology, fails to provide ISPs with guidance to assess the validity of a takedown notice and ultimately forces ISPs to make an ill-informed judgement call whenever they receive a libel-related notice. This not only creates a secondary liability for ISPs, thereby undermining the intended level of protection, but also has implications for freedom of speech as notices are often directed at ISPs rather than the primary publisher.

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<sup>122</sup> Ministry of Justice. 2011. Draft Defamation Bill Consultation, p.44.

Voluntary notice and takedown has, to a certain extent, been quite successful. In relation to child abuse images, for example, the Internet industry helped to set up the Internet Watch Foundation which provided an effective solution to the problem of child abuse images hosted in the UK. The issue of defamation, however, provides for a different set of problems. In relation to child abuse images, even a lay person can clearly identify that the content in question is unlawful, so that ISPs only have to assess the validity of a takedown request. In relation to allegedly defamatory content, lay persons and, to a certain extent legal experts, are unable to clearly identify whether content is actually defamatory and unlawful.

The e-Commerce Regulations, for example, protect hosting providers from liability as long as they do not have “actual knowledge of unlawful activity.” However, the Regulations do not provide a clear definition of what “actual knowledge” actually means and expects ISPs, which generally do not have expertise in libel law, to assess whether content is unlawful. The lack of legal certainty and the limited legal expertise are aggravated by the fact that ISPs generally do not have full knowledge of the underlying facts to assess whether content is actually defamatory. Faced with this, ISPs tend to err on the side of caution by taking down content when they are faced with a libel-related takedown request.

This has potentially negative consequences both from a public policy and ISP perspective. ISPs are essentially acting in good faith, assume that the takedown notice is valid and that the content in question is defamatory. This, however, may not be the case which not only puts the publisher of the allegedly defamatory publication in a position where they can take legal action against the ISP, but also wrongly removes legal content from the Internet.

ISPA believes that the law needs to be updated, clarified and changed to provide ISPs with the level of protection that legislators intended to provide to them and to remove them from a position where they are forced to be judge and jury without having the necessary level of knowledge and legal expertise to make fair and just decisions on taking down content.

**Q5. What changes would you make to the law (if any) to prevent internet service providers and online forums being forced to self-censure, while ensuring that ordinary people have a practical way of challenging defamatory material that is published online?**

The MoJ’s consultation paper outlines various approaches to providing ISPs with greater protection against liability. Of these approaches requiring a “claimant to obtain a court order for removal of allegedly defamatory material before any obligation could be placed on the ISP,” would be ISPA’s preferred solution.

As outlined above, ISPs are generally not in a position where they are able to make an informed decision on the defamatory nature of content. ISPA believes that the best solution to this problem would be to ask a competent legal authority, ideally a court, to assess the validity of a takedown request. In this context, “actual knowledge” under the e-Commerce Regulations 18 and 19 would be defined as being served with a court order that states that an online publication is unlawful under the Defamation Act.

Upon receipt of a court order ISPs would be required to act according to the e-Commerce Regulations, e.g. to act “expeditiously to remove or to disable access to the information” if the ISP is a hosting provider. However, in order to provide clarity for all parties involved, the court order should further provide ISPs with clear instructions of what they are required to do and timescales for how quickly they are required to act. ISPs who comply with the process set out in the court order should be exempt from any liability for the actions they have taken in order to comply with the order.

Claimants should be required to confirm that they were unsuccessful in pursuing another entity with greater editorial control (e.g. the primary publisher) to take down the allegedly defamatory material before pursuing action against the intermediary. The claimant should further provide details about the allegedly defamatory material in a standardised format and ISPA believes that, in addition to the notice requirements set out in clause 9 of Lord Lester’s Bill, claimants should be required to specify the specific URL to facilitate identification of the allegedly defamatory material.

The court-based process should ensure that online publishers are given the right to defend themselves against claims that are brought against them. It must also be ensured that any request to disclose communications data or the identity of a user goes through the normal legal process.

**Q2. IPSA & Yahoo! Initially] You recommend that internet service providers and online forums are protected from liability provided they take down material when a court orders them to do so. Is it realistic to expect ordinary people to obtain a court order in order to protect their reputation given the time and expense involved?**

Throughout the various evidence sessions, Committee members and witnesses expressed the concern that a court-based notice and takedown system could be too costly for claimants and add significantly to the volume of urgent applications for injunctions brought before the courts. However, we would urge the Committee to consider that applications for injunctions that currently are not brought before courts are effectively processed by ISPs which do not have the resources and expertise to deal with them in a just and fair manner. Bringing these applications before a court

would ensure that they are assessed by a competent authority rather than an ISP; that online publishers are guaranteed a right to defend themselves and that only actually unlawful online content will be taken down.

Given the importance of getting this right ISPA, proposes that the MoJ and/or the Committee make this area the subject of a separate working group of interested parties to ensure that more time and expertise is given to this important area. This working group could, for example, explore whether something akin to a small claims court for minor defamation cases could solve the problem of access to justice. ISPA is also aware that the Libel Reform Campaign has provided the MoJ with a detailed proposal of an accessible court-based notice and takedown system and we believe that this proposal could be a starting point for the discussions of the working group.

**Q10. To ISPA and Prof Walden] Should Internet Service Providers do more to develop voluntary codes of conduct aimed at co-ordinating the approach and timetable for removing defamatory material? What should codes contain to ensure that people who are defamed can protect their reputation?**

ISPA generally promotes the adoption of voluntary codes and self-regulation tends to be an effective approach in a competitive environment such as the UK broadband market. In the context of defamation, however, we believe that the adoption of a voluntary code would do little to improve the current situation. Many hosting providers already offer referral mechanisms for people who would like to flag up allegedly defamatory content but these are tailored to the different hosting providers, e.g. those hosting websites and those hosting user generated content. Moreover, we believe that the key to improving the removal of defamatory content online is to provide ISPs with a clear definition of what constitutes a valid notice so that they have an objective set of criteria on which they can base their decision on whether they take down content. The status quo puts ISPs, which generally do not have expertise in libel law, in a position where they are judge and jury and a voluntary code would not change this situation.

**Q3. Could you comply with an obligation to attach a notice or take-down material within 24 hours of a complaint? Do you accept that any longer time-period undermines all attempts at preventing the spread of defamatory material?**

Hosting providers can generally remove content stored on their servers quickly (during working hours) but the speed essentially depends on whether ISPs are provided with a clear mandate which specifically identifies offending material correctly and contains an actionable instruction. As stated above, notices related to defamation do not necessarily provide ISPs with such a clear mandate and often require our members ask further questions and the process takes longer as a result. This further underlines our argument that ISPs need to be provided with a clear

definition of what constitutes a valid notice so that they have an objective set of criteria on which they can base their decision on whether they take down content.

*July 2011*

## Written Evidence, Yahoo! UK & Ireland (EV 44)

*In reply to your letter of 25 May, I attach responses to the additional questions from the Committee.*

**Q1. Could you comply with an obligation to attach a notice or take-down material within 24 hours of a complaint? Do you accept that any longer time-period undermines all attempts at preventing the spread of defamatory material?**

*It is possible to remove content online quickly (during working hours) when we receive a legal mandate which clearly and specifically (e.g.: via URL) identifies offending material correctly and contains an actionable instruction. Claims asking us to act but have not been through due legal process take longer to resolve because we would have to carry out a case-by-case assessment before deciding how to respond. It is worth noting that we often receive claims that do not identify the material or the statement with sufficient specificity or do not explain why the statement is defamatory. This requires us to ask further questions and the process takes longer as a result.*

*It is therefore important that the revised Act clarifies the law with respect to online publications and sets out a clear process for notification and removal of content.*

**Q2. Is it unrealistic for law makers to try to regulate the internet (with the aim of balancing freedom of speech with the protection of reputation in online publications)?**

*The online environment is certainly more challenging than tradition media but we believe there is a lot the Bill could do to clarify the law with respect to online publications and the position of intermediaries, and set out circumstances where content should be taken down. Certainly the current situation is not balanced but skewed heavily in favour of protecting reputation at the expense of freedom of expression and this should be addressed. We outline more detailed thoughts on what could be done in our response to the MoJ's consultation.*

**Q3. What changes would you make to the law (if any) to prevent internet service providers and online forums being forced to self-censor, while ensuring that ordinary people have a practical way of challenging defamatory material that is published online?**

*We believe the Bill is a one-off opportunity to make some important changes with respect to online intermediaries:*

- Provide for a separate definition for online intermediaries in section 1 which is distinct from the definition of secondary publishers.

- Include the eCommerce Directive’s liability framework on the face of the Bill, which has become the custom and practice for any new legislation which could apply to online content.<sup>123</sup>
- Address the procedural weaknesses of the legal framework governing online defamation in the UK by defining a notice and take down process and giving clarity on what legal mandate triggers an obligation to act – what constitutes “actual knowledge” for the purposes of online defamation claims.
- Provide a genuine legal safe harbour for intermediaries that act in good faith and follow a specified process – i.e.: introduce legal provisions which would ensure that online intermediaries cannot be sued by claimants where they are not the author or publisher of content believed to be defamatory.

*The review could explore a formal process for making this process work better for all parties – claimants, publishers, authors and online intermediaries. We favour an approach that mirrors the Communications Decency Act in the US, which relies on notice being given by means of a court order. We believe this option is the most consistent with the policy objective of safeguarding free expression. Requiring content to be removed by a court order ensures that due process is respected and that the author has the opportunity to defend themselves. We outline in our response to the MoJ how this might work in practice and what safeguards we feel are necessary to be consistent with the eCommerce Directive.*

*We note the concern about cost being a barrier to accessing the legal system for some claimants. We agree that the issue of cost and access to redress in court should be addressed to ensure that claimants can protect their reputation regardless of their means. This should, however, not detract from the principle and we would be concerned if cost were being presented as a reason not to clarify the situation for online intermediaries.*

**Q4. What are your views on the Government’s Bill, including the substantial harm test, the multiple publication rule and the proposed defences?**

*We agree with proposals to introduce a single publication rule with a one year limitation. We also agree that a claimant should have to prove substantial harm.*

*Proposals to strengthen protections for authors and publishers are welcome but, by not specifically considering protections for online intermediaries, the Bill creates a potential loophole where online intermediaries could become the new tactical target for those who want content removed from the internet. This has obvious consequences for free expression.*

**Q5. Should there be a public interest defence in cases where the material is on a matter of public interest and the author has acted in accordance with expectations of the medium or forum.**

*See response to Q4 above.*

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<sup>123</sup> For example: Terrorism Act 2006, Religious Hatred Act 2006, Criminal Justice and Immigration Act 2008.



*June 2011*

## Written Evidence, Professor Ian Walden (EV 64)

**Could websites be expected to comply with an obligation to attach a notice or take-down material within 24 hours of a complaint? Would any longer time-period undermine all attempts at preventing the spread of defamatory material?**

*I would expect that urgent notice and take-down procedures will already be in place for most major commercial providers of web-based services, since they will be anxious to protect themselves from liability, as much as to protect the interests of third parties. In the area of child sexual abuse images, for example, members will remove material reported to them by the Internet Watch Foundation within 48 hours.*

*Having the ability to take material down rapidly, however, does not mean that such procedures should be mandated upon service providers in respect of defamatory material. Take-down procedures for user-generated content interfere with an individual's right to freedom of expression. While a balance must be maintained between freedom of expression and other rights, any system will inevitably have to have a procedural 'error preference' in favour of either keeping up or taking down content. In my opinion, while it is arguable that the 'error preference' should be in favour of removal of content that breaches the criminal law, such as child sexual abuse images; for material giving rise to a civil action, especially in such a complex area as defamation, the 'error preference' should lie with leaving the information up until some independent legal (e.g. courts) or regulatory (e.g. PCC) mechanism has determined otherwise.*

**Is it unrealistic for law makers to try to regulate the internet (with the aim of balancing freedom of speech with the protection of reputation in online publications)?**

*First, we have to distinguish between the 'internet' as a platform, as a medium of communication, from the range of content services made available over that platform, that enable speech to be published. We in fact already regulate both, the platform and many of the content services. The PCC's jurisdiction, for example, extends to online newspaper as well as the traditional paper versions; while on-demand video services are subject to the regulatory oversight of ATVOD, the co-regulator, under the oversight of Ofcom. Various models exist for how the 'internet' could be regulated, from recognising it as a unique and distinct environment, to the assertion of traditional national sovereignty, such as the 'Great Firewall of China'. Personally, I ascribe to a general principle that what is legal offline, should be legal online, and vice versa. The internet inevitably raises enforcement problems, which may require novel solutions, but trying to create bespoke regulation for internet-based content is likely to generate many more problems than it solves.*

**What changes would you make to the law (if any) to prevent internet service providers and online forums being forced to self-censure, while ensuring that ordinary people have a practical way of challenging defamatory material that is published online?**

*Broadly speaking, self-censure by providers of internet services arises from two sources: self-interest and the law. The first may be driven by a desire to establish a particular position in the market-place, a family friendly walled-garden, or a more altruistic sense of corporate and social responsibility. The second is driven either by liability rules that expose the service provider to liability for the conduct of others, or regulations that require it take pro-active steps to prevent or control certain behaviours. Both result in the intermediary acting as 'judge and jury', with a likelihood of erring on the side of caution.*

*Liability rules have been adopted at an EU level that are designed to balance the interests of service providers with those of people trying to protect their rights and interests. The law provides a safe-harbour for service providers from liability for the content of those using the service, such as hosting companies, provided they take action once they have been made aware, have 'knowledge', of such content. Actual knowledge has two components: (a) knowledge of its existence/location and (b) knowledge of its illegal nature. In my opinion, these rules generally provide the most appropriate solution to the problem you raise. Inevitably, the operation of such rules may result in legal uncertainties or gaps, i.e. about where a line is drawn or where new services develop, which will either require clarification by the courts or reform by the legislature, but generally the current system works well.*

**Would it be appropriate to exempt online interactive chat (on sites such as Twitter, Facebook, or Mumsnet) from legal liability all together on the basis that it is more in line with "pub chat" than serious allegations? Would legal exemptions turn the internet into the Wild West in terms of protecting reputation?**

*A defamatory statement is 'published' where it is communicated to third parties, even one person would potentially be sufficient. The 'seriousness' of an allegation will depend on a range of factors, including the content of the statement and how widely it was disseminated. Such 'seriousness' should then be reflected in the remedies granted to the subject of the defamation; although Parliament decided in 2009 to abolish criminal remedies for defamation. The legal system ensures that de minimus claims are not heard, either through the courts exercising their discretion not to hear certain cases (on grounds of abuse of process, e.g. Jameel, or not meeting a "threshold of seriousness", e.g. Telegraph) or through the costs of access to justice.*

*As we have seen recently, online interactive services have fundamentally changed the nature of 'pub chat' statements, in terms of their availability to ever greater numbers of persons as well as their stickiness over time. This may require us to change the manner in which we communicate, but may also require the law to be changed to reflect this changed reality. The Defamation Bill is obviously an example of such reform. However, exempting particular online services would simply drive defamatory content on to such services, to the serious detriment of traditional media outlets as well as those subject to defamatory statements.*

**Is it fair for Mumsnet or Demon Internet to be liable under our libel laws given their links to the UK, while Twitter or Facebook are for practical purposes legally immune?**

*As you are aware, from a legal perspective, defamation law does not discriminate between UK-based publishers and foreign publishers, being subject only to the requirement that the damage to reputation (the tort) occurs in the domestic jurisdiction (as detailed in the Brussels Regulation 2001). Obviously for companies that are located outside the jurisdiction of English law, the ability to bring an action will depend on a range of factors, especially the degree of connection to the England. The problem is by no means unique to defamation and, indeed, the nature of defamation law means that it has an especially extensive jurisdictional reach, exposing foreign ‘publishers’ to liability where no intention may exist to defame or publish in the jurisdiction. Enforcement of the law requires something to enforce against, whether a person or his property/assets. As such, Internet-based activities will always create an enforcement problem, especially where the legal position differs between different jurisdictions.*

*What are your views on the Government’s Bill, including the substantial harm test, the multiple publication rule and the proposed defences?*

*As an academic, I specialise in cyberspace regulation rather than defamation per se. As such, I do not feel qualified to comment in detail on the Government Bill. However, in general, I think the Bill represents an improvement on the existing legal framework, with the uncertainties and consequences generated by the current rules.*

**Should there be a public interest defence in cases where the material is on a matter of public interest and the author has acted in accordance with expectations of the medium or forum. How would “expectations of the medium or forum” be assessed?**

*This raises a difficult issue for regulation in an increasingly converged internet-based environment. Existing legal regimes do reflect the nature of the medium, with broadcasters being licensed and having obligations in respect, for example, of harm and offence and impartiality. Newspapers, by contrast, do not require prior authorisation and are expected to be partisan, while not being subject to rules concerning taste and decency. In 2010, a new regulatory regime was established for video-on-demand, under ATVOD, where the rules differ from those imposed on traditional broadcasters. EU law (Directive 07/65/EC), which this new regime transposes, uses the phrase ‘television-like’ as a regulatory criteria for distinguishing between on-demand audiovisual content services that should be regulated like traditional broadcasting (e.g. BBC’s iPlayer) from other services that should not (e.g. YouTube). The operation of this criterion will require the regulator to assess both the intentions of the service provider as well as the expectations of the consumer, when assessing whether a service is ‘television-like’. On the one hand, such an approach to regulation may enable us to better tailor regulation in a converging environment; on the other, however, it creates substantial legal and regulatory uncertainties for the regulatees. Such uncertainties are likely to deter market entry and service innovation, as well as result in regulatory arbitrage, with providers deliberately positioning their services to fall outside the regulated sphere.*

July 2011



## Oral Evidence, 23 May 2011, Q 326–370

### Evidence Session IV

#### Members present

Lord Mawhinney (Chairman)  
Lord Bew  
Sir Peter Bottomley MP  
Chris Evans MP  
Lord Grade of Yarmouth  
Dr Julian Huppert MP  
Mr David Lammy MP  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon  
Stephen Phillips MP

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Witnesses: **Nicholas Lansman**, [Secretary General, Internet Service Providers Association], **Mark Gracey**, [Chair of ISPA's Content Liability Subgroup, Internet Service Providers Association], **Emma Ascroft**, [Director of Public Policy, UK and Ireland, Yahoo], and **Professor Ian Walden**, [Professor of Information and Communications Law and Head of Institute of Information and Communications Law, Centre for Commercial Law Studies, Queen Mary, University of London].

**The Chairman:** Can I start the proceedings by offering you a sincere apology on behalf of the Committee for the discourtesy that you have been shown. It was not intentional and I give you my word that this Committee will take every step to ensure that it does not ever happen again in the lifetime of this Joint Committee. But I apologise to you for the obvious discourtesy that has been extended.

Secondly, on behalf of the Committee, I thank you for coming. We have limited time. If any of you feel there is something you absolutely have to get off your chest before we start asking questions, we will give you that opportunity in a moment, otherwise we will move straight into questions. But before we do, can I, for the record, say that Google and Facebook were unable to provide a representative on the dates of the Committee's Executive evidence sessions and Twitter was also invited but has failed to reply to any of the Committee's attempts to make contact with it. I think that should be on the record.

Now, is there anything that you would absolutely like to say or can we move straight into questioning? Perhaps I should add that our practice has been that if, when a question is asked, one of you answers it, it is not necessary for the other three to answer if you agree with the first one. If you want to distance yourself from the first one then, of course, you are free to chip in. But if you are all in agreement we will get more questions asked if you are willing to let somebody speak on your behalf.

Does anybody have to get something off their chest? Good, in that case, Mr Lammy.

**Q326 Mr Lammy:** I should just state for the record, I was Intellectual Property Minister responsible with the unholy mess of file sharing, which was the last thing that internet service providers got very animated about indeed. I managed to avoid taking the Digital Economy Bill through, which I was very relieved about. Can I ask, probably it is directed initially at Professor Walden and Mr Lansman, do you think that internet intermediaries should have an extra layer of protection from claimants bringing actions, i.e. that claimants should, if they are concerned about defamation, pursue the authors first?

**Professor Ian Walden:** I think the law tries to codify the position that exists in common law in respect of liabilities flowing from knowledge. And to the extent that there are examples of intermediary activity where knowledge is not naturally present, such as a mere conduit where you are simply transporting data on behalf of others or where you simply provide a platform for the hosting of content, then the law recognises the absence of knowledge and should therefore offer the intermediary protection from liability. So I do not think the rules are special for intermediaries, I think it is more of a clarification of standard rules of law, which is designed and was designed at a European level to facilitate the provision of intermediary services, which are so critical to the internet.

**Q327 Mr Lammy:** You think it is working well?

**Professor Ian Walden:** I think by and large it is working well. Inevitably there is a problem in all the law in terms of clarifying all possible situations and therefore there is perhaps need for clarity about whether hosting covers other sorts of hosting-like services. There is a need for a clarity for concepts of what constitutes actual knowledge and how that actual knowledge is brought to the attention of the intermediary. But I think the general principle of codifying this general rule that liability should not flow without knowledge is a good one.

**Nicholas Lansman:** If I might add to that, on the question of whether companies who provide access to the internet should have more protection; the answer for the internet service providers is, yes, absolutely. I think internet service providers have been easy targets and sometimes it is easier to spot a large company that provides access to the internet and target those instead of the publisher or the author of a work or a comment on the internet. There are differences; ISPA represents the UK internet industry and we have members who are indeed those forms of intermediaries who just provide almost like the plumbing to send bits of data around the country, but we also have members who have slightly more control. So there is a difference but, in direct answer to your question, yes, internet service providers who provide clear access, who are mere conduits, should not be the point at which people try and get remedy for a defamatory remark. It is too easy to chill and create a problem for freedom of speech.

**Q328 Mr Lammy:** But let's just penetrate this sort of area about the different type of provider. If London Underground allows someone to seriously defame Yahoo on the posters that they allow in their tube, I suspect that Yahoo's lawyers will be looking both at London Underground and at the defamer. Why is there a difference here?

**Nicholas Lansman:** You have obviously given a very specific example.

**Mr Lammy:** It just helps concentrate the mind.

**Nicholas Lansman:** Absolutely. An analogy that might be of use in trying to respond to your question would be the situation of a bookshop who has a range of books, one of which is accused of defamation. The bookshop might be a very small bookshop in the Charing Cross Road; it might be easier to go after the logistics

company that transports books all around the country to lots of bookstores, and what we are concerned about as internet service providers is the easy target; you go after the ISP rather than going after the author. If the author, for example, might be abroad that might be an issue.

**Q329 The Chairman:** That is an interesting analogy, which is noted, but what is the answer to Mr Lammy's question?

**Professor Ian Walden:** Sorry, I think it is a matter of the scale of the content. So, for example, London Underground would not be liable for a breach of the Advertising Standards Authority Code in respect of a particular advert. But take an alternative example, YouTube, you have say 24 hours' worth of content being uploaded every minute of every day, then you have a question of volume similar to the bookshop in the Charing Cross Road. We do not expect the bookshop to read every single book that they may sell because of the volume involved, whereas for the London Underground placing adverts on particular boardings, the volume is capable of being regulated by London Underground.

**Q330 The Chairman:** Again, forgive me, just for clarity, so I understand what Dr Walden is saying; that sounds to me like a little bit of naughtiness is all right but a big bit of naughtiness is not all right.

**Professor Ian Walden:** No, I—

**Emma Ascroft:** Can I try and answer this? I think to answer Mr Lammy's question, it comes down to editorial control. So if it is London Underground's advert and they are putting it there and they are defaming Yahoo and they have signed off the statement, they are effectively the publisher and they have editorial control of that. So, yes, they are responsible. But if they are just providing the advertising space as you go down the escalator in the Underground, and it is somebody else's advert that somebody else has had editorial control of, then that party is responsible for the advert. So it depends which hat you are wearing in the value chain. I think that is what makes it complicated on the internet because different parties wear different hats, and sometimes in the online environment, particularly where you have, say, comment boards, there may not be a publisher, there is just an author and an online intermediary. There is not a publisher in the traditional online sense, and I think that is where the challenge comes.

**Q331 Mr Lammy:** In the internet service providers' submission there is a big difference between, say, AOL; BSKyB, who are engaged in a lot of content; eBay, who facilitate quite a lot of comment about the nature of products on their site; Google, who are right across this in many different ways; there is a lot of difference between the different sorts of companies with that. I think it would help the Committee if you yourselves were able to distinguish between those that are responsible solely for the piping, literally to get one thing to the other place, those where content is critical to the business and those obviously that provide outside comment within their sites, which is the subject of headlines just today.

**Nicholas Lansman:** If I could just say, you are entirely correct; there is a difference between the services they are offering. I suppose the difficulty we have is in the UK and many other countries there are not companies that solely provide access. They might do that as a major part but they also might have a service that offers web chat. So it is difficult to look at the company in themselves. What you have to look at is the service they provide and what level of control editorially they have over the content, which might be none, if you are just talking about access, to a great



deal of control if they are providing and commenting on the service and providing that content themselves.

**Q332 Mr Lammy:** So where would Twitter fall?

**Emma Ascroft:** I think Twitter falls in the example that I have just outlined, where you would have an author and a platform. You would have the author, the Twitter user, and the platform, which is Twitter, but you would not necessarily have a publisher exercising editorial control in between as you would do, say, in newspaper publishing.

**The Chairman:** Sorry, can I just chip in? Ms Ascroft, the acoustics in this room are not good. That is not your fault but it is not our fault either, it is just a fact of life. So it would be helpful if all of you could speak up, but ladies' voices in particular are a bit difficult to hear.

**Professor Ian Walden:** I was just going to say, if you take the example of BSkyB, obviously for the vast majority of the content that they provide over their service they are considered to have responsibility, but there are websites operated by BSkyB in respect of programmes where they allow you to post comments and they do not necessarily exercise any premoderation of those comments until a complaint arises and then they will examine them. So they are not exercising editorial control over some of those readers' or viewers' comments.

**Q333 The Chairman:** Ought they to be?

**Professor Ian Walden:** I think there are two reasons why a company will self-censor, if you like. One reason is because it wants to position itself in the marketplace as being family friendly or offering a walled garden, or for reasons of corporate and social responsibility. The other reason why they may monitor is for reasons of reducing exposure to liability. I think your concern, or the broader concern, is do we actually want intermediaries to be looking at everything that is being posted in an online environment? Do we want all of our communications activities to be monitored?

**Q334 Mr Lammy:** Do you, as a panel, believe that the frontiers of what is public and what is private have changed in the last decade or so and that this Committee needs to understand that, or do you simply think that you are facilitating something that has always been the case?

**Nicholas Lansman:** I just think it goes back to your original question; it depends on what the service provision is. If it is literally about providing a pipe so data can go down it and connect up people then we would argue that things have not changed. However, if there is control by an organisation then indeed they have the same responsibility as the offline world; in other words, the editors. So, for example, the *Guardian* newspaper has editorial and publishing control, its online site is exactly the same.

**Professor Ian Walden:** But I do think that we are in a new communications environment and I think people do have to recognise that the distinction between public and private has shifted and that will take time in terms of literacy for people to understand that some of the things that they think they are doing in a private way are taking place in a much more public environment. The law may have to change to respond to that as well, but I think we are seeing a fundamental change in that division.

**Q335 The Chairman:** Is the extension of that argument that damage to reputations in the process is just a bit of unavoidable collateral damage?

**Professor Ian Walden:** No, I think this is something we were talking about earlier. I think people will start to discriminate between trusted sources of media and untrusted sources of media. Twitter has been full of examples of false stories essentially being circulated and so perhaps people will learn to have a certain scepticism or mistrust in certain media outlets, new media outlets, because of its unreliability and people will return to trusted services, and therefore that—hopefully from a market perspective—will encourage providers of content to operate in a trusted environment or create a trusted environment.

**Q336 Dr Huppert:** Can I first ask a very quick question just to be clear? We were told in a previous session that the E-Commerce Regulations 2002 protect you completely and you should be happy with that. Just to be clear, you are not happy with that position?

**Professor Ian Walden:** They do not protect intermediaries completely.

**Q337 Dr Huppert:** I am glad to have that confirmed. There are a number of directions one could take this. One is just to be clear about processes where you are informed that things should be taken down, to take the London Underground example, if they are told there is a defamatory poster or something. Are you concerned that there is quite a strong chilling effect if your response to being told that there is a concern is to remove a post?

**Emma Ascroft:** Can I answer that? I think the concern for us is that, yes, the E-Commerce Directive does give us a limitation to liability and it is a limitation—it is not a complete exemption, it is a limitation. The Directive says that unless we have actual knowledge that the content is there and that it is illegal we do not have liability. The question is: what is the trigger for actual knowledge? With respect to the Defamation Act that is where the Act is not clear.

So to your question about whether there is legal clarity, the answer is no with respect to the Defamation Act. The challenge for us is, when we are put on notice, anything short of a court order is very difficult for us to assess. If the claim has not gone through a due legal process then it is often down to us to assess the facts because the law is not clear on what is actual knowledge. So at this point in time a mere claim could be sufficient to remove our limitation to liability. Defamation law is a very complex area of law, you have to know the full facts to make a proper judgement. You also have to know something about the author, which in the case of Yahoo would be our customer, to know whether they are entitled to any of the defences. In nearly all cases we do not have access to that information, so the law forces us to make a best efforts judgement but because of the nature of the law and the fact that we would not have all the facts of the case, it is very difficult to make an assessment that would be equivalent to a legal judgement.

**Q338 Dr Huppert:** So would you prefer to see any legislation that comes out this, say, requiring a court authorisation for something to be taken down before you are required to do anything?

**Emma Ascroft:** We would like the new Defamation Act to define what is “actual knowledge”, whether it is a court order or some other kind of legal mandate. I think that is probably a matter for the consultation. But it does need to be more than a mere claim, and at the moment a mere claim is sufficient to trigger us to intervene and that has obvious impacts on free expression.

**Q339 Dr Huppert:** Are you concerned at all that if you do any moderation of comments that might increase your liability to claims?

**Emma Ascroft:** That is not our primary concern. It is just very difficult to moderate anything for defamation for the reasons I have just outlined, because you can never have the full facts of the case. You need to know the facts of the case from the claimant's perspective but you also need to know something about the author, specifically whether they are entitled to a defence.

**Q340 Dr Huppert:** If I may, one further question, Lord Chairman. There has been a suggestion that the sort of discussion that would happen on some of these sites or on Mumsnet or other places, indeed on Twitter, is rather more like chat in a pub than publication of an item. I think you identified the fact there is not really a publisher. Do you think there should be a change in law to look at this much more from the perspective of slander, which has higher thresholds than of libel?

**Emma Ascroft:** As I understand it the law is quite binary at the moment, so if it is written down it is defamation and so, as I understand it, it would require a change to the law. But I agree that certainly the nature of the platforms means that discussions that would have happened privately are now much more easily had online in a permanent form. And the Defamation Act at the moment as it is written extends to that and the question, I guess, for this Bill is whether it should.

**Q341 Dr Huppert:** Is there a flip side that a video on YouTube, for example, is more permanent than something oral and that by drawing a line between printed and spoken word that may have been true historically but is no longer appropriate?

**Emma Ascroft:** I do not know. It is my understanding that the courts have considered whether the nature of an online platform changes the expectations of the user but I do not believe that they have opined on that yet. So the law, as it stands, still stands.

**Q342 The Chairman:** Just before I call Lord Grade, Ms Ascroft, you have just talked about needing to have "actual knowledge". What is actual knowledge?

**Emma Ascroft:** That is a very good question; it has never been defined. The E-Commerce Directive liability regime sets out the framework and sets actual knowledge as the legal threshold. The Directive says it is actual knowledge that the content is there and that it is illegal but it is not defined with respect to individual offences and, as I said earlier, it is not defined with respect to defamation here either.

**Q343 The Chairman:** But you said you could only act if you had actual knowledge. What were you talking about? What does that mean in the sentence that you used?

**Emma Ascroft:** I am sorry, which sentence are you referring to?

**The Chairman:** You referred to actual knowledge, how were you defining actual knowledge in your head when you were telling us about the importance of actual knowledge?

**Emma Ascroft:** It is knowledge that the content is physically on a service hosted by Yahoo and that it is illegal.

**Q344 The Chairman:** And that it is illegal?

**Emma Ascroft:** That is the threshold that has been set by the E-Commerce Directive, but in practice that is not defined with respect to defamation. So when somebody makes a mere claim to us we—

**Nicholas Lansman:** Can I just add to that? The issue of actual knowledge has been a problem for the internet industry for some time, simply because there is no definition of it. We would like the Defamation Act to be very clear, that it is ideally from a court telling us that something definitely is unlawful. Then when the ISP can act they are very clear on what it is. In lots of other areas where internet service providers get notices, there is no definition. It could come from a child with a crayon writing on a pad. That is what the level of notice could be. So what we would like for certainty and to avoid potential take down of information that has a right to be posted, in existence and published is for clarity from a court or something similar to say either, "Remove this content because it is unlawful" or that it should be left up.

**Q345 Lord Grade of Yarmouth:** I can understand that ISPs really want to distance themselves from the business of editing in the traditional sense, and the internet has disintermediated the function of editing. This is what we are all trying to grapple with. Nevertheless, if my business, my reputation or my family is trashed on the web I can quite understand, since you do not have an editing function, that you are in a sense blameless. But don't you think there is an obligation on you in this new role, not as publisher but as distributor—which is probably a better word—that you should not allow people to post information anonymously. In other words, if I get an anonymous letter telling me that this has happened or that has happened, I tear it up and throw it in the bin. That is what I do with anonymous letters. I cannot do that on the web. I can get you to take it down or I can go through various procedures but what you want to try to discourage is people just for mischief's sake saying anything they want; using your distribution mechanism to say anything they want. These days we are rapidly approaching the point where the distribution on the web is just as effective as traditional printed prose. To what extent do you allow anonymous posts and do you think that would help if people were not allowed to post anonymously, because then at least you would have redress, you would know who was perpetrating the crime?

**Nicholas Lansman:** I think that question has to be split. You are entirely right, this is a balance about the difference between freedom of speech and also almost the right not to be defamed to have some access to stop that, and we have talked earlier about the chilling effect. But you have to split it up. If you are talking about, for example, anonymous posts on a website, there is a section of the internet that does not deal with that. They provide the bits and the bytes on the pipe work, so let's leave them to one side for a second because they do not have control over those posts. They do not even provide that platform. There are services that do provide that platform and some will deal with it in terms of contract, so they will allow themselves to pull content if they look at it and say, "That's obviously a clear case", they will remove content, and those moderated chat rooms, if you like, will do that. The danger we have is how you have a law that can rest right across the industry. So the heart of the problem is on one side you want the ability to stop those comments and on the other side you want the ability to allow freedom of speech. I suppose from the ISPs' point of view this is complicated in most cases and while the internet industry does get emails with requests for defamation to either remove content or keep it up, it is very difficult for the ISP to act as a judge and jury on it.

**Q346 Lord Grade of Yarmouth:** Forgive me, I am not asking you act as a judge and jury, I am saying, go ahead, just let anybody publish using your pipes, as it were, but they should not be able to hide behind anonymity. So if you do not take it down or you do not take it down for two weeks or whatever happens, I know exactly who has posted this stuff and I can go after them.

**Professor Ian Walden:** But that is possible. The law gives you a process by which you can go and ask the court to require the ISP to deliver up information about who the subscriber, who the poster was. We have lots of examples of that.

**Q347 Lord Grade of Yarmouth:** You know, to 100%, who is posting?

**Emma Ascroft:** The individual can be traced.

**Professor Ian Walden:** The individual can be traced.

**Emma Ascroft:** We can be served a court order, or if it is a criminal investigation through the police, to reveal data that we have about those people, whether that is subscriber data or IP addresses and so on, and that can be used to trace the identity—

**Q348 Lord Grade of Yarmouth:** But I could not get that as an individual from you unless you were willing to give it to me. I would have to go to court to get—

**Emma Ascroft:** It cannot be disclosed to you voluntarily, no. If it is a criminal investigation generally the police have a process by which they apply to us. If it is a civil case you would have to apply to a court but it is disclosable, nobody is completely anonymous on the internet.

**Q349 Mr Lammy:** Mr Lansman, could you just, when giving different examples, name the sorts of companies you are talking about because sometimes it is hard to distinguish between the many people who are your members. But on Lord Grade's point in relation to the distributor, again in the old world the music industry provided content and they distributed the record and therefore if they had an artist that was libellous you would go to the music industry. You have some members who are distributing, they are providing the platform—now I am afraid they have quite a lot of people creating the content as it were—why should they be exempt from the content that they distribute?

**Nicholas Lansman:** I think there are two things there, one is—

**Mr Lammy:** Where they make quite a lot of money.

**Nicholas Lansman:** Let me answer your question about which are the types of companies. If you look at companies such as BT, Virgin that provide literally the connectivity in the home to enable you to access the web, they are not necessarily providing you with a web platform, which may be provided by Yahoo, Google and dozens of other companies who would not even class themselves as ISPs, they would be software platforms online. We would argue that a pure distributor is a bit like the analogy I mentioned earlier, going after the van driver who is delivering books to the bookshop, one of which might be defamatory. Having said that, there are other levels. The company that provides the platform—Google, Yahoo, AOL, dozens of these companies—does have some ability to deal with what you are suggesting, which is to analyse content. What I am arguing, I suppose, is that it is difficult for the ISPs to get involved who are purely providing distribution, it is also difficult, I think, for companies who are providing these platforms, these bits of software, to then get in and start making judgement calls over other people's content. I am not disputing that in certain circumstances they can be very clear but often they are complex and difficult and require analysis of a whole thread of communications.

**Mr Lammy:** That is very helpful, thank you.

**Q350 Stephen Phillips:** I just wanted to take you back, if I may, to Lord Grade's suggestion that perhaps ISPs should not allow comments to be published anonymously and that if, therefore, a defamatory comment were published one would

know who published it if you always checked on people's names and addresses and things like that. I think part of your answer to that was, "Well, you can go and get that information by obtaining a Norwich Pharmacal Order". Now, I can quite understand if I am a Premiership footballer with £50,000 to spend that I can do that, but what if I am an ordinary chap who has been accused wrongly of child abuse? Are you really suggesting in those circumstances he should go to the High Court and get a Norwich Pharmacal Order?

**Nicholas Lansman:** We accept, and we put in the ISPA's evidence to say that there does need to be a better, cheaper, easier procedure for individuals who are not indeed a Premiership footballer or big companies to protect themselves online. We do not have all the answers as to how that quasi court system might work to make it faster and cheaper. We know it is analogous with the Small Claims Court, which has worked extremely well. Something I would have thought similar to that for defamation would seem sensible.

**Stephen Phillips:** Thank you very much, Mr Lansman, that is extremely helpful.

**Q351 Chris Evans:** How confident are you tracking people down? You say you could track down a subscriber with ISP address but how are you sure it is that person doing the defamation if it is done, say, at an internet cafe or something like that? And how sure are you it is not somebody just going to somebody's house and doing the defamation or something like that? How confident can you be, and that seems to be the tension here for me, that you are talking about, "Yes, we can track those subscribers", "Yes, we can track an ISP address" but you do not know who is that person at the end of the terminal? That really is the major problem I see with the internet, we do not know who is on the end of that computer.

**Mark Gracey:** If I could answer that one. It is the same question that the police ask as well. Everybody who connects to the internet has an IP address, the IP address will be stored in some access log on a particular server so if you take an internet service provider from BT then they will have access logs. Then the real question is nailing down who is using that IP address at that specific time and whether they have the log still. This is why we have data retention legislation so that the police have access to that kind of thing. So I think that is the same kind of situation. When you talk about internet cafes, of course, it will be the internet cafe's IP address that will be connecting to the internet, maybe doing it through BT so BT will say the person is the cafe and then you have the problem of how do you identify in the cafe who it was using that terminal at that particular time. That is a question for how cafes are managed or any other forum.

If I was to go and connect to a Wi-Fi hotspot out on the bridge, you would still have a similar type of problem although there would still be a connection IP but it is who is using it at that particular time and from a user connecting to the internet perspective, you have the logs that show you the internet connection. But when you start offering services in cafes, then it is how far down the chain you can go in identifying. I can see that that is a problem.<sup>124</sup>

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<sup>124</sup> Mark Gracey has stated for clarification, on its own, an IP address is generally considered insufficient evidence for identifying an individual. Through an IP address you can identify a computer or the subscriber of an internet service provider. However, if this is a shared computer in a household, cyber cafe or open public Wi-Fi, where multiple people are using the internet connection, it may not be possible to identify the exact individual who made the posting.

**Q352 Chris Evans:** Now, I am going to ask probably a daft question: is there any technology available to mask the IP address or mask a subscriber, and how widespread is it?

**Mark Gracey:** There are services that are available over the internet that do obscure IP addresses, yes.

**Q353 The Chairman:** Mr Gracey, just before I call Dr Huppert and then Sir Peter, given that internet cafes spring up and hard-headed businessmen and women decide to invest their money in them, is that not a fairly hefty sign that they do not think that they are at any legal risk whatsoever and the protestations of the industry that they are at legal risk in reality do not have any meaning?

**Mark Gracey:** I do not have any experience or any expertise in internet cafes but I would imagine that some contracts would have happened at some particular point that may be able to nail down who was signed on to a terminal point at a particular point, but that would depend on a cafe by cafe basis. But the issue really is that user will have put content on a server somewhere, be it Twitter or Facebook or on a website, and the server that is recording that content will also have a record of who was accessing it so it would give the IP address. If it went back to a cafe, you would then get back to this problem of it depends on how the cafes are managed with regards to how they can identify who was using the computer at a particular time.

**Q354 The Chairman:** The difficulty, though, Mr Gracey, is that while all of this ring-a-ring-a-rosie is going on somebody's reputation is getting trashed on the internet. I do not hear an awful lot of concern about that aspect of the issue that we are trying to wrestle with.

**Mark Gracey:** I think my point was really that the cafe would not be able to help you in getting the content taken down and removing the harm to reputation, it would be wherever that content is posted, which is probably not going to have anything to do with the cafe. The cafe would be the facilitator of accessing the internet. So if it was a cafe user posting to a chat room on a website hosted by BT then most people would go to BT and say, "You're hosting a website that's got this content on it that we believe is defamatory and therefore we need to take action". So it is where the content is hosted where it needs to be taken down, which is where the issue is. And that is the issue for the ISP because we have to make a decision about whether we think that content is defamatory or not and is harmful, and whether the person complaining is indeed telling the truth.

**Q355 Dr Huppert:** Just a couple of very quick things of clarity, Lord Chairman. Is it technically possible or practical for a pure ISP to screen out the content which they are passing on to look for defamatory comments? Am I right that users of something like Tor could effectively guard their anonymity completely whatever technical measures are used?

**Nicholas Lansman:** Just a couple of quick ones. On the anonymity issue, yes, people can hide their identity over the internet. Also people can send unsigned letters in the post as well. To me this boils down to this balance that ISPs are stuck in the middle of a rock and a hard place. On one hand they are responsible in making sure the people have freedom of speech, on the other hand they should be responsible for making sure that people are not defamed. I suppose the point we are trying to make, in the best way we can, is to say we are not trying to avoid responsibility, we are just trying to say that ISPs are not lawyers, they are not in the

best position to make decisions on whether someone has been defamed or not. It is not that we are trying to shirk responsibilities but it is extremely difficult when you are dealing with issues of people being defamed, which is hugely important, and we know there are those cases. Equally we have stories—perhaps less in Britain, but certainly around the world—where the ability to post something anonymously in a cyber cafe is the difference of getting stories out of Egypt, Iran and Iraq and so forth, which is also very important.

**Professor Ian Walden:** Sorry, the particular problem with the first part of your question about defamatory statements, yes, clearly ISPs' pipes could monitor all the traffic that goes over those pipes and I think that would be highly undesirable, but that would be particularly difficult in the area of defamation because there is a scope of material that would have to be reviewed in order to make some sort of judgement about that material.

**Nicholas Lansman:** It is like drinking from a fire hose.

**Emma Ascroft:** I think it comes back to the points I made earlier about defamation being such a complex area of law. Certainly from the perspective of an intermediary, when we get a complaint about a child abuse image, it is fairly easy to train a layman to know whether that image triggers a legal threshold or not and whether or not it is criminal; it is very difficult for defamation because you need all the facts of the case and you need to know both sides of the case. It is not an objective judgement and so that is why we feel that some kind of legal due process needs to be involved for this particular type of content.

To answer the first part of your question, and Nick mentioned it as well, we have a limitation to liability in law and that sets out a balance of rights and responsibilities, and we have responsibilities. The question is how does the Defamation Act help us fulfil those responsibilities and at the moment it does not help us at all because it does not tell us what actual knowledge is. So we end up drawn into a very private dispute between two individuals in which we are probably the worst placed party to adjudicate on that, and in terms of the goals of the review of the Act, that has obvious concerns for free expression. So we are not saying we have no responsibilities, we are saying we need the Act to be reformed in a way that helps us fulfil those responsibilities without chilling free expression.

**Q356 Sir Peter Bottomley:** There is a lot of interest at the moment about whether blogging and some of these sites are the equivalent of a telephone, where you cannot easily interrupt what is happening. Do you think that service providers are going to have to review, or choose to review, their own codes of conduct across an industry as well as their individual company policies after this period?

**Nicholas Lansman:** ISPs have their own terms and conditions, as do other forms of intermediaries. Will they have to review them? They may choose to but I think, to a certain extent, that is not the actual issue, because even if ISPs did review their codes what is ideally required is for a court or a fast route independent body that acts like a court to give a notice to the ISP, and then the code could come in to perhaps ensure that across the industry, based on that court order or quasi court order, we remove that content quickly and speedily. So the code could be useful for helping ISPs across the board to remove content quickly to communicate and cooperate with that court or independent body quickly.

**Professor Ian Walden:** But you are right to point out that these services providers have terms and conditions so Amazon decided to take down or stop hosting WikiLeaks because it held that WikiLeaks was in breach of its terms and conditions. So this is where ISPs have the ability to self police on the basis of their



terms and conditions. If they say users should not use this service for breach in copyright or engaging in criminal conduct, then ISPs would have a choice about doing that and some ISPs have very specific lists of illegal material, some ISPs say, "We will decide what is in our best interests".

**Emma Ascroft:** It still does not solve the underlying problem, which is the Defamation Act does not let us know what is legal and a code of practice would not necessarily help us then.

**Q357 Sir Peter Bottomley:** Defamation is not normally illegal, it is normally actionable. Some of the discussion is about criminality, which is not what we are mostly concerned with. Most providers, whether they are publishers or broadcasters or others, are concerned about what is illegal, what is defamatory, what is distasteful and what is against policy, and those are four areas I can think of off the top of my head. In printing, we often required an imprint. It may be a false imprint but an imprint might be required in certain circumstances, and still is, for example, in election material. It would be perfectly open for the pipe owners, service providers, to say, "If we believe we are getting material from people who are trying to obscure their identity, unless this is hard news where public interest is higher, we won't use it". Is that open to you?

**Nicholas Lansman:** I think, again, I need to clarify between a type of internet company that would provide perhaps a platform for those sorts of comments, that sort of news, but I think we have to make very clear that intermediaries such as BT or Virgin, who are just providing the pipe work, are not publishers and they are not editors.

**Q358 Sir Peter Bottomley:** In the same way they are providing a service of pipes taking clean water, it might require those putting water in at one end to make sure it is clean?

**Professor Ian Walden:** Yes, and that will be quite possibly a standard term and condition. The point is how do you police it? You have this choice, we can look at everything that you do and that will be undesirable, I think, to the vast majority of us, or we could say the pipe owner is strictly liable for everything that is carried across this service. Highly undesirable and it would have a very detrimental impact on the provision of internet services. So choices have to be made and we have to err on one side or another. The current state is we err on the side of ISPs not being liable until they have this actual knowledge.

**Q359 Sir Peter Bottomley:** Can I then put a separate question that you are welcome to answer in a sentence if you choose to, or not if you do not? Should bloggers be able to get away with any kind of defamation or should they be liable?

**Professor Ian Walden:** The law does not distinguish individuals. It does not regulate journalists any more than it regulates bloggers per se.

**Sir Peter Bottomley:** It is a "should" question, not an "is".

**Professor Ian Walden:** No.

**Sir Peter Bottomley:** Thank you.

**Q360 Lord Morris of Aberavon:** One of you did say just now that intermediaries are not publishers, is that right?

**Emma Ascroft:** Yes.

**Nicholas Lansman:** Certain types of intermediaries. Again, it is complicated but companies that just provide the ability for an individual to connect to the internet,

but do not provide those services, have no publishing or editorial control over what a user might upload on to someone else's website.

**Q361 Lord Morris of Aberavon:** Yes, but that goes to culpability. But they are publishers, aren't they?

**Emma Ascroft:** No, they are online intermediaries. The E-Commerce Directive has created this new category of a party in the internet value chain and that is the concept of an online intermediary—and that is very distinct from an author, a publisher, a secondary publisher and so on—as the entity that provides either the pipes or the platform and does not exercise editorial control over the content.

**Nicholas Lansman:** That is the near conduit status within the E-commerce regulations.

**Lord Morris of Aberavon:** Yes, I understand that.

**Emma Ascroft:** It is also the hosting provision.

**Q362 Lord Morris of Aberavon:** I understand that. The other matter is—excuse my voice again—will you clarify the position raised by Mr Phillips regarding the machinery for the small man, one way or another—for lack of better words—to stop a defamation on the internet? How effective is the present machinery about taking down? Are there gaps in pinning responsibility? Might it be said that as regards the internet it is uncontrollable in some aspects?

**Emma Ascroft:** I would not say it is uncontrollable. Certainly the internet is a challenging medium but there are changes that could be made to the Defamation Act to make it easier—

**Q363 Lord Morris of Aberavon:** Yes, but let's take the position now. Are there enough remedies for the small man who is defamed, either blogging or whatever or on the internet in whatever shape or form? Is the machinery effective or does it need devising to ensure that there is a proper machinery?

**Emma Ascroft:** There are probably some procedural changes that could be addressed as part of this consultation in terms of how the legal structure works. We have touched on that already in terms of the very high cost of court proceedings, which makes it inaccessible for some people. We are very sympathetic to that and agree that it should be addressed. The other issue is the one that we have described about our situation and how the Electronic Commerce Directive sets out a provider's rights and responsibilities but there are gaps in it that make it difficult for us to fulfil our responsibilities, and that is what we are asking the Bill to address.

**Q364 Lord Morris of Aberavon:** So it needs a remedy?

**Emma Ascroft:** It does need a remedy, there are gaps, yes.

**Q365 Lord Marks of Henley-on-Thames:** Both Ms Ascroft and Mr Lansman have touched on this; part of the problem seems to be that there is no fair system to enable you to decide when to take down material on receipt of a claim. The idea that that should require a court order seems to be very cumbersome and I am wondering whether you in the industry have thought of a system that would enable you simply to draw a balance between taking down everything that you are at risk of a claim, which obviously chills free speech, and ensuring that people who are defamed get a remedy quickly without having to go to court to get it. Is there any system you see as a possible solution?

**Nicholas Lansman:** We have discussed this very issue. Let me give you an example of what has happened in another sector, which is child abuse images, where we have a system that is self-regulatory that works very well. But that is only because the law for protecting children is so very, very clear and it is clear not only in the UK but in most countries in the world. So it is very easy for a body to be set up to provide that role. In the area of defamation we have discussed what might be needed, which is some sort of body that has the authority of a court that could make speedier decisions and so have a lower threshold for access in terms of cost and in terms of transparency, in terms of ease of use. I gave the analogy at the start of a small claims court that is used very widely and, I believe, very successfully in normal business disputes. Our consideration would be something similar in this area might provide a solution.

**Q366 The Chairman:** Can I conclude by just asking a few quick questions? Can I pick up Sir Peter's question about blogging? Some blogs are named. Should such people be treated differently from the author of a newspaper article or a book just because they are on the internet?

**Emma Ascroft:** From our perspective, we would treat them just like any author.

**Lord Grade of Yarmouth:** Could you speak up?

**Emma Ascroft:** Sorry. From our perspective, we would treat them just like any author. They have editorial responsibility over what they say and from our perspective as an intermediary that is how we would treat them.

**Q367 The Chairman:** My next question is going back to the conversation about terms and conditions and Mr Lansman just making the point that maybe there ought to be a body set up that could act quickly and with some authority, so why don't you set up such a body, maybe along the lines of the PCC? It is fine telling us that maybe that would be a solution but we have not heard any evidence that you are minded do anything like that, and I was wondering why?

**Emma Ascroft:** I think codes of practice can be very successful where they aim to address content which can be objectively assessed by layman against a legal standard or against an objective set of standards set out in a code. Two very good examples are the Internet Watch Foundation with respect to child abuse images—it is very easy to train a layman to know what is criminal and what is not—or the Advertising Standards Authority with respect to objective standards for advertising content. But defamation is such a complex area of law, it is very difficult to train a layman to make a judgement and it does not overcome the problems that we have outlined in our evidence about how you assess such cases. We think that ISPs and other intermediaries are very badly placed to make those assessments. So while a code of practice might be an idea if it were a statutory code that involved some kind of due legal process, as a voluntary scheme set up and run by intermediaries, we do not think that defamation is suitable area of law to explore that particular option.

**Q368 The Chairman:** But you are open to the possibility of a statutory body that would be set up that might, among other things, insist that your terms and conditions be rigorously applied and there would be penalties if they were not?

**Emma Ascroft:** No, when we say a statutory code, we mean a code that is set out in the law. An example would be Section 512 of the Digital Millennium Copyright Act in the US, which sets out a notice and take down process for copyright infringing content that does not involve the courts but it just sets out a process in the law that

says if you follow this process you have limitation to liability and if you are a claimant this is what you can expect from the process, and if you are the author of the work, then this is what you can expect from the process. So everybody's needs are addressed in that process and we think something like that could be worth exploring—not necessarily exactly the same but something that is designed to achieve the same objectives.

**Q369 The Chairman:** We have had evidence that in many respects the internet is, “the Wild West”. Do you want to dissuade us in any sense?

**Professor Ian Walden:** Yes, I think we have huge numbers of examples of the internet being a highly regulated environment. In some ways it is the most regulated environment that we have because of the applicable laws applying to the conduct. The question is one of enforcement. And clearly enforcement is a challenge in the internet environment, but we have seen a whole range of different mechanisms emerging to achieve quite effective enforcement in a whole range of areas. Just to reiterate, the Internet Watch Foundation is an incredibly successful example of regulating against a certain type of content, not just in the United Kingdom but on an international level.

**Q370 The Chairman:** One final question, I would be ever so grateful if each of you would just give me one example. You have understandably and very professionally argued your corner. There has been some identification of issues that might be addressed, to use Ms Ascroft's phrase, in the context of defamation, particularly the man in the street being defamed. What you have not done is given us any examples of what you think or would like to see done to move in that direction. We are blessed with lots of examples of why what all of you are doing is of enormous benefit to mankind and free speech, but I would like one example from each of you of what you think might be done to address the rights or the protection of the man or woman in the street who has been defamed.

**Professor Ian Walden:** I am not here to represent the internet service providers I am, in fact, a member of the Press Complaints Commission. I think the Press Complaints Commission offer a free, fair and fast way for the man in the street to complain about the inaccuracy of things that are published in newspapers, whether they be online or offline.

**The Chairman:** Thank you, but both of us know that is ducking the heart of the question. You are here because you are a serious expert and you are recognised as a serious expert. It would be helpful to us, who have to try to find some way through this maze or jungle, to have your expert suggestion of one thing that might be done to aid in the protection against or the resolution of a defamation of the man or woman in the street.

**Professor Ian Walden:** Legal Aid funding, access to justice.

**Nicholas Lansman:** I can give you one that is—I suppose we touched on this—how you remove from your discussions the one to one flame war discussion online on web chats that is akin to sort of pub chat, and leave that to one side, because I think if it is one to one, that probably does not class as defamation anyway<sup>125</sup>.

Emma Ascroft: It does.

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<sup>125</sup> Nicholas Lansman has stated this statement is incorrect and has said defamation claims are possible in one to one web chats.

**Nicholas Lansman:** Can it? Okay, I stand corrected. But I think it could be limited to serious comments, where people do not get a right to reply. The sort of chat between people might want to be taken to one side.

**Emma Ascroft:** I think we notice that in the consultation document there are a lot of references to the cost of legal process and that being a barrier to lots of things. I think there is a risk that then becomes a reason not to reform certain things in the Act, and I think the issue of cost and accessibility of the legal system needs to be addressed in its own right, because I think that will unlock quite a few issues. So we think cost of legal action is a key point.

**Mark Gracey:** To be honest, I am struggling to think of an example that has not already been said, but something that we have not touched upon in any detail is that right now people can get content taken down very easily, because they just tell the hosting provider that the content needs to be taken down because it is defamatory or whatever. The intermediary then has to make a decision whether they think that their business is at risk if they do not take it down, which means they invariably take legal advice, at expense, which they then apply their terms and conditions to.

What has not been mentioned is that that leads to a situation where material might be taken down wrongly, and that is the freedom of speech aspect. But at the moment, the situation is the intermediaries having to make a decision about whether it bears defamatory meaning, not whether it is defamatory, and so the material could be taken down wrongfully. The intermediary is then liable to the other party as much as it is for not taking it down, so there is as much about ensuring that the process is fair. At the moment, as I say, I think the example is that currently defamatory material can be taken down pretty quickly once they have identified the person who is hosting that material. It is the host that is gone after, rather than necessarily the person who put it there in the first place.

**The Chairman:** On behalf of the Committee, it is my pleasure to thank you all very much indeed for your time and for your expertise. Thank you.

**Mark Gracey:** Thank you.

## **The Publishers Association, The Booksellers Association and the National Union of Journalists**

### **Written Evidence, The Publishers Association (EV 38)**

#### *Introduction*

*The following submission is made by The Publishers Association<sup>126</sup> (The PA) in response to the Committee's consultation on the draft Defamation Bill. The PA broadly supports the Bill, as indeed we supported Lord Lester's original private members' bill, and we are in general pleased to see how much of Lord Lester's original has been retained. However, having held a number of consultations of our*

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<sup>126</sup> The Publishers Association ('the PA') is the representative body for the book, journal, audio and electronic publishers in the UK. Our membership of 113 companies spans the academic, education and trade sectors, comprising small and medium enterprises through to globally successful companies. The PA's members annually account for around £4.6bn of revenue, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.

own with our members, we do have some concerns and queries, which we set out below.

*Defamation is a significant concern for many of our members – particularly those involved in publishing biographies, autobiographies and diaries – but more generally all trade and academic publishers, whose authors express opinions, which may often need, in the public interest, to be robust. Our overriding concern for many years has been to preserve freedom to publish in the UK, despite a defamation regime which has until now had the opposite “chilling” effect. We have similar concerns over the current costs and conditional fees regimes, and our views on this are expressed in our submission to the Ministry of Justice consultation on the Jackson Review of Civil Costs.<sup>127</sup>*

*The PA conducted a survey of our members in October 2010, to find out how the current libel laws impacted on publishers’ businesses. The results are below in summary and the Report is attached in full at Appendix I.*

*100% of the publishers who responded have been forced to modify content or language ahead of publication as a result of the threat of libel;  
Almost half of the publishers who took part in the survey have withdrawn publications as a result of threatened libel actions;*

*A third have refused work from authors for fear of libel suits;*

*A third have avoided publication on particular subjects;*

*60% have avoided producing books about specific people or companies who have previously sued for libel;*

*The average cost of defending a libel trial was £1.33m;*

*On average, the cost of libel reading, libel insurance, and defending against libel threats over the previous 12 months amounted to just under £200,000 per organisation – this represents around 1% of the average annual turnover of the respondent companies.*

*We respond below to those questions of primary concern to our members, approximately in the order raised in your consultation.*

### *Consultation questions*

#### *Clause 1 – Substantial Harm*

*On the whole, we agree with the definition of ‘substantial harm’ in the draft Bill, particularly since it will be for the claimant to prove this (publishers are usually defendants). However, we do feel it will be necessary to have clarification or guidance before long on what is or is not “substantial”, although to some extent inevitably this will have to depend on the circumstances of each case (and the guidance of the courts). We feel substantial harm should be a mandatory requirement. For almost any other tort, loss must be proved in order to bring a claim and we feel defamation should be no different. In our experience, a lot of time and money can be wasted dealing with claims (or threatened claims) where there is no real harm, merely a personal affront or annoyance. A substantial harm test will in our view provide an effective de minimis threshold for any claim, and given the time and*

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<http://www.publishersassociation.org.uk/images/stories/Policy/pa%20response%20civil%20litigation%20costs%200211.pdf>

*expense publishers currently spend fending off insubstantial claims, particularly relating to biographies, this would be welcome. Some examples may help (both from a major publisher):*

*SD threatened to sue over AL's autobiography, because AL said in passing that SD went bankrupt, which was factually incorrect although widely believed. In fact he went to prison for non-payment of bills. This happened a relatively long time ago, in the late 1960s. SL was a bit of a recluse and not in the public eye so it was unlikely to be substantially damaging.*

*JD's lawyer threatened to sue over minor and non-defamatory factual inaccuracies in a memoir by his band mate HP relating to their time in a well known band, which a test of substantial harm would have weeded out. Costs were wasted in protracted correspondence with JD's lawyers over this insubstantial claim.*

*We believe it is very important that the "substantial" harm requirement should be incurred in the UK, in order to prevent libel tourism. Many of our members are international publishers, and often have to publish different UK and international (particularly US) editions. The draft Bill does not currently say that substantial harm should be substantial UK harm, but we believe it should be made clear.*

*Relevant issues to be addressed here may include the number of copies of a work published, the claimant's reputation before and after, and how corporate losses are to be assessed (for example, on a fall in share value or on lost contracts).*

*The case law underpinning this section has been the extent of publication, usually in libel tourism cases, but we do not believe that this issue can be considered without also looking at the rules governing the introduction of evidence about someone's reputation, particularly when one is able to gather so much information about a person or company via the internet. One could not look at substantial harm to reputation in a vacuum, as happens in libel cases at the moment with the rule in *Scott v Sampson* (governing the introduction of evidence on general bad reputation) still applicable. Evidence on reputation which can be adduced under cases like *Burstein* go towards mitigation not liability and in any case is restricted to the area of the claimant's life which is the subject of the words complained of. The rules on general reputation are not sustainable in an age when information is spread so widely, but is then excluded at the court door.*

*By way of an example, there was a case a number of years ago where a Russian accused of being involved in a money laundering scandal was able to sue here despite being excluded from this country and searches of the internet revealing that he was also excluded from other countries because of each country's concerns about his alleged criminal activity. He was allowed by the Home Office to enter England to fight his libel action (which he did successfully) but the defendant newspaper was prevented from telling a jury about his worldwide reputation as portrayed on the internet or that he was in fact excluded from this country due to the government's belief about his reputation. He was presumed to have a pristine reputation.*

#### *Clause 2 – Responsible Publication in the Public Interest*

*We agree with the inclusion of the new public interest defence and believe that this is an improvement on the existing common law defence. We do not consider that a*

*fixed definition of “public interest” would be helpful or appropriate, since this needs to be a moveable and developing test. We agree with the adoption of the non-mandatory list of factors (a) to (h) which courts “may” consider, which in our view should provide necessary flexibility and discretion, according to the circumstances of each case. It will in our view provide a basic level of codification, in the form of a limited menu, which will aid certainty. We do not support the addition of a further test relating to compliance with a voluntary industry code since, unlike the newspaper industry, publishing has no suitable code at present and it would be difficult to set one up solely for the purposes of compliance with the Act. It might well discourage publishers from signing up to any code if they felt that they were thereby exposing themselves to statutory liability. We do, however, agree that the defence should apply equally to both opinion and fact.*

### *Clause 3 – Truth*

*We agree that it is appropriate to replace the existing common law defence of justification with a new statutory defence of truth and that it would be in the interests of certainty to abolish the existing common-law offence. We do feel that the language of this clause should contain the same definitions as those at Clause 1 on ‘substantial harm’. In the present draft, Clause 3 uses the term ‘materially injure’, which may create discrepancies between the implementation of this clause and Clause 1.*

*Publishers are in an extraordinary legal position of having the burden of proof on them as defendant, which breaches the fundamental principle that someone is innocent until proved guilty. Many publications have to be abandoned where public domain material widely known (and accepted) as true cannot be published, for example in autobiographies, simply because it is not realistically possible to prove its absolute truth. In many instances, publishers rely on the accounts of first hand witnesses to establish the truth of what they publish, but these witnesses can be unwilling to testify in court for fear of reprisal. In such cases the publisher cannot provide such evidence to prove the truth of what they have published because of their confidentiality obligations to their sources. However, in such cases, the complaint would not be able to prove that the statements were untrue. One leading publisher turned down a book on Scientology a few years ago for these reasons, and will not now publish a biography of a public figure known to be rich and litigious. This self-censorship suppresses the accurate publication of important matters.*

*One of the largest problems with establishing ‘justification’ and henceforth, ‘truth,’ is identifying the meaning that the words bear and the single meaning which is to be defended. The current draft of the Bill does not propose to amend this requirement to establish a single meaning, although the MoJ’s consultation paper does ask for responses on this issue. If one abolished the right to a jury trial (as suggested in Clause 8), judges would then be allowed to rule on what the words actually meant as opposed to what they were capable of meaning, but a judge would still have to pick one meaning, excluding shades of meaning or a different sustainable meaning. If the single meaning position is retained, it would be useful for there to be a clear and low-cost way of determining meaning, so that vast sums are not spent on justifying Lucas-Box meanings only to find them redundant as the jury pick the claimant’s higher meaning. A scheme to determine the meanings of a single defamatory*



*imputation could usefully be introduced as part of the Early Resolution process. We also support the inclusion of subclause 3 under Clause 3, on multiple imputations.*

#### *Clause 4 – Honest Opinion*

*We believe it would now be in the interests of certainty for existing case law on fair comment to be superseded by a new statutory defence of honest opinion. We support the adoption of an objective test of whether an honest person could have held the opinion in question, although we query how far it will be possible to define “honest person” with any accuracy or consistency. Guidelines may be necessary, particularly as to the apparent need to establish absence of malice. We do not believe that the new defence should not apply to statements to which the public interest defence applies. However, we do not support the inclusion of a public interest test as part of the honest opinion defence itself, on the grounds that the pursuit of free speech entitles everyone to an honest opinion, regardless of whether the matter is in the public interest or not.*

#### *Clause 5 – Privilege*

*Much of this is relevant primarily to newspapers rather than books, but we welcome the addition in the Bill of a qualified privilege defence for fair and accurate reports of scientific or academic conferences. Few traditional books can be “contemporaneous” (although some can, and digital publishing is changing this), but scientific and academic journals are already a major publishing market in the UK and internationally, so a category of privilege for fair and accurate reports by them would be welcome, and whether any modified test of “contemporaneous” publication would be applied to them in practice*

#### *Clause 6 – Single Publication Rule*

*In principle, this is particularly important to commercial publishers since it does not have the effect of the previous law of putting digital or database publishers at risk every time existing material is accessed by a new user, and would be a welcome clarification. However, as currently drafted, subclause (4) of clause 6, removing the defence from any “materially different” manner of publication would appear to put at risk online rather than print publication of the same material, as would subclause (5), which removes the defence from publication with a greater “extent”. Clarification of the intended meaning here would be welcome. It would be an unfortunate side-effect of this otherwise beneficial reform if the wording of clause 6 were to be interpreted in a way which penalised online publication of the same material, even though virtually contemporaneous. Many books or articles are now first made available online rather than in print, or made available online soon after the print edition is published, once the market has been established. With many journals, the publishing sequence may work the other way round, but still run the risk of being “materially different”. An example may help:*

*A major publisher has a much-respected and long-standing scientific journal, available for some time simultaneously in print and online. In response to public demand, they are now moving to make this content available on a single article basis rather than issue by issue. This could be construed as a “materially different manner” of publication, and so fall foul of subclause (4), even though each individual article is*

*exactly the same. The journal concerned, like most publications, is constantly evolving new ways to make its backlist available to the public, but it seems that the current drafting of subclause (4) would run the risk of creating an unintended barrier to new and important business models, even for the same material.*

*In the digital age, we need to be alive to such risks. In our view, it would be essential to clarify the meaning of the terminology in clause 6, and how far (if at all) it may be taken to apply to online publication of identical material.*

*If one were trying to arrive at a definition of material changes giving rise to fresh publication, the new material or changes should be looked at in isolation, without renewing the limitation period for the entire work. For example, if a nonfiction book contains a new introduction to update it when a new edition is published, only the introduction (and anything affected by it) should be actionable on publication. The entire book (which remains exactly the same, bar the introduction) should not be treated as “materially different” and thus become exposed to the risk of action.*

*Book publishers have also been affected by the absence of a single publication rule for a different reason to in the online context: the sale of back lists, which leads to continued publication and a never ending limitation period. For example, a new edition of a work, in which the text of the work is exactly the same as the previous edition but the cover and introductory notes have been updated. The same concerns about definition of ‘materially different’ apply in the physical context as well as the online context.*

#### *Clause 7 – Jurisdiction: “Libel Tourism”*

*The extent to which our libel courts have become playgrounds for Russian oligarchs and Middle Eastern princes has become a national scandal, with a severe “chilling effect” on UK publishing, and anything that will reduce this tourism is a welcome development. However, clarification of what may or may not be “clearly the most appropriate place” to bring any action may in our view be necessary. For example, will this be a test of objective fact (and, if so, subject to which conditions), or give subjective discretion to the court? For publishers, the most appropriate test of “appropriate place” would be the place where the substantial (or most substantial) harm occurs. In our view, this would need to be the territory of first publication by the publisher, so that, for example, any unauthorised leakage (or minor, or incidental making available) in the UK would not give grounds for a claim here.*

#### *Clause 8 – Trial by Jury*

*Defamation in our view should be brought in line with other tort actions. Trial by jury adds enormously to the cost of cases, increases the scope for uncertainty and variance in verdicts, and is often inappropriate in complex technical cases, which libel cases often are. On issues such as establishing a single meaning in cases of defamation, the role of a judge in determining the meaning assists in providing significantly less variance in outcomes than the role of a jury.*

*Issues for consultation*

*Would it be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?*

*We would strongly disagree with any proposal to offer absolute immunity to ISPs, although the present E-Commerce Directive regime (and the rule in *Demon Internet*) in our view works reasonably well, i.e. that there should be no obligation to monitor content before it is posted, and a general rule of immunity should apply, but only conditional on expeditious takedown in the event of actual or implied notice. However, publishers do report problems in persuading some ISPs to take down material “expeditiously”, and The PA itself (for example, in operating its own Infringement Portal) has often found ISPs will use all manner of excuses to avoid taking material down, e.g. suggesting (via their own automated notices, ironically) that automated group notices somehow are not valid (which of course they are). Given the scale of individual infringements in the UK and internationally, infringement notices have to be sent via automated processes, and it is important for all rightsholders that ISPs should work with these processes and respond expeditiously. PA infringement notices are necessarily sent in automated or semi-automated groups, but we are careful to make sure that each individual notice complies with the current international standard, in the US Digital Millennium Copyright Act 1998 (DMCA), and we believe these are in general use nowadays.*

*For these reasons, we would have reservations about any proposal to introduce a new UK standard for Notice and Takedown – not because we are not concerned about enforcement in the UK, but because we believe adoption of a standard materially different from the current widely used US DMCA standard might lead to confusion, and give ISPs further excuses for non-compliance, even when the infringement is perfectly clear.*

*We would support the inclusion of a clause which limited the ability of claimants to bring an action against secondary publishers, such as booksellers, if they had not already brought an action against the primary publisher. This would apply to both physical and online booksellers. Booksellers are different to ISPs, as the content they supply to the public has a reliable, well-advertised and obvious provenance. The publisher of each work is easy to identify, locate and contact in respect of a case of suspected defamation.*

*Do you think that a new court procedure to resolve key preliminary issues at an early stage would be helpful?*

*Yes, absolutely. In our view this must be in the interests of justice and proportionality. We would also support proposals for a system of alternative dispute resolution for defamation proceedings, which could in our view save considerable time and cost.*

*Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases brought by corporations or more generally)? If so, what provisions would be appropriate?*

*We support changing the rules under which corporations can bring libel actions. We believe that corporations should not be able to sue unless they can demonstrate special damages (substantial financial loss to the company). We believe that moving*

*to a test of malicious falsehood would present too high a hurdle for legitimate corporate defamation cases.*

#### *Overarching issues*

*Do the proposals strike an appropriate balance between the protection of free speech and the protection of reputation?*

*The PA believes that the proposals do strike the correct balance, as they continue to offer those with genuine cause for grievance access to due legal process, whilst addressing the fundamental concerns around those who abuse the legal process to gag publication of unwanted material. We believe that the introduction of the 'substantial harm' test will enable spurious claims to be struck out at an early stage, enabling those genuine cases to proceed, costs of the overall system to be kept lower, and access to justice to be available to all.*

*Will the draft Bill proposals adequately address the problems that are associated with the current law and practise of defamation?*

*We believe that the current proposals do adequately address the problems which are associated with the current law and practice of defamation. By introducing the 'substantial harm' test, they assist in striking out spurious cases and those which seek to gag uncomfortable truths, whilst enabling those whose names have been genuinely defamed to have recourse to justice. We expect that this will reduce the 'ambulance chasing' mentality and practice amongst some law firms (particularly in association with the proposed revisions to CFAs under the Lord Justice Jackson proposals), enable costs to be reduced throughout the system, and enable more access to justice for more claimants and defendants. In addition, the proposals to tackle libel tourism will address a key and growing area of abuse in the existing system, and ensure that libel cases are only brought in this jurisdiction where that is clearly most appropriate. In addition, reducing the costs associated with the system and ensuring that more cases are able to be put before the court will be key to ensuring that genuine defamations are highlighted and that spurious claims which seek to gag are exposed.*

*The PA welcomes this long-overdue reform of defamation law and believes that it will redress the balance between claimants and defendants and ensure more access to justice for all.*

*June 2011*

#### *Appendix I*

*Report on the Impact of English Libel Law on the Publishing Industry and Freedom to Publish in the UK*

*May 2011*

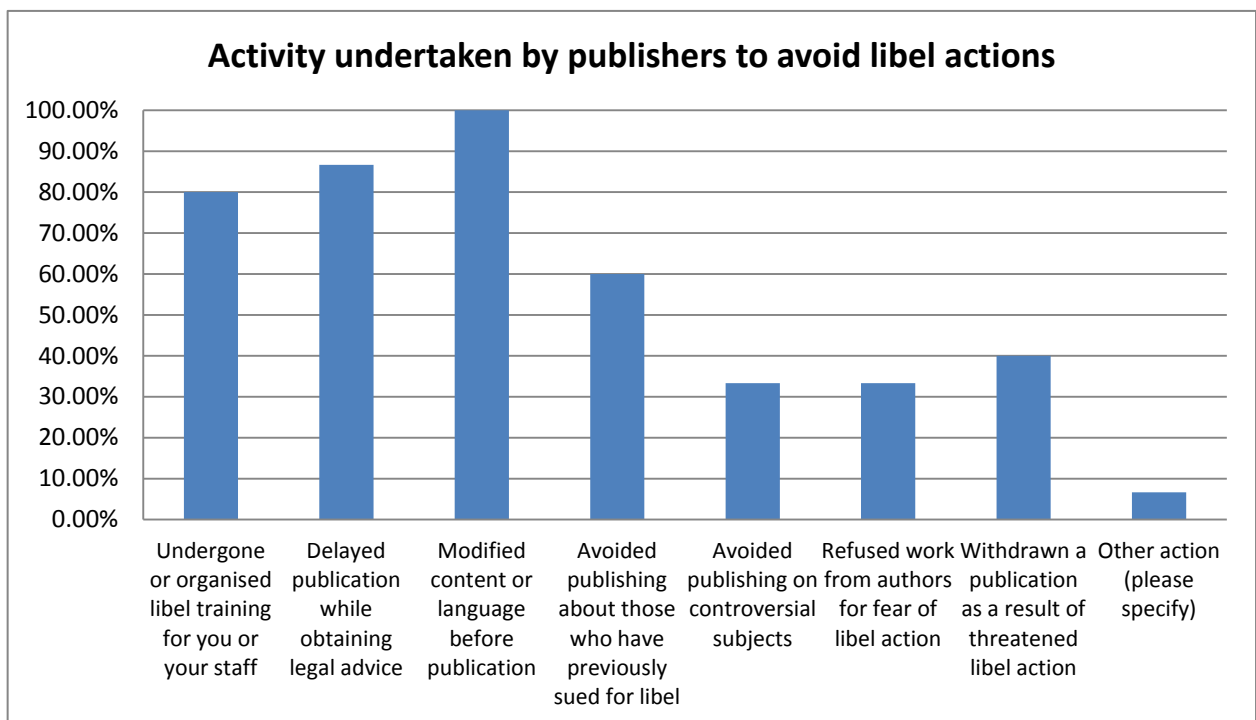
*The Publishers Association conducted research amongst its member companies in October 2010 to establish the commercial impact of current libel laws on the*

*publishing industry. Respondents to this survey represented 65% of our membership by turnover.*

*The Publishers Association is the representative body for the book, journal, audio and electronic publishers in the UK. Our membership of 113 companies spans the academic, education and trade sectors, comprising small and medium enterprises through to globally successful companies. The PA’s members annually account for around £4.6bn of turnover, with £3.1bn derived from the sales of books and £1.5bn from the sales of learned journals.*

*Has your company undertaken any of the following steps to protect itself from the threat of libel actions?*

- **100%** of the publishers who responded had **modified content or language** ahead of publication as a result of the threat of libel.
- **Almost half** of the publishers who took part in the survey have **withdrawn publications** as a result of threatened libel actions.
- **A third** have **refused work** from authors for fear of libel suits.
- **A third** have **avoided publication** on particular subject.
- **60%** have **avoided producing books** about specific people or companies who have previously sued for libel.



*What costs are associated with the threat of libel for publishing companies?*

*The average cost of libel advice and libel reading prior to publication was £39,000 per annum.*

*The average annual cost of libel insurance was £83,000.*

*The average cost of defending against a libel threat was £21,000.*

*On average, the cost of libel reading, libel insurance, and defending against libel threats over the previous 12 months amounted to just under **£200,000 per organisation** – this represents around 1% of the average annual turnover of the respondent companies, all to respond to threats of libel **before any case has been submitted to the courts.***

*The average cost of defending a **libel trial** in the courts was **£1.33m.***

## **Written Evidence, The Booksellers Association of the United Kingdom & Ireland Limited (EV 11)**

### **1. Summary**

- 1.1 We act for The Booksellers Association of the United Kingdom & Ireland Limited (“Booksellers Association”) which represents some 3,700 bookshops in the United Kingdom and the Republic of Ireland and is the largest trade association in the world representing booksellers. Amongst the outlets in membership there are large chains with mixed business such as WH Smith, large specialist chains such as Waterstones, large academic businesses such as Blackwells, wholesalers, library suppliers, small independents and supermarkets.
- 1.2 Considerable concern exists within the book trade as to certain provisions of the Defamation Act 1996 (“1996 Act”) and in particular section 1 which has, we believe, inadvertently weakened the common law defence of innocent dissemination and which, senior defamation counsel have advised, section 1 sets out to replace. Booksellers now find themselves in an invidious position: the sale of a book may be stopped simply by the issue of threats – usually contained in a so-called “gagging letter” from the claimant’s solicitors - against particular booksellers not to sell that book to the public where no action is at the time being taken against the primary publisher or author.
- 1.3 In paragraphs 101 to 119 of the consultation paper published in March 2011 (“Consultation Paper”) at the same time as the Defamation Bill, the issue upon which we now focus our submissions is raised although directed in large part to another type of secondary publisher, the internet service provider (“ISP”). In broad terms the position of booksellers is similar to that of the ISPs in that neither can – unlike the author and his publisher - be said to create or have editorial responsibility for the passages that offend. Each facilitates the dissemination of the work which contains those words and as such is often referred to as a secondary publisher. There are however some significant differences between the range and subject matter dealt with by ISPs and booksellers respectively and these make it necessary for them to be dealt with differently in certain respects in the law of defamation. We consider this further in section 4 below.
- 1.4 Freedom of speech and (indirectly) the right to disseminate literature freely is of course dealt with in Article 10 of the European Convention on Human Rights. The Booksellers Association is of the view that there is a danger that such rights have been and will continue to be eroded unless section 1 of the 1996 Act is amended.
- 1.5 Since 1997 representations have been made by the Booksellers Association to the (then) Lord Chancellor’s Department and various committees appointed by the Government to review the law of defamation, including the Head of Law Reform and Tribunal Policy at the Lord Chancellor’s Department, the Law Commission and more recently to Lord Lester. The Booksellers Association has during this time consulted expert defamation counsel: Mr Edward Garnier QC MP and Mr Gordon Bishop.
- 1.6 In this submission we concentrate upon the problem that has been created by s.1 of the 1996 Act rather than the many other issues upon which comment has been invited by the Joint Committee. We will also comment briefly on clause 9 of Lord Lester’s Defamation Bill 2010 which is referred to in the Consultation Paper and upon which comment has been invited.

## 2. Section 1 of the 1996 Act: the Problem

- 2.1 Section 1 of the 1996 Act was intended to provide a statutory defence equivalent to the previous common law defence of innocent dissemination to booksellers, newsagents, distributors and other secondary publishers. The protection that the Act was intended to provide in this respect has however proved to be somewhat illusory and – by dint, we believe, of poor drafting - provides less protection to booksellers than that previously afforded by the common law defence of innocent dissemination. Indeed, the provisions of the section have encouraged prospective claimants (often with dubious claims) - who are unwilling for reasons of expediency to commence proceedings against the author or publisher of the allegedly defamatory publications - to take or threaten action against booksellers alone in an attempt to force them to remove such publications from their shelves. As those claimants and their legal advisers clearly realise, booksellers are not in a position to put forward a substantive defence of justification or any of the other defences to libel proceedings because they have no direct knowledge of the subject-matter of the alleged libel. Further, the majority of independent booksellers do not have the means to fight a libel action even if they were to have access to the facts that would enable them to put up the usual defences.
- 2.2 Under the provisions of section 1 a secondary publisher loses his protection if (inter alia) he knows or has reason to believe that the publication contains any defamatory statement. Under the pre-1996 common law defence of innocent dissemination a reasonable belief on the part of the bookseller that the allegedly defamatory material was not libellous – because, for example, he had been assured by his lawyers or those representing the author or publisher that it could be justified – constituted a defence for the bookseller. Since 1996, however, because of the way section 1 of the 1996 Act is worded this defence is no longer available. As a result, the claimant can effectively prevent the sale or distribution of the book by simply having a letter written to the bookseller alleging a defamatory passage and threatening legal proceedings against the bookseller unless the book in question is withdrawn. The bookseller cannot now simply claim as a defence that he has a reasonable belief that the defamatory passage is not libellous and continue to sell the book in question.
- 2.3 Although there are undoubtedly some cases where a claimant may have good reason to sue a bookseller or other secondary publisher, as for example, where the author and publisher are out of the jurisdiction or can no longer be traced or are penniless, in the vast majority of cases where a secondary publisher - and not the primary publisher - is sued it is for the purpose of obtaining an advantage which could not be obtained if the action were taken against the primary publishers themselves. This tactic, in our submission, seeks to exploit an unintended weakness in the drafting of section 1 of the 1996 Act and tilts the balance in a way never contemplated by Parliament against secondary publishers: the need for any of proceedings to be issued is removed and a defence that had often pre-1996 been relied upon by booksellers demolished. This has in our submission weakened the right of free speech and is contrary to the spirit of Article 10 of the European Convention on Human Rights.
- 2.4 On receiving a letter alleging a defamatory passage in a stocked publication, the bookseller will in the normal course contact the publisher. The publisher will then consider whether or not to give the bookseller an indemnity but may



in any event be reluctant to accept back the books unless they have been supplied to the bookseller on a sale or return basis. Whilst the large well-resourced booksellers may be more inclined to ignore threats and accept the risk of litigation, others are unlikely to do so.

- 2.5 Nor is a publisher's indemnity necessarily an adequate solution to this problem: the publisher may not be willing to give an indemnity; the terms of the indemnity need to be sufficiently wide; the indemnity needs to be backed by substantial financial resources in view of the cost of litigation and possible multiplicity of legal actions; the fact that the publisher is unlikely ever to be able to disclose the amount or scope of any insurance cover that backs the indemnity and the bookseller therefore be in a position to assess the worth of the indemnity.
- 2.6 The present position is that booksellers who defy a gagging letter may now be put to the expense and under the administrative burden of having to establish one of the formal libel defences. This many will not have the resources to do. We were assured at an earlier meeting with the Lord Chancellor's Department that it had not been contemplated that this would be the effect of the new Act. Nor, had there been any intention to undermine the defence of innocent dissemination.
- 2.7 In response therefore to the specific question posed in Q.23 of the Consultation Paper we would submit that it is indeed appropriate for the law to be changed to provide greater protection to secondary publishers although within that category a distinction needs to be drawn between booksellers and ISPs and this we comment upon more fully in section 4 below.

### 3 Some Examples of the Problem

- 3.1 The Booksellers Association is aware of a number of examples of the problem which has arisen since the coming into force of the Act on the 5th September 1996. In one case David Irving sued individual branch managers of Waterstones for stocking the book "Denying the Holocaust: The Growing Assault on Truth and Memory". In another Neil Hamilton's solicitors threatened a number of booksellers with proceedings for libel if they stocked the book "Sleaze: The Corruption of Parliament". In neither case was action taken or at the time being pursued against either the author or publisher of the book.
- 3.2 Another example, which occurred at around the time the 1996 Act came into force, relates to the left-wing magazine "Searchlight". The booksellers Housmans and Bookmarks were sued by political opponents of the magazine in an attempt to persuade them not to sell it. Other small bookshops were also threatened with proceedings. In an article in The Bookseller (the booksellers' trade magazine) entitled "BA to fight gagging laws" further instances of gagging are described (see Appendix 1).

### 4. Booksellers and Internet Service Providers

- 4.1 The Consultation Paper deals under the heading "Responsibility for Publication on the Internet" (paras. 101 to 119) with the problems faced by secondary publishers and in particular ISPs. Although not made clear from the heading there is also comment directed specifically at or at least relevant to booksellers in their capacity as secondary publishers (see especially paras. 107 and 114). Booksellers and ISPs are bracketed together as secondary publishers where, in our submission and as already mentioned in para.1.3

above, a further important distinction needs to be drawn between these two categories of secondary publisher and the material that each publishes: the distinction exists not only between online and offline as suggested in the last sentence of para. 114 of the Consultation Paper.

- 4.2 In addition to printed books sold from actual brick and mortar outlets there are a large number of e-books stored and sold online and a significant distinction needs to be drawn between the ISPs and the booksellers in the context of any provision included in the new Defamation Act to amend s.1 of the 1996 Act . In the case of both books printed off-line and e-books sold online details and the identities of the author and publisher – and in the case of the publisher its place of business – are almost always provided in the book. This is not so however in relation to much other general material – other than e-books - that appears online where neither the identity nor location of the author may be shown.
- 4.3 The distinction is well illustrated by reports in the national press on 10 May of the leaking of details of so-called super injunctions on Twitter by an anonymous author. The identity of the author and ISP are very difficult to trace.
- 4.4 The distinction is again highlighted in an article by the sports journalist Gabby Logan which appeared in the Times on 14 May (see Appendix 2). Ms Logan refers to a series of salacious libels against herself published recently on Twitter. In view of the near impossibility of tracing the author without the cooperation of Twitter - not it appears to-date forthcoming – Ms Logan claims that she has no effective recourse. She comments that “If lies tweeted about me had been printed in newspapers then I would have sued”. We would suggest that her comments in relation to newspapers applies equally to online books: in both cases the identity of author and publisher could be immediately ascertained.
- 4.5 Whilst therefore there are similarities there are also differences between these two separate classes of secondary publisher and these differences need to be recognised in the new legislation. It may be that these differences can be dealt with by distinguishing between a secondary publisher who publishes material where the identity of the author and origin of the material can be readily identified – and recourse be readily available against the author and publisher - and a secondary publisher – likely to be an ISP – where it cannot. The distinction is fundamental if the flow of e-literature is to continue unimpeded by any limitations that the new Defamation Bill places upon the ISPs.

## 5. A Possible Solution

- 5.1 If indeed it was not the intention of Parliament to undermine the common law defence of innocent dissemination but simply to incorporate it in statute as section 1 of the 1996 Act then some amendment of that section is needed. Only by such amendment can the situation in which the distribution of a book can be prevented simply by a (solicitor’s) letter to the bookseller without the need for any proceedings to be issued or the primary publisher/author made party to the measures taken by the claimant. Booksellers neither expect nor seek immunity from liability in respect of the publications they sell, but they should be provided by the new Act with as good a defence as they had under the common law prior to the 1996 Act’s coming into effect. The problem has in

our submission been caused by the loose drafting of section 1 and was never intended.

- 5.2 We would urge that booksellers be free from threats and the risk of proceedings against them unless:
- (1) at the time they sold the publication they knew that it was defamatory of the plaintiff and did not reasonably believe that there was a good defence to any action brought upon it; and
  - (2) the plaintiff has no or no sufficient redress against the author or publisher.
- 5.3 The wording of (1) above is taken from section 11 of the Defamation Act 1952 which sets out the circumstances in which an agreement for indemnity in respect of civil liability for libel is lawful. There seems to be no reason why such provision should not be introduced in to the new Act by way of a defence for booksellers in relation to both online and printed books. Indeed (2) may be used to deal also with the position of the ISP's.
- 5.4 Further, to avoid "gagging" letters or writs against secondary publishers the claimant should not be entitled to sue or obtain interlocutory injunctions against them, unless at the same time (or before) he also brings proceedings against the author, editor and publisher unless there are good grounds for not doing so.

## 6. Some Suggested Amendments to Section 1 of the 1996 Act

- 6.1 In response to Question 24 of the Consultation Paper - and in so far as it applies to booksellers – we would submit that the best course would be for section 1 of the 1996 Act to be completely re-written. At the very least sub-section (1) should be amended to read something along the following lines: "In defamation proceedings a person has a defence if he shows that he was not the author, editor or publisher of the statement complained of, unless at the time of publication:
- (a) he knew or had reason to believe that it was defamatory of the plaintiff; and
  - (b) he had no reasonable grounds for believing that there was a good defence to any action brought upon it.
- The burden of proof shall be upon the claimant to prove that such a defendant knew or had reason to believe that the statement was defamatory of him and upon the defendant to prove that he had reasonable grounds for believing that there was a good defence to any action brought upon it. "
- 6.2 Sub-section (5) should be deleted and a new sub-section (5) introduced to provide something along the following lines: "No proceedings for defamation shall be commenced against a defendant who is not the author, editor or publisher of the statement complained of unless:
- (a) one or more of the author, editor or publisher are made defendants in the proceedings or proceedings have already been commenced against one or more of them; or
  - (b) the author, editor and publisher are not within the jurisdiction of the court or it is otherwise impractical or unreasonable for the plaintiff to take proceedings against the author, editor and publisher."

6.3 It might also in our submission be desirable for the new Act to include provision that:

    - (i) in proceedings brought under (a) above against a primary and a secondary publisher the proceedings against the secondary publisher

should be stayed until after the action against the primary publisher has been tried and determined or otherwise disposed of;

- (ii) a plaintiff should not be entitled to commence proceedings under (b) without the leave of the Court;
- (iii) a plaintiff should not be entitled to recover damages or costs against a secondary publisher save in a case falling within (b) above or unless there is another good reason for joining the secondary publisher as a defendant.

6.4 So as to reduce further the risk of vexatious gagging letters or proceedings against booksellers we would suggest that there be introduced provision that a wrongful threat to bring proceedings against booksellers should, as in patent law, be actionable by the person aggrieved by that threat.

## 7. Lord Lester's Defamation Bill 2010 ("Lester Bill")

7.1 Issues were raised in the Consultation Paper that related to the Lester Bill and accordingly in response to Question 26 it might assist for us to let you have some comment on section 9 of the Lester Bill which covers in part the responsibilities/liabilities of a secondary publisher.

7.2 There should, as we have already commented, be a requirement that the claimant has, before issuing proceedings against a secondary publisher, first or at the same time issued a writ against the author, editor (if any) and publisher with a possible exception if the claimant can establish that the author, editor (if any) and publisher are all outside the jurisdiction or that it is for some other reason impractical or unreasonable to expect the claimant to issue such proceedings.

7.3 The claimant should be required to establish that at the time of publication the secondary publisher knew that the passage was libellous and had no reasonable grounds for believing that there was a good defence to the action.

7.4 The burden of proof in relation to the notification defence in section 9 is upon the claimant (section 9(2)) and this should extend to the defences proposed in para 5.2 above.

7.5 In addition further provisions may be considered: (i) a requirement that before a claimant can bring proceedings under para. 5.2 above the Court's consent be obtained (ii) if proceedings have been/are at the same time commenced against the primary publisher then those against the secondary publisher should be stayed pending the outcome of the primary publisher action.

7.6 It is not entirely clear that the definition of "primary publisher" in section 9(6) clearly excludes a bookseller which of course it should. We assume also that the definition of "facilitator" is not intended to include a bookseller but this too is unclear. Some further minor drafting would need to be made to help achieve clarity.

## 8. Conclusion

As already mentioned, the Booksellers Association has on a number of occasions since 1997 made representations on behalf of its membership to the (then) Lord Chancellor's Department, the Law Commission et alii in relation to the innocent dissemination defence that is of fundamental importance to the bookselling industry. We hope that with a new Defamation Act under consideration there is now the chance to restore the balance

between claimant and bookseller where it has been tilted too far in the favour of the claimant.

*May 2011*

## **Written Evidence, National Union of Journalists (NUJ) (EV 19)**

The National Union of Journalists (NUJ) is the TUC-affiliated union representing journalists working in the UK, Ireland and internationally. The union was formed in 1907 and currently has approximately 38,000 members with around 30,000 working as journalists or producing or editing editorial content in newspapers, broadcasting, web-sites and news agencies.

The NUJ has always seen the relationship between democracy and journalism as important and the right to freedom of expression as imperative. The NUJ has consistently supported a free press since its inception. However, it also supports other civil rights, as outlined in the Human Rights Act and so believes that people have a right to a reputation and a right to a private family life and that these should be invaded by the media with caution and only in the public interest. In order to inform members' ethical decision making, the union has had a code of ethics since 1936 (this code helped to inform the current Press Complaints Commission code) and this is regularly reviewed and updated (the last major update was in 2007).

The union has expressed its concern about the effect of the present law of libel on many occasions, most recently at the last Culture Media and Sport Select Committee examination of this issue in 2009 when we told the committee:

“UK libel laws and the operation of conditional fee agreements have a chilling effect on reporting in the UK. The NUJ agrees it is important to protect people's reputations and that these should not be harmed purely for the entertainment of readers and to increase circulations; nor should someone's reputation be damaged by lies, smears or innuendo. However, in order to report on the fitness of people in public life, whether politicians, those in public office or those who deal with the public through their business or personal inclinations, it is occasionally necessary to expose wrongdoing or anti-social behaviour. We strongly believe there should be a public figure defence, such as that which is in place in the United States. This would mean that someone in public office would have to prove either a reckless disregard for the truth, or malice when damaging information about them has been published. Refusing to print corrections or clarifications would be evidence of reckless disregard. At the moment, there is less risk to a newspaper in publishing true, but private revelations of some private citizen's sex life, than there is about publishing details of corruption in business or political life. This is not acceptable and the libel laws should be amended.”

Our view on this has not changed and we continue to pursue the aims outlined above.

For that reason we welcome many aspects of the Bill. Its aim of reconsidering the balance between reputation and free expression is welcomed as is its attempts to address one of the major concerns of the NUJ, which is the exorbitant cost of defending a claim for defamation against the subject of a story. Whilst we understand that the Committee will also be concerned with the right of an individual to his or her private life, we would say that these concerns are identical to those of journalists facing claimants determined to suppress damaging truths. The difference is that whilst a major publisher can use 'costs' to intimidate a claimant there is the possibility of Conditional Fee Arrangements (CFAs) that allow claimants to bring cases and there

are numerous examples of successful claims using CFAs. However, CFAs are not available for freelance journalists or small publishers.

A threat to sue, regardless of the potential for success, can often deter a journalist because of the simple problem of costs. Even to get a suit thrown out as vexatious can cost tens of thousands of pounds; money a freelance or small publisher doesn't have or can ill-afford. Even if the story is finally published, it will often make only a very small income. It was suggested during our oral evidence to the Joint Committee that there ought to be a penalty imposed upon a vexatious claimant. This might have some advantage in that at least it ought to guarantee that after all the difficulty and stress of a long drawn out defamation suit, and possibly an appeal, the journalist would get all their costs paid but it is doubtful that it would seriously deter a determined claimant.

The reality is that if you write something that upsets someone with sufficient funds they threaten to sue. As a journalist you must then consider whether you apologise and retract reasonably quickly, or do you defend, with the chance you may lose with six or even seven figure costs or that you may win, only to face an appeal that will double the potential costs. Even if you finally win, the actual settlement may not cover the full costs of defending such an action. There are ways of levelling the playing field. In the United States, for instance, public figures need to prove malice as well as defamation. This obviously sets a high bar and although it does not prevent every attempt to bully a journalist into dropping a story, it does alter the balance.

The most important element of defamation reform is cost reductions, more efficient case management and the emphasis in the draft Bill ought to focus on statutory definition and defence guidelines, strike out provisions and alternate proposals to jury trials.

## **Definitions**

The statutory provisions appear to simply reflect the Common Law position. However, the move to statutory definition on the substantial harm as a test, the move to truth rather than justification, the definition of honest opinion and the widening of the categories of privilege are welcome. However the aim ought to be to make a real difference to the Common Law provisions as they stand in order to reform an area of the law which favours the wealthy rather than freedom of speech.

## **Responsible publication**

The most important change, and one that must be got right, is the change in the Reynolds's defence clause. When first drafted this was welcomed by all but its operation by the courts over the years has been disappointing. Even following the Lords' decision that the guidelines were just that and not a set of ten hurdles, all of which must be jumped in order to gain protection did not seem to ease the difficulties of using this as a defence for serious reporting in the public interest. Consequently the NUJ welcomes the introduction of a clause on responsible publication on matters of public interest.

We feel that drawing up a list to which the court *may* have regard is a step forward. The list itself contains only two elements that we have concerns about:

Point (e) concerns whether the journalist sought the views of a claimant before publication. Whilst we would agree this is good practice, we are also concerned that it is not always possible for a variety of reasons, the threat of a lawsuit, the triggering

of an injunction and the threat of physical violence being just three. Whilst we have no problem about this being seen as good practice, we would have concerns that this clause might lead to this defence being dismissed automatically every time a reporter did not approach a claimant for a comment until after initial publication. We would prefer to see a clause that insisted that a claimant should be approached within a reasonable time of initial publication in order to put their viewpoint if the defence is to be used.

We are also concerned about clause (g). Whilst rushing to print is no excuse for poor journalism, in a world where journalism is part of a commercial operation in a 24-hour news environment getting the story first is crucial for a newspaper or broadcaster's commercial viability. We would be concerned that parliament and the courts need to understand that if we are to have a free press run on commercial lines then urgency is an important criterion as a publisher who does not believe in urgency will soon go out of business. What might seem over-hasty to the courts, might be considered slow and cautious within the publishing world and we would like the clause to reflect that.

It would also be appropriate to include evidence of adherence to a recognised code of practice such as that of the NUJ, PCC, Ofcom or the BBC.

### **Single publication rule**

We strongly welcome the change in the single publication rule. The introduction of the internet has changed how the industry publish if every new page imprint is considered (as the courts have determined they should) a new publication. In reality, accessing a page and so tripping a new imprint is much more akin to popping into the newsagent and picking up a copy of your favourite paper.

### **Jurisdiction**

We also welcome the Bill's changes on jurisdiction. It is important to reduce, or better still eliminate, the opportunistic libel tourism and preserve the principle of freedom of expression.

### **Corporations**

One element that is not in the draft Bill but which the NUJ would seek is to remove the right for corporations to sue. Human rights apply, and should only apply, to people. Corporations have the ability to protect their brands and trading positions but should only be able to sue if they are able to prove actual financial damage. Corporations are already able to exert a range of influences on journalists and publishers and corporations can sue for malicious falsehood as well as having a range of other legal recourses. Their individual staff and executives are of course able to sue in their own personal right if they wish and of course if a corporation wishes to fund that it's up to their shareholders to decide whether that's appropriate.

### **Internet comments**

Comments and discussion around stories is now an important part of the work of news publishers and broadcasters. Moderating these comments can be extremely burdensome especially if thousands of comments are received each day. It is standard practice for many publishers to post-moderate. In effect this means using the abuse alerts to pick up offensive or abusive comments. Checking for offence, abusive and obvious defamation is fairly quick and such comments can be quickly removed. However some comments might receive complaints of defamation where the underlying truth of the defamation cannot be easily verified. In order to prevent



publishers from feeling obliged to remove every potential slight from the site there needs to be a way of quickly and cheaply deciding whether such comments should be removed. Although the NUJ is now committed to the abolition and replacement of the PCC, we believe that an industry body such as the PCC or Ofcom could take such complaints as an independent body able to look at the evidence presented by the claimant and make a recommendation to the publisher about whether it would be appropriate to remove it. If the publisher decided to ignore the advice, then they would lose the innocent publication defence and the claimant could sue. In the meantime, the publisher should mark the comment as in dispute to limit its spread around the internet.

*May 2011*

## Oral Evidence, 23 May 2011, Q 371–397

*Witnesses:* **Vicky Harris**, [Senior Legal Counsel in the Markets Division of Thomson Reuters, The Publishers Association], **Tim Godfray**, [Chief Executive, The Booksellers Association], and **Professor Chris Frost**, [Chair of the National Union of Journalists' Ethics Council, National Union of Journalists].

**The Chairman:** Welcome, and thank you very much for coming and for being willing to share your expertise with the Committee. You will have heard how I started the preceding session. First of all, you are free to speak through the Chair whenever you want to, but if there is a question and one of you answers and the other two are content with the answer, you do not need to repeat it, but if you want to dissent from the answer, then of course you must feel free to do so. That way we get slightly more questions in.

Secondly, if there is anything that any of the three of you absolutely feel that you need to get off your chest before we start, now is the time to do so. No? In that case, Lord Bew.

**Q371 Lord Bew:** Mr Godfray, I completely understand why booksellers are concerned to protect the common law defence of innocent dissemination. I was, however, struck by the cautious tone that you have adopted towards proposals currently in play for possible changes in the law, and even slightly surprised, for example, at the comment in your paper on Lord Lester's Bill, I think Section 9, where you raise an issue about the distinction between the primary publisher, I think the phrase is, and you say it is not clear whether that is or is not the bookseller, whereas I must say to me it is fairly clear it cannot be the bookseller. There is a clear distinction. So what I would ask you to comment on is there seems to me—perhaps I am naïve about this—a surprisingly cautious tone in your attitude towards the ideas that are currently in play, either in Lord Lester's Bill or in the Government Bill.

**Tim Godfray:** Perhaps the deferential tone is due to the fact that I am not a lawyer or a bookseller, but I do understand the book trade, and I am very pleased that you are understanding of the positions that booksellers find themselves in.

Our concern revolves around Section 1 of the current Defamation Act, and we do not think that what is written at the moment gives booksellers the protection that we believe they deserve. Also, the world has moved on, and we do not think that it differentiates sufficiently or properly between on the one hand the internet bookseller and, on the other, the ISP. As far as the bookseller is concerned, most of our members have bricks and mortar shops, but they also sell books online as well. And if you sell a printed book or if you sell an electronic book, it is very clear to you or to the consumer who the author is or who the publisher is, because you have that very clearly indicated on the book itself, usually at the back of the verse of the title page. That is pretty prominent.

I listened in the earlier hearing to some of the discussions, and I would just like to stress that I do not think that we are in any way not transparent. The name of the publisher and the name of the author are absolutely out there. We are not Twitterites, if you see what I mean.

**Q372 Lord Bew:** Thank you. Because one could be brutal and one could say that the examples that you gave of, I accept, difficult cases are all not even, I think, in this century. They are all 1990s, am I right, in terms of the cases where booksellers have found themselves—

**Tim Godfray:** Well, yes. In our submission, we did mention a number of high-profile cases that reached the national newspapers. There were two books that were involved with David Irving, the writer and historian who tried to suppress publication and circulation, and there was another one that involved Neil Hamilton, the MP, who tried to prevent the distribution of a book. But as far as we are concerned, the WH Smiths and Waterstones have told me that they receive about six letters probably a year, and booksellers are in this very difficult position, because once a claimant sends a bookseller a letter saying, “I have seen something in this book, and I believe I have been defamed” the bookseller is effectively on notice, he or she is gagged, and you almost have to take the book off sale. That is your first reaction.

It seems to us very unfair that the claimant can have a go at the bookseller under the 1996 Defamation Act and does not have to approach the primary publisher, the publisher and/or the author. But when a bookseller does receive what we call a gagging letter, it involves the retailer in an enormous amount of work. You have to consult the publisher, you have to talk to your own legal advisors and you also have to discuss the issue with the management team. So for us the present situation that we find ourselves in is far from perfect. And we are very grateful, my Lord Chairman, to this Committee for having a look at the matter, because we do hope that some improvements to our position can be made.

**Q373 Lord Bew:** Could I just conclude by putting my first question the other way around, if I may? Is there anything that you see either in the Government’s draft Bill or in Lord Lester’s Bill that would improve the situation from your point of view?

**Tim Godfray:** I think that our main concern is that under the proposals of the 2011 Defamation Bill the position of secondary publishers does not appear to be covered in any way. So that is our main concern. For starters, I think, we would say we are disappointed that has not been addressed. Nevertheless, I said at the beginning I was not a legal expert, but I have read some of the background papers and it does seem as if a great deal of improvement has already been made in the drafting that has been done to date. So I think those people from the book trade that have looked at what is proposed in broad terms—broad terms—welcome many of the changes that are being introduced.

**Lord Bew:** Thank you.

**Q374 Sir Peter Bottomley:** On the bookselling point, am I right in saying, to summarise, that what your members would like—or those in your industry—is that if you return to the word “liable” rather than “defamation” or “defamatory” you would be pretty content?

**Tim Godfray:** I think that is a bit of a legal question and I am not sure I am equipped to answer it, but possibly I could make another point, just to say that booksellers themselves are not legal beavers and there is no way a bookseller can know whether a passage in a book is defamatory or not, because the bookseller did not write it. But when there is a position of doubt, we want to be able to be told very quickly by somebody in authority—I do not know, whether it is a defamation tribunal, or whether a judge or whatever—if the book is, so to speak, onside or offside, and a quick decision I think for us would be enormously helpful.

**Sir Peter Bottomley:** If I can just interrupt myself by saying a bookseller could write back to the person who sent the chilling letter saying, “I expect to sell 40 books. I expect my net revenue to be £120. Will you send me £120 if you do not proceed with a defamation against the author?”

Tim Godfray: Yes.

**Q375 Sir Peter Bottomley:** Can I just turn to journalism? What makes the present law as it is known on defamation and libel on writing untruths damaging? Does it harm the dissemination of information and opinion that ought to be out in the open?

**Professor Chris Frost:** Well, I would certainly say it has the possibility to harm it enormously, not necessarily from truth, though certainly all responsible journalists—and I accept not all journalists are necessarily responsible—do their very best to ensure the accuracy of what they are writing. Very often defamatory remarks are based around opinion and fair comment, as I am sure you well know. So it is about the way that you talk about someone, and certainly my thankfully relatively limited experience of those lawyers’ letters is that it is the sort of almost throwaway remark that you did not think about when you were writing that attracts the letters. The ones where you have worked quite hard to ensure the story stands up, that you have the facts, that it is as fair as you can make it, do not tend to. That said, I have not been writing as a journalist on the front line for a while, and things, as I understand it, have probably become a little worse over the last few years.

But if I can just sidetrack a bit and support what is being said here. One of the issues that we do have concerns about is where you have done all those things and you have worked very hard to make sure that the piece that you are writing is accurate and is fair, and then you find someone takes an almost backdoor route to defamation by going off to the bookseller, by not going after the author, by not going after the publisher or the editor, because they know very well that they will defend it, and they will defend it very firmly, where of course, not surprisingly, the bookseller will turn around and say, “Nothing to do with me. I’m going to make a few pounds out of this. I will just take it off the shelves”. If you do that with a big distributor, the WH Smiths and the like, it is no surprise—and I sympathise with them—if they were to take down magazines, books from the shelves because of that kind of risk. It is not their fight, at the end of the day.

**Q376 The Chairman:** Just before I call Lord Grade, can I ask a question that has come to mind following that exchange? I am told that what newspapers permit in terms of reader input is much less regulated on the net version than in the paper version. Would it be sensible for the papers, in your view, to have a single standard that would require them perhaps more rigorously to fillet contribution from readers that appears on the internet to the standard that they appear to do when they appear in the newspapers in a hard copy form?

**Professor Chris Frost:** It is quite difficult. You are quite right, it is very much easier for people to read the article, particularly if they have read it online, and then to add a comment, and most newspapers solicit this. It is good in terms of journalism, it is good in terms of free expression, it is good in terms of involving communities in discussions around issues, and so generally it is something that I am sure we would all wish to encourage. The difficulty is if you raise an issue that is important or that is very popular, and particularly for some of the bigger publications who have large readerships, perhaps less so for a small local newspaper, but even there the numbers of responses that you start to get become extremely difficult and very burdensome in terms of costs to premoderate. So the temptation is, in order to

continue to have these responses, to post-moderate. In other words, somebody rings up to complain, you have a look. If it is abusive, if it is offensive, you immediately take it down.

But of course with defamation, it is much more difficult. While you can see something that clearly is defamatory, you do not necessarily know if something is inaccurate or is based on untrue facts, and that can be extremely difficult to deal with. This is very much going back to the questions that you were raising in the earlier session. I have to say I took a slightly different view to some of the expressions of opinion from here earlier on, in that I think premoderation is too burdensome in many cases. It would damage freedom of expression and it would prevent people exchanging views. A way around that is if someone says, "This is defamatory" as opposed to purely being offensive or abusive—that is much easier to deal with—it does need to go somewhere. I do not see that needs to be a statutory tribunal. It is quite easy to get an industry body.

The NUJ no longer agrees with the PCC; we are now campaigning to oppose the PCC and replace it with a better organisation, as we see it. But as the PCC is what is there at the moment, let us take the PCC as an example. You could complain to the PCC—indeed, as you do now—and the PCC would look at the evidence, decide if there was some potential for there to be a case, put that to the publication concerned. If the publication then said, "No, we are ignoring that, we are ploughing ahead with it" then of course they would lose that defence of an innocent publication.

So I think there are ways to deal with this without reducing freedom of expression, which is coming through I think very, very strongly, and to be encouraged on a lot of newspapers and other websites. If you read the BBC, you read the *Guardian*, any of those, all the comments that follow on from those I think are very important, even if some of them are rather unpleasant.

**Vicky Harris:** Yes. I think—sorry, just to add to that—we would equally find that to have that kind of premoderation in advance would stifle that discussion, and would just send it to a different forum. I think that if you did have a premoderated discussion board that would mean that people would not use that as a forum to discuss, they would go on to Twitter, they would go on to other social networking sites, and I think you are just moving the problem somewhere else. Having it on a responsible publisher's website, when there is a problem, it can be dealt with through an adequate system and that is a better way of dealing with the problem.

**Q377 Lord Grade of Yarmouth:** I think there would be a general consensus that one of the results of the complexity and uncertainty surrounding increasing the defamation legislation is that it inevitably leads to very high costs in terms of court proceedings and so on. Perhaps I could ask Professor Frost whether, in your view, what the Bill has proposed in respect to Reynolds and the other defences goes far enough that they will result in some greater certainty and in reduced costs or do you think by codifying things and being more explicit, you just add to the complexity and you are at the mercy of long court cases as a result? What would you like to see?

**Professor Chris Frost:** Well, I do not think it would be possible to codify it any more than is in the Bill. I have racked my brains now on a number of occasions thinking, "Does this go far enough? Are there other ways of doing this that would adjust it?" but quite clearly you need to be testing for how true the accusations are and you need to be testing for whether it is honest opinion, you need to be testing for privilege. There are still attempts to do that and apart from one or two minor points, which is probably best put in my evidence, we think that a reasonable job has been done.

The costs build up for several reasons, in my view. One of those is that they are used as a battle weapon by both sides at times, and publishers with large pockets can use it against claimants with small pockets but, equally, claimants with big pockets can use it against publishers with small pockets. So costs can be used as a battle and so cost management is incredibly important. It is obviously not mentioned in this Bill, but it has to go alongside this Bill, otherwise frankly I think we are wasting our time with the Bill. The same again about defining the meaning as early as possible, so that a number of the battles are fought as soon as possible, so there are ways to do that, and they have been identified by others who are more knowledgeable about the law than I am. I cannot see anything in the Bill though that particularly needs changing in terms of what it is trying to codify.

**Q378 Lord Grade of Yarmouth:** Do you think that statutory mediation should be part of that? In other words, you set the bar pretty high before you can get to court with a full-blown defamation action.

**Professor Chris Frost:** Yes, I think it needs to be reasonably high, but I think the Bill does that. It is now saying we have to have substantial harm, so you are not just turning up and saying, "My feelings have been slighted, I want to pursue this". You could say now, "There is substantial harm. I can show how this has damaged me" and that can be fairly early on before the costs get too high.

**Lord Grade of Yarmouth:** So just to get you on the record on it, you are quite comfortable, or reasonably comfortable?

**Professor Chris Frost:** Reasonably comfortable, yes.

**Q379 Lord Grade of Yarmouth: Reasonably. Where is it unreasonable?**

**Professor Chris Frost:** Well, I was afraid you were going to say that. No, there is not. Again, I have been racking my brains. I am not a lawyer; I am not a Bill draftsman. I cannot think of a better way of putting it than is in the Bill. However, five years, 10 years down the line, who knows?

**Lord Grade of Yarmouth:** Yes, thank you very much.

**Q380 Chris Evans:** I think one thing that is forming in my mind, it is quite clear, is it is all very well being defamed on the internet and asking the ISP to take it down, but how do you stop that defamation going around the world within 30 seconds of being put on the internet? You have seen over the weekend there was a super-injunction upheld where somebody asked Twitter to give the information of the original defamer. Over that weekend there were 20,000 tweets on defamation. Now, how do you frame a Bill that, one, stops that and, two, crosses a number of countries' jurisdictions as well? That is my real problem with this Bill. I am wondering if you can help me with that. How can we frame a Bill that can stop the original defamation being just spread everywhere?

**Professor Chris Frost:** Well, you cannot, and nobody has ever been able to stop defamations, where they are interesting enough and strong enough, from circulating. I am fairly willing to bet that before Twitter got hold of this that at least a third of you knew who the person named in the injunction was. It is almost a macho posturing for journalists to find out. They are not necessarily interested in it, they are not going to publish it, but just feel you ought to know. So these things go around very quickly and they always have done. Indeed, I assume they did hundreds of years ago and that they will do now. If you try and draw up a Bill that defeats that, all you will end up doing is completely squashing freedom of expression, because the

only way you have left to go is to say, “Well, nobody can talk about anything, any story”.

So you need, in my view—and I think this Bill attempts to do that—to aim a Bill that is looking at the sort of average circumstances, the average person, the person who has been defamed, who did not expect to be defamed, who was not in the public eye and would not have taken out an injunction in the normal run of things, because they were not rich, they were not famous, they were not a celebrity. If you are protecting those kinds of people, then that is what a Bill should be doing. It is going to be very, very difficult to have a Bill, in my view, that would protect that kind of celebrity if enough people are interested in it, and clearly they are.

**Q381 Chris Evans:** My other question is to booksellers. Is it right that if you sell a book through Amazon and somebody posts a review on there that the author views as defamation, is it right that that bookseller can get sued? Or is it just the author being hyper-sensitive in that he does not like bad reviews?

**Tim Godfray:** I think you have to regard the physical bricks and mortar bookshop as being often a physical pipe, so you are taking words from the author that hopefully have been enhanced by the publisher, and the bookseller is permitting a route to market. The internet bookseller is doing the same, offering an electronic pipe rather than a physical one. Now, if the internet bookseller is just providing a platform and is not in any way changing the text or information, if it is just offering a platform and not having anything to do with the content, then I do not believe a claimant should believe that the bookseller, the internet bookseller, is vulnerable. However, if a review has been posted into Amazon or whatever and the internet bookseller has then massaged it in some way, has contributed, worked on it, and a defamation has ensued, then I feel that the internet bookseller has become a primary publisher.

**Q382 Chris Evans:** When you say “worked on” what do you mean? Is it a case of, “Several reviewers said this book was terrible”? Is that the type of thing when you say “working on it”?

Tim Godfray: Yes.

**Q383 Chris Evans:** Could you expand what you see as “working on” a bad review then and making it worse or something?

**Tim Godfray:** Well, if the bad review comes from somebody, a member of the public or whatever, then I do not think that the internet bookseller should be vulnerable, but if the internet bookseller has done some work on changing the text or on producing some content about that book him or herself, then that is a different matter.

From the booksellers’ point of view, you have, I think, 1 million books in print at any one time. You have 137,000 new books coming out each year, and even a sort of average-sized bookshop—Waterstones in Peterborough, for example—have 37,000 different titles there in stock. You just have so many titles around so much information. I think for a physical bookshop or an internet bookseller to be responsible for knowing what has been posted is asking a bit much.

**Q384 Sir Peter Bottomley:** I am trying to get to secondary collection of information. If I do an internet search on one of the recognised, respected services—Factiva, LexisNexis, Thomson Reuters, Google, whatever it may be—and I am searching for some acknowledged defamation that went out in print, do you think that the people

who are providing the search service to me, whether a subscription or it is free, have a responsibility to try to weed out known defamations?

**Vicky Harris:** I think in that instance it is difficult, because the record is out there of what that information is. The search engine is just producing that information for you in response to that search. Equally, I think where there are known defamations, there is a responsibility on the primary publisher. So, for example, Thomson Reuters has its own news agency. There is a reuters.com website with articles on there, and to the extent that we are having an article that somebody comes and makes a complaint about and we are in the belief that we have said something defamatory, we will take steps to correct that and remove it and it will not be there in future. I think there is a difference between that primary publisher role and the kind of search engine that will find information that is out there on the internet.

**Q385 Sir Peter Bottomley:** Is there a system that you know of where the primary producer of the information can say, "Please don't put this into your search results, because we have taken it down" or taken it off or made a note against it?

**Vicky Harris:** I am not aware.

**Professor Chris Frost:** I understand you can tag them so that they do not come up in the search engine, although the risk is that apparently they stay in the search engine's cache for up to two or three weeks, so it depends. It just exists somewhere. I do not understand why.

**Q386 Sir Peter Bottomley:** But it might be a defence to say, "We do have a system. The system is working; the fact it cannot work instantaneously is one of those things"?

**Professor Chris Frost:** As I understand it, yes.

**Q387 The Chairman:** Can I ask one or two questions to conclude our conversation? The law appears to treat individuals and corporations in exactly the same terms when it comes to defamation. Do you think that is right?

**Professor Chris Frost:** No. I mean, the only thing—

**Q388 The Chairman:** Not is it correct; do you think it should be like that?

**Professor Chris Frost:** Still no. The NUJ believes that corporations are not natural persons, they therefore do not attract the same human rights as natural persons, and that therefore their right to sue for defamation should not be there either, in that they do not necessarily have a full right to reputation. There are clearly other ways for corporations to deal with problems of that sort, malicious falsehood probably being one of the most obvious ones, but there are other ways of dealing with it as well. Again, this comes back to a certain extent to claimants with big pockets trying to suppress writers, authors and publishers with very small pockets, and there are a number of examples of that. I know you have heard of some already.

**Q389 The Chairman:** We have had evidence that might be divisible into two groups. One is corporations should not have any right to sue at all, but they can, as you point out, take other legal remedies, and the other is they should have to show serious financial damage. That should be the basis on which they sue, although we have not been offered unanimous views as to how you judge serious financial damage. Any comment on either of those, a preference for either of those under the terms of the question?



**Professor Chris Frost:** Yes. Again, my understanding of the law is that if they were able to show serious financial damage, then they would almost certainly be able to bring a suit for malicious falsehood. The niceties of the law are so detailed that I am afraid you would need to ask a lawyer where that dividing line comes. That is my understanding of it, though. So, no, we do not think it needs to be there. They have other recourses that I am sure they would be very happy to use.

**Vicky Harris:** I think from the Publishers Association perspective, we would see that probably going that other route, with kind of the substantial financial loss as a better option. We see that there are certain circumstances in which a corporation should be allowed to bring a claim for defamation, but it should certainly be a higher hurdle than for an individual.

**Q390 The Chairman:** Another issue on which we have had divided opinion—so I am inviting you jump on one side or the other—there are those who have told us that libel tourism used to be a problem but it is not much of a problem now, and there are those who tell us that libel tourism is still a problem. Which way do you think we ought to be guided?

**Professor Chris Frost:** Certainly the NUJ's view is that libel tourism is still a problem, and that the answers you put in the Bill we think go a long way to address that. So yes, we think it is still a problem. Can I give you any examples? Not just now, sorry.

**The Chairman:** Oh, I thought you were going to offer us one. You notice the way we all perked up there, because we have not had many.

**Professor Chris Frost:** I thought I would cut you off at the pass there.

**Vicky Harris:** I will give you an example.

**The Chairman:** Go on.

**Vicky Harris:** We had a case recently where we reported on a court document that had been filed in a court in Bahrain. It was in relation to 15 individuals employed by a company, three of whom were English, and they wrote to us with their English lawyers to complain under English law about a claim of defamation, despite the fact that we were reporting accurately, factually on a document that was filed with the court in Bahrain and I think that the Bill looks to address that point. But it is an example of where even though that story was mostly published in the Middle East, it was not picked up in the UK but nevertheless we received a complaint. It did not proceed, because we just decided to deal with it, we spoke with them, we amended the story slightly so that they were comfortable with what we were reporting. But the point was we did have to go through that process and we would have preferred not to.

**Q391 The Chairman:** If an individual or a company was to bring a defamation case after chilling and to fail, should the court have the power to punish the chilling?

**Professor Chris Frost:** Well, as I understand it, the courts have the power now to pick up on either vexatious claims or claims where quite clearly there is an abuse of power. Much as I would like to, I do not think it would be appropriate to go any further than that. I could see that becoming extremely difficult.

**Vicky Harris:** Yes, I suspect that the most that a court could do—and it would probably, certainly under the current system, have a huge effect—would be to address the costs issue, because if you lost your claim and you are forced to pick up the defence costs, then I think that would be punishment enough.

**Q392 The Chairman:** All right. Although I guess perhaps I should explain my question by saying that we have not had a session yet in which we have not had evidence about chilling and the unhappiness and the cost that chilling can and does generate. I just wondered whether you thought—because I am hearing overtones from you as well—giving some legal redress against chilling was an option, in your mind.

**Professor Chris Frost:** The major problem with chilling from a journalist's perspective is that this happens well before you go to publication. You are scared off, if you like, before pen hits paper or typewriter keys, in today's parlance. So that you contact someone—we will doubtless come on to this, about contacting people before you publish—and one of the risks of that is that the first thing you then hear is back from their lawyers, "Publish and we will sue" and that raises the bar. Particularly for a small publisher or for a freelance journalist, they are having to look and see whether it is worth the risk, knowing—and this is the chilling effect—that just to get into the starting box is going to cost £20,000, £30,000, £40,000, £50,000.

**Q393 The Chairman:** But maybe if someone knew that in the event that they brought an action after trying to chill one to stop it, if they lost, they would not only have to pay the costs, but the court had the right to raise a penalty against them, would that not have the effect of overall reducing the possibility of chilling?

**Professor Chris Frost:** I am certainly not convinced. We are usually talking about people with sufficiently deep pockets to take the risk of the large costs in the first place on the basis that by playing legal poker with the journalists that they will win. The fact that it might cost them damages at the end of it may not be an issue. I do not know; I am not lucky enough to have such deep pockets.

**Q394 The Chairman:** But if they were to be found to have chilled on something that they then lost in a defamation case in court, does that not have some effect on their corporate reputation?

**Professor Chris Frost:** Well, potentially, I suppose. I would like to think about it more. It has attractions, but I have not—

**Q395 The Chairman:** If you have any further thoughts, do not hesitate to let us know. I say to my colleagues, I have a piece of paper from the Publishers Association that you have not seen yet, because it only came today and it will be sent to you. It is very interesting, because it includes information about the reasons why activity is undertaken by publishers to avoid libel actions and the cost of libel actions and so on. I am not going to go over this, because my colleagues have not seen it, because as you know, it only just arrived. I have one question, just for clarification, and that is at the bottom it says, "Average costs for [this, that and the other]" and I am not sure what the company is in this context. Is this a publisher or is it a bookseller or—

**Vicky Harris:** Yes, it is a publisher.

**Q396 The Chairman: It is a publisher?**

**Vicky Harris:** This was research done in October 2010 among our members.

**Q397 The Chairman:** Yes. I followed that, I understand. I just wanted to be clear it is publisher costs for when the rest of you see the paper.

Can I, on behalf of the Committee, very genuinely say thank you to you? We have had slightly less time because this Committee has 10 minutes of private business to

do and those of us in the House of Lords have been told to expect a statement at 6 pm that relates to the business of this Committee. All of my colleagues would wish to be free to be in the Lords, and we have 10 minutes of private business that we simply have to do before that. So on behalf of all of us, thank you very much indeed.

## BBC and Tom Bower

### Oral Evidence, 13 June 2011, Q 298–439

Evidence Session VII

Members present:

Sir Peter Bottomley MP (Chairman)  
Chris Evans MP  
Dr Julian Huppert MP  
Mr David Lammy MP  
Lord Marks of Henley-on-Thames  
Stephen Phillips MP

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Witnesses: **Sarah Jones**, [Head of Litigation, BBC] and **Tom Bower**, [Author].

**Q398 The Chairman:** I welcome you both. Tom Bower and I have met each other socially but not often. There may be one or two others who want to add to the declaration of interests that they have made already. They should say it now so that it is on the record.

**Baroness Hayter of Kentish Town:** My partner has written for and peer-reviewed stuff for *Nature* and was one of the scientists who helped support Simon Singh and wrote letters on his behalf.

**Dr Huppert:** I and others closely related to me have published in *Nature* among other things. Although I have not published in the *BMJ*, other relatives and so on have been quite involved in that. I know Ben Goldacre's uncle.

**The Chairman:** I once took part in a benefit for *Science*.

**Mr Lammy:** My father-in-law has written for *Nature*.

**Q399 The Chairman:** Would each of you like to say some preliminary words?

**Sarah Jones:** I suppose the only thing I would like to say is that, while I think the Bill is a welcome proposal, the biggest issue that needs to be tackled is the question of costs. That is one of the causes of some of the problems of libel.

**Tom Bower:** My evidence will be that, although I think you are tinkering with the problem, I agree with Sarah that costs, the chilling factor in publication, have got worse. The recommendations that I have read on the whole help the defence reform but they go nowhere near enough to resolve the problem.

**Q400 The Chairman:** Before my colleagues come in, would you like to tell us what you think should be in the Bill and how the law should work?

**Tom Bower:** Let me tell you my experience briefly, so that you understand where I am coming from. I cannot remember the first time I was sued for libel but it was some time in the 1970s at the BBC. The biggest libel action was by Robert Maxwell in 1988, when he sued me on my book *Maxwell: The Outsider*, which declared him to be a crook. That went repeatedly through the courts until he died, but the book was withdrawn from sale, so many of those people who suffered from Maxwell were unable to see the evidence. The judge in that case, Michael Davies, constantly found in favour of Maxwell. The problem was that costs were huge—they

met were by the publisher, and by Andrew Lloyd Webber—and they came to millions of pounds even before we got to court.

Then we go forward to the next case, after Conrad Black sued me. Then we had Richard Branson and now Richard Desmond. I want to explain that in some detail. The nub of the case—this is where your recommendations fail to resolve the problem—is that here is a man who is very rich and very powerful, who used the libel laws to suppress the publication of my biography of him because it showed him to be a violent and fundamentally dishonest man, exactly like Robert Maxwell. Using one paragraph in a biography of Conrad Black, which said that he influenced the content of Express Newspapers, he was able to launch a libel action against me but not against the publisher, which is exactly what Robert Maxwell, Richard Branson and many others did, thinking that I by myself would not have the financial ability to defend the case.

Fortunately, I anticipated those sort of problems and the publisher and insurer stepped in. The Desmond case cost £4.5 million between the two parties. I would not have been helped in any way by the recommendations that you are suggesting. I have brought the book with me, as I really want you to see it. Here is a book that describes Richard Desmond's violence and dishonesty. I cannot get it published, not because it is not true—it has been legalised and set for printing. Every publisher in London is not afraid of publishing the truth, and neither are the insurers afraid of financing the defamation action. However, the time, costs and the fact that the complications within the trial process make it impossible to produce the book and sell it without consuming a huge amount of effort and time. That is where we are.

My suggestion is that you must include in the Bill a presumption of the interests of publication, as in the First Amendment in America, and that the threshold for someone like a public figure—whether Richard Desmond, an oligarch, or anyone—is to prove that the author or publishers are motivated by malice. Once that threshold is discussed and decided, you can go into the issues of whether it is true or whether a reputation has been affected. Until you get to that presumption, I do not think that you are handling the problem.

In the Desmond case, I came across another problem. The money in the end was not a problem because the insurers, Hiscox, were more than willing to fund the action in the anticipation that we would win. But they never anticipated the prejudice of the judge, David Eady. You may think that I am being unfair but the truth is that in my case, which was unique, within the trial itself, which lasted for two weeks, the Court of Appeal twice ruled—we appealed to the Court of Appeal during the jury trial, saying that David Eady was being unreasonably prejudiced, which we anticipated in all the pre-trial hearings—that he was perpetuating and risked a miscarriage of justice. Despite its ruling twice, he ignored the Court of Appeal. I was only saved by the jury. David Eady was determined to find for Desmond. I have come across the prejudice of judges for the past 40 years of my career. They are not minded to help the publication of embarrassing material about very powerful and influential personalities in this country. The only safeguard I have always found has been the jury.

**Q401 The Chairman:** Thank you for that. Just to be helpful to us in our discussions, let me say that the Government are proposing the Bill and we will comment on it. Does that prompt anything from you, Sarah Jones?

**Sarah Jones:** I think that the question you asked was what provisions in particular I think would be helpful in the Bill. The substantial harm provision is to be welcomed. It is an important provision so that, where costs are incurred, they are

incurred in relation to defamations which are not trivial but have a threshold of seriousness to pass. That is a very important provision, which might go a little further in relation to what will be called the “Jameel test”. It focuses on the question of substantial harm but does not address quite so much the question of whether vindication is proportionate in a particular circumstance. That is to be welcomed.

The internet publication provisions, which are not in the Bill but which people are hoping will be introduced, are important. It is a very difficult area to legislate for because we are still learning how it all works, but the position is a bit out of date at the moment. The Reynolds provisions are to be welcomed and might go a little further.

**Q402 The Chairman:** Would you codify Reynolds?

**Sarah Jones:** I would codify Reynolds. Although Reynolds in theory should work, in practice it has not. We need something that makes it more workable, as the House of Lords, as I think it was then, or possibly the Supreme Court, has recognised.

**Q403 The Chairman:** For a matter of record, are we right in thinking that Rupert Murdoch has never tried to interfere with your writing?

**Tom Bower:** On the contrary, he has always supported it. But Rupert Murdoch does not sue for libel. That is a fact.

**Q404 Dr Huppert:** I should like to explore two issues. I suspect, Ms Jones, that they are mostly directed at you but obviously I would be happy to take comments. On the status of non-natural persons—certainly none of the people Mr Bower has described are non-natural—should they be able to sue in libel? Do you think that they should be forced instead to rely on malicious falsehood and declarations of falsity? Where do you see the balance being?

**Sarah Jones:** Starting with the view that companies do not have feelings but can be hurt in their pockets, it would be a sensible provision that they should not be able to sue unless they can establish financial loss. I do not think that that is an unreasonable proposition. I do not think that removing the right of companies to sue altogether is a particularly extreme position as long as the right to sue for malicious falsehood is retained. I would be comfortable with a position where, as long as financial loss was established, a company should be able to sue.

**Q405 Dr Huppert:** The next question may be slightly more open. I wonder whether you are able to help the committee. We have had various discussions about what to do about things online. The BBC obviously has quite a lot of experience in dealing with things online. Particular issues include postings by other people, what liability you assume and whether you moderate or do not moderate. We have had various suggestions as to what might be the best way of dealing with this—for example, whether a court order should be required before you are required to remove something, or else you are liable, or whether a notice should be affixed to say that this is questioned and what the process might be. You have presumably thought quite a bit about how to run this within the BBC. What I hope we are looking for is some suggestions as to a simple and clear way forward to resolve this.

**Sarah Jones:** I do not think that it will be that simple. I am not sure how clear I will be but I will have a go. First, we need to reflect on what I would describe as the three different roles. There is the role of the primary publisher—the old-fashioned editor/author publisher—which does not really need to be addressed in the context of

online because you have your liability as usual. Then there is what I have described as the “mere conduit”, which is along the lines of the Lester Bill—I do not think that there should be liability if you are simply acting as a mechanism to get something from A to B. Finally, you have what might be described as an intermediate publisher or a secondary publisher, where you have control, as does the BBC in post-moderated sites, which is a very tricky area. We pre-moderate sites that we think are likely to be controversial, which probably means that we are assuming liability that perhaps we would not otherwise have in those circumstances. We think that it is right to do that because of the BBC platform that is being used. That puts us in a slightly different position from that of some other secondary publishers because it is our job and we have a public service remit. That set-up is there because we publish a lot of editorial ourselves online. I am not saying that this is the answer for everybody but I think that a secondary publisher has some responsibility in relation to what goes up.

The question is what level of responsibility. A notice and take-down policy works well from the secondary publisher’s point of view, but it has a chilling effect on the primary publisher. So you have two competing rights: the right not to be defamed by someone posting material online which is untrue about you and the right of freedom of expression or the right not to have material taken down that you put up which is true and which you have no control over. That can be an incredibly valuable platform for discussion and debate.

How do you get the balance right between the two? I think that the starting point is notice and take-down. That addresses allowing people to put material up without worrying too much about it, but it means that you are not really protecting the person who is posting material from the chilling effect of simply having a letter sent or that sort of thing.

Is there something more that you should be doing with notice and take-down? One option is to say, “Well, there has to be a little bit more than that in order for you to have to take material down”. Perhaps there has to have been a failure of the primary publisher to engage with the complainant through you or perhaps the complainant should demonstrate why what is up there is unlawful, which arguably is the European position anyway under Article 19—the demonstration of unlawfulness. I thought that I had a third point, but I cannot remember what it was.

**Q406 Dr Huppert:** While you are thinking about that, there are various spectra. Just to be clear on notices, there are two ways in which the word “notice” is used. First, there is the notice to you to do something and secondly there is when you attach a notice to the comment to say that it is questioned. One might be very simple to do—to put up a little notice to say that it has been challenged. We have had suggestions that there should be, for example, a court procedure to require you to remove things. Do you think that that would be enough and that a court would have to say that there is reason to believe that it may be unlawful?

**Sarah Jones:** From the point of view of the secondary publisher, that is fine. From the point of view of the person who has been defamed, that is a quite a lot of effort and cost to go through, and all the time the publication is still there. You might look at a hybrid solution, which is to say that you will have to put up a legal notice of some kind pending an application or instead of an application. There is no easy fix because there are two competing issues and it is trying to address both. If you have been defamed unjustifiably, there needs to be something more that you can do than just putting up a notice. It cannot simply be enough to put up a notice.

**Q407 Mr Lammy:** I am not clear. Has the BBC ever sued for libel and defamation?

**Sarah Jones:** Not in the last 14 years. I cannot speak for before then.

**Q408 Mr Lammy:** Okay. So it is not something that you as a corporation would seek.

**Sarah Jones:** I think the BBC would say as a broadcaster that it would take that step only with the utmost reluctance and in the most extreme of circumstances. Individuals may of course be in a different position.

**Q409 Mr Lammy:** Can you give us a sense of your experience of being the subject of litigation?

**Sarah Jones:** We have probably got three or four reasonably substantial libel actions on at the moment. During the course of a year, we probably get 20 or 30 complaints about defamation that have legs. We have no problem in establishing that our position is correct in probably half of them. The rest we look at very closely and sometimes settle.

**Q410 Mr Lammy:** Have you seen an increase in volume?

**Sarah Jones:** Any single publisher will see ebbs and flows but you cannot necessarily say that there is a trend. You would have to look at more than one publisher because you can have periods where, like buses, everything arrives in one go and then it is quiet for a while. However, I would say that there has been an increase in costs for any single piece of litigation.

**Q411 Chris Evans:** Mr Bower, thank you for coming today. I was very interested in what you had to say. Have you ever been fearful of publishing something out of a worry of being sued? Have you ever abandoned a project halfway through because of fear of litigation?

**Tom Bower:** No, because I would only publish the truth.

**Q412 Chris Evans:** That is the point. Have you ever been fearful of publishing a truthful statement for fear of being litigated against?

**Tom Bower:** No, because I am not the publisher. The problem is that the publisher is fearful. They are not fearful of publishing the truth; they are fearful of the costs and the consequence of a rich and powerful person starting a libel action that then takes them into the unknown. The real problem is for the publisher not the author.

**Q413 Chris Evans:** Have you ever had an idea and gone to a publisher and said, "I'm thinking of writing this", and they have said, "Do you really think you should go ahead for fear of litigation?" Have you ever been in that situation?

**Tom Bower:** Richard Desmond is the perfect example. Here is a book that was commissioned, but the publisher then feared the costs. After Desmond lost the trial, you would think it would be easy to publish it, but the contrary happened. Every publisher in London looked at the £4.5 million bill, the attitude of the judge and the complications and thought that it could not be sustained commercially. That is the problem. It is not that the truth is not available; the publication of it is held up by the libel laws, procedures and costs.

**Q414 Chris Evans:** How do you think publishers' attitudes would change if this legislation were passed? Do you think there will be a change?



**Tom Bower:** Frankly, I do not think that this legislation will help publishers at all because they will still have to cope with the phenomenal cost of fighting a case. For example, in the Desmond case, the judge decided that the jury would have to—

**Q415 The Chairman:** I do not want to interrupt unnecessarily, but I do not want to have it too personalised. Can you give us some examples from Maxwell instead?

**Tom Bower:** The judge there was always arguing about the meaning. The meaning of what is written is often the conflict. Do you leave the meaning to the jury, in which case you spend a huge amount of money to argue for the different meanings, or do you just have the judge decide it straightaway so that it becomes procedural? That cost is not—

**Q416 Chris Evans:** What was the cause of the Maxwell case? What was the real argument there?

**Tom Bower:** I wrote a biography. The biography said that he was crooked, and he was, but you had to suppress the truth to perpetuate his business for the next three or four years, which ended in the way that we know. That is exactly what I would say. The courts kept on finding in favour of Maxwell. It was endless. There were 11 writs between us in the end. The truth was suppressed.

**Q417 Chris Evans:** I find it amazing that the case went on right up to the day he died. How do you think that legislation can be framed to ensure that that does not occur again?

**Tom Bower:** If you are very rich, you are able constantly to find a procedural side road to go down to find ways to delay the trial or to examine something. That automatically mounts the costs, delays the procedure and, at the same time, suppresses publication, which is essential.

**The Chairman:** We have got the picture very clearly. Thank you.

**Q418 Stephen Phillips:** Good afternoon, Mr Bower. At the beginning of your evidence, you expressed some views about the chilling effects of the costs associated with libel actions and some fairly trenchant views about the way in which the judiciary appears, in your view, to be very conservative and to side with public figures. One way of reducing costs might be the removal of jury trial altogether or a presumption against it. Given that the jury in the Desmond case essentially stood between you and liability, is that something you would favour?

**Tom Bower:** I am 100% in favour of retaining the jury because I would have lost the Desmond case had the jury not found against the judge, so to speak, and I was very deliberately protected by the Court of Appeal. The cost is not in the trial itself, because in the end we have to bring the evidence before the judge. There is not a great amount of saving in relation to cross-examining witnesses. The cost problem and the chilling effect of costs is in the pre-trial period when the judge decides, quite rightly, what the jury should hear. He wants to keep the case focused and does not want it to spread over many weeks. It is that process that needs to be refined.

**Q419 Stephen Phillips:** Take, for example, the question of meaning, which, as I understand it, is currently a question for the jury. That question may be argued to a jury for several days and perhaps in the past for several weeks. A judge might decide that question at a very early stage in the litigation or in a much more speedy manner than it might be argued to the jury because, if there is a jury, the judge feels obliged

to let it hear as much as counsel want to say to it rather than to cut counsel short. Is that an issue which would be dealt with by a judge alone?

**Tom Bower.** I think so. You are always subject to appeal. That would save an enormous amount of time. You still have an ability to bring in your evidence based on what the judge decides the meaning is, but the moment you leave meaning all to play for, you waste a lot of money.

**Q420 Stephen Phillips:** I have one final question for both of you. Does the problem lie perhaps not with the law of libel but with the mechanisms by which defamation trials are conducted and decided?

**Tom Bower.** I think that the problem lies with both. I believe that you need to have a presumption in favour of publication before you bring in all these protections and reforms. I think that you also just need to have a different attitude among lawyers towards costs. The costs are the chilling factor for all publications at the moment, and that has got worse because the bills have accelerated. It is in the interests of an aggressive, ruthless, rich litigant to increase the costs in order to stifle the publisher.

**Sarah Jones:** I think that, unless costs are controlled, litigation is likely to be protracted. That makes access difficult for claimants as well as defendants.

**Q421 Stephen Phillips:** Do you attribute those costs to the law of defamation or to the civil procedure associated with a trial for a defamation action?

**Sarah Jones:** I would attribute it principally to the mechanisms rather than to the law, but I also think that the law needs to be liberalised somewhat.

**The Chairman:** There is also the desperation in some cases if big powerful people are expecting to get their own way by using such procedures and practices.

**Q422 Baroness Hayter of Kentish Town:** I was a magistrate for many years and we dealt with far more serious cases than libel—I say that with great respect for those have gone through such cases. At the magistrates' court, cases are dealt with fairly quickly and easily and then they can go up to the appropriate level. I still find it difficult to understand why libel or defamation accelerates immediately up to a High Court judge. What are your thoughts about having a different system, perhaps involving a tribunal or district court, so that such cases are automatically given a hearing more quickly because they would be taken away from the High Court? Is that one way forward?

**Tom Bower.** The problem is that, actually, the law of defamation is pretty complicated unless you are trained. One reason why all such trials and superinjunctions in England are focused on three judges is because they are the only ones who understand the law itself. It is not common law. At the level that you are talking about, people would not have the expertise necessary to draw on precedent in the law and to direct attention to what is relevant.

**Q423 Baroness Hayter of Kentish Town:** I do not like to correct you, but I have dealt with very difficult fraud cases involving lots of complicated law. Is this a chicken-and-egg situation, where because we have highly paid QCs and the cases go straight to the High Court, we end up with something that becomes highly complex, whereas most of these issues are, as I look at them, actually quite simple? Have the costs been driven by the fact that the cases go that way, or is defamation of necessity a highly complex legal issue?

**Tom Bower.** No, I think that it is easy to establish that someone has said something defamatory; the issue is whether there is a defence and how to argue that

defence. I agree with you that it could be simplified. However, the problem is that with simplification come complications, and then you get precedents, which is why you are tinkering with the law now. I think that the easiest way to cope with the issue is to make a presumption of a right to publish. Once you had passed that threshold—whether the matter has been done with honesty, which is one of the reforms that you rightly want to bring in, and with the right motivation—I think that a lot of what we are complaining about would disappear. I can see the attraction of what you are suggesting, but I do not think that it will save on costs in the end, because the rich, determined litigant will bedraggle and bombard the district court as much as the High Court. People will use just the same procedures whatever the court.

**Q424 Baroness Hayter of Kentish Town:** The difficulty is writing a law just to stop the rich, determined bully. On the take-down procedure for internet-based publications, would there be any easy way of doing that? Someone gave evidence to us—I am afraid that, at the moment, I cannot remember who—in which it was suggested that there would almost need to be something like an affidavit, whereby people would need to go and fill in a form to say, “I think this is defamation”. Might that be the entry into a take-down procedure?

**Sarah Jones:** It could be, but that again would be directed at the secondary publisher rather than at the primary publisher. There would need to be a mechanism whereby the primary publisher was brought back into the loop.

On the question of costs, I think that there is an argument in the case of smaller libel disputes. As well as the important cases along the lines that Mr Bower has experienced, there are what would be regarded as much less serious and much less lengthy libel cases. In matters that are likely to last less than one or two days, I think that there is possibly a case for referral to something like the Patent County Court, which is a specialised county court in London that takes some of the IP cases—

**The Chairman:** Do you mean intellectual property?

**Sarah Jones:** Yes, the Patent County Court takes some of the intellectual property cases that would otherwise stay in the Chancery Division. It is a complex area, but I think that cost control is so important that it might be worth looking at that as an option for cases where damage is unlikely to be higher than a certain level and where we are not talking about the most serious libel.

**Q425 Lord Marks of Henley-on-Thames:** If this committee is minded—as well as making recommendations about the Bill and possibly additional provisions to go into it—to set out procedural recommendations that would be implemented within the rules, what are the most important procedural changes that you would both like to see to reduce costs? How could we encourage greater use of alternative dispute resolution to get rid of some cases?

**Sarah Jones:** I think the provision in relation to determination of meaning is important. At the moment it cannot be done very early on. If I was getting my dream wish list, I would like a provision to allow an application for cost capping to be made at an early stage in proceedings. On process, that is probably the most important issue.

**Q426 Lord Marks of Henley-on-Thames:** You said cost capping. What of ADR?

**Sarah Jones:** It is absolutely to be welcomed. There is a view now that you can make it almost mandatory but there was a case a while back that said that

mandatory ADR was inconsistent with Article 6. I may be out of date on that. I am all in favour of ADR. It is always good to talk.

**Tom Bower:** The easiest way is for the judge to decide right at the outset whether the reputation of the plaintiff or claimant has been damaged. That is easily determined by a judge. I refer you back to the Desmond case—it is one of many, but it was so simple. Here was a man who claimed that his reputation was severely damaged because I had written that he had influenced the content of his newspapers. Can you imagine any other newspaper proprietor claiming that it is defamatory to say that he influences the contents of his papers? That was the basis of the case. The judge could easily have said that that was not a serious defamation and that it was comment. He might then have said, “What else have you got to defend your reputation?” That would have been the end of it. You could easily, procedurally, have stopped that case early on, as you could with most defamation cases, by the judge asking whether the claimant’s reputation is so damaged that he requires the full panoply of a trial and all the rest.

**Q427 Lord Marks of Henley-on-Thames:** Why would that not be addressed by the substantial harm test, were it properly phrased?

**Tom Bower:** It would be. The problem is that you will find that the defendant or the publisher is terrified of the costs. To get to the stage of the claimant persuading the judge that there was substantial harm, they will go down the road into tens of thousands of pounds. That is the problem: the chilling effect of the potential costs and, at the same time, the mind of the judge. Can he actually make the decision that the reputation has been damaged? That is the mindset of the courts. That is why you must have a presumption in favour of publication, to help the judge to see that sometimes to say that a rich, famous person and especially, in this case, a media owner influences the content of his papers is not really defamatory.

**Q428 Mr Lammy:** I have just a small point. Obviously, your preoccupation is with the rich and famous. The presumption of publication is an interesting solution to that. How does a presumption of publication affect someone who is not in the public eye, not rich or famous, but is defamed by, say, the *Express*?

**Tom Bower:** As I just replied to Lord Marks, if you straightaway can go before a judge and say, “Is this a substantial harm to my reputation—yes or no?”, because that procedure is simple and cheap, the poorer person would straightaway know whether he had a chance of winning a substantial trial. The publisher—the defendant in this case—would know whether he had a hurdle to climb. That helps straightaway. The libel laws at the moment are not in place to protect the publisher. They are there to protect the claimant. I think that the proposed legislation should alter that balance. Then your small, poorer man would be protected.

**Q429 Mr Lammy:** That is, let us protect freedom of speech, not reputation.

**Tom Bower:** There are both but I think the balance should be struck by what is the purpose of the legislation. Is the purpose to help the rich, the poor, damaged person or the publisher? That is how you should frame the legislation so that judges will be in no doubt about the intention of the new codified defences.

**Q430 The Chairman:** Can I take you through two or three things briefly? Sarah Jones, you have suggested that Clause 2 on the Reynolds defence should be changed. Are there other specific changes that you would like to talk about?

**Sarah Jones:** One possibility is to adopt the sort of test available in the Data Protection Act, which is whether the publisher reasonably believed that the publication was in the public interest. We have to try to get the goggles of the publisher on when looking at whether what was done was responsible; we need to emphasise the importance of applying the test in a way that is done with meaning at the moment, whereby if somebody sets out to say one thing and inadvertently gets the wrong meaning, there is a margin of error allowed by the courts. I do not know whether it would work, but it might help in what otherwise is a bit of a damp squib of a defence at the moment.

**Q431 The Chairman:** Let us recognise that we must make available to all what is known to a few.

**Sarah Jones:** Yes, it is a public watchdog function.

**Q432 The Chairman:** Do you have any examples in the BBC of libel tourism?

**Sarah Jones:** Libel tourism is not a huge problem for the BBC because of the way in which we operate. That is not to say that it is not for others. I do not think that I can comment on that.

**Q433 The Chairman:** And corporate libel claims?

**Sarah Jones:** Mostly we have individuals who sue us, although we have companies that sue. I have a case at the moment which is a very good example of a situation where probably the company should not be suing, but I would not want to discuss that here. I might put in an anonymised submission or something.

**Q434 The Chairman:** On jury trials, Mr Bower, you have told us that you think that judges ought to be able to sort out what meaning is. You also said that juries have come to a conclusion that is more just than some of the judgments of judges. How do you think that juries should be brought in? Can we do that most of the time?

**Tom Bower:** In some libel cases they do not have juries. The case that springs to mind, which I sat through, was the Granada case. I think that it was Marks & Spencer or Tesco suing them. Popplewell was the judge. He had just sat in the Jonathan Aitken trial without a jury—no one had had any doubt where the result of the trial was going until they found the receipt in Switzerland. He then had a trial—I think about cheap labour in the Far East—again without a jury, and he found against Granada on that one. No one was in any doubt that juries would have found for the publishers in both those cases. That boils down to the jury representing whether a man's reputation has been damaged. It is sensible and I do not think that it extends the length of the trial meaningfully. It would be a poor day if you did not have to rely on 12 trusted people to judge whether a reputation had been damaged in the modern context.

**Q435 The Chairman:** Let us switch subjects. On the reporting of Parliament, should other parts of the media regard something that is said in Parliament as automatically available to be published?

**Sarah Jones:** From a defamation point of view that is not a problem, but people would like the position on contempt clarified for sure.

**Q436 The Chairman:** Perhaps we will not solve that this afternoon, but thank you for that. The only other thing that we have not gone through in detail is the truth or honest opinion defence, but that has been reasonably well covered in general

discussion. Is there anything that either of you would like to add before we thank you very much for coming?

**Sarah Jones:** I should just like to endorse the provision that, if something is proved but does not quite get home and does not materially injure the claimant's reputation, the defence of justification should be made out, which is not necessarily covered by substantial harm.

**Q437 The Chairman:** Perhaps you or any of your colleagues would like to write to us on that.

**Sarah Jones:** It will be covered by the MLA submissions.

**Q438 The Chairman:** That is very helpful. You have never been tempted to sue anyone for libel, have you, Mr Bower?

**Tom Bower:** I sued Robert Maxwell. I thought that that was the way to hit him back. Perhaps I may make just one tiny but important point. When a lawyer looks at a manuscript for libel, the problem is that he will keep on saying, "Well, if we say it like this, we might get it through, and if we say it like that, we won't". That becomes a hugely expensive and distorted process.

I have looked at your recommendations and I do not think that you have covered this. A litigant can pick on one tiny error. He can ignore 99.9 per cent and just sue on that one thing from the whole book. That therefore distorts the general impression that the reader will get. In the reform of the law, you need to make a defence that one innocent mistake, given that the publisher and everyone have been very careful, should not condemn and destroy the whole work. That again needs to be included in the reform.

**Q439 The Chairman:** The last question is for the BBC. Do you have views on the single publication rule?

**Sarah Jones:** I am in favour of the single publication rule. It is quite difficult to work out where you circumscribe the single publication.

**The Chairman:** I should like to thank both of you. We will have a quick break and have our second set of witnesses in five minutes.

## **Dr Ben Goldacre, Nature, British Medical Journal and Dr Simon Singh**

### **Written Evidence, Dr Ben Goldacre (EV 27)**

*I am not an expert on law, and I don't have the legal skills to spot holes in legislation or recommend specific changes. However I would like to raise some general points and concerns, many of which I'm sure have been covered elsewhere, and respond to some specific questions in the consultation.*

#### *1. Legal chill has serious consequences in medicine.*

*In medicine, real-world treatment decisions are made based on the information available to doctors and patients. Anything that restricts access to information on the benefits and harms of treatments may have serious consequences: specifically, unnecessary suffering and death. This should always be considered when making laws that restrict what doctors, academics, and journalists can write about the ideas, claims and practices of companies and individuals. In medicine, "public interest" has a concrete and grave meaning. There clearly needs to be qualified privilege for people raising legitimate concerns about medical issues that are in the public interest, and room for people to make amends for occasional honest mistakes simply and swiftly through appropriate corrections where possible, without incurring costs.*

#### *2. Doctors and academics at present face conflicting responsibilities.*

*Doctors and academics are obliged, through professional codes such as that of the General Medical Council, to speak out whenever they are aware of ongoing practices that harm patients. Libel law makes this difficult. When defending a case successfully and winning can cost more than the average price of a home, and take up thousands of hours of your own time, for which there is no compensation, it is to be expected that many doctors and academics will see cases such as those of Peter Wilmshurst, or Henrik Thomsen, and conclude that the responsible thing to do when threatened – for the sake of their families, or their colleagues, or their cash-poor institution – may be to back down, or avoid raising concerns in the first place. Overall, this chilling effect will have negative consequences for patients and the public.*

*It is common in my experience for lawyers to claim that a doctor or academic has nothing to fear if they simply make a true statement. My experience is that this is not true. There are many legal beartraps when writing critically about ideas and practices, and the techniques for doing so safely are well known to professional journalists but not to doctors or academics. Scientists generally have no idea about libel law, which is a complex and unpredictable area. We cannot expect every utterance at a conference or in a medical journal to go through pre-approval by a solicitor: their services are too expensive, and the scale is plainly impractical. Similarly we should expect mutual criticism - which at the core of the discipline, and the means by which ideas improve in academic medicine - to be conducted in an atmosphere of fear and uncertainty.*

#### *3. This legal chill also extends to the media.*

*I'm sure this has been covered elsewhere, and is self-evidence, but busy journalists and editors will also often decide not to bother writing on a difficult issue, because of the risks posed by libel law. I've had many legitimate stories delayed by what I regarded as spurious legal threats, and if I'd not been willing to spend more time*

*pushing the pieces, these legitimate stories would simply have disappeared. Paradoxically, while people say that libel laws persist partly because trashy journalism makes newspapers unsympathetic victims, I think libel laws make real investigative journalism much more difficult and risky, and so they actively contribute to UK media being dumbed down.*

*4. There needs to be some clarity on where responsibility lies for publication online outside of mainstream media.*

*(a) Pre-moderation is good.*

*As I understand the law, at present, if someone running a website makes any kind of effort, with good intentions, to pre-moderate user-submitted comments, and so reduce the risk of libellous content appearing, they are more liable for the comments they allow to pass through, and so it is in their interests to leave everything unmoderated, and wait for complaints about specific posts instead. This is plainly not in anyone's interest, as it increases the likelihood of genuinely defamatory material appearing, and the law should surely welcome and encourage people pre-moderating wherever they are able to try and do so.*

*(b) Where does responsibility lie?*

*There have been several cases recently where organisations wishing to silence dissent have chosen not to approach the person running a website where they have been criticised, and instead threatened their webhost, a large organisation hosting huge number of individuals' websites, each for a few pounds a month. These large webhosting organisations have no interest in dealing expensively with a libel case and have a tendency to simply shut down whole websites. This is clearly disproportionate.*

*My suggestions here would be:*

*pre-moderation is good and should be encouraged, not penalised.*

*the government should provide clear guidance on what is and isn't libellous, written in everyday language, for people facilitating and engaging in discussions online.*

*Publishing is no longer the domain of trained media professionals, nor will it ever be again, so public guidance of this kind would be useful.*

*claimants should be encouraged to contact the person running a website to resolve concerns.*

*there should be some kind of legal hump before a claimant can intimidate a webhost into taking down a whole website, and the suggestions of Sense About Science on this seem sensible to me.*

*5. Companies should be treated differently to individuals.*

*In many important cases in medicine and science, claims and products produced by a company are subjected to important and valuable critical scrutiny. In most cases a company should have to give evidence of serious and substantial financial harm as one of the conditions of even initiating a libel claim.*

*6. Corrections should be used more.*

*It's inevitable that people will get things wrong occasionally when raising legitimate criticisms in the public interest. Where no significant financial harm has been done, and especially where a company is involved rather than an individual, it seems to me that a timely correction of whatever individual facts were wrong should settle many of these cases.*



*On the specific questions raised in the consultation document.*

*Do you agree with the inclusion of a substantial harm test in the Bill?*

*I agree that companies and individuals should have to show that they've suffered genuine unwarranted significant financial damage (or for individuals, reputation). I don't have the legal skills to spot where the holes are in the wording of this test.*

*Do you consider that the defendant should be allowed to rely on the honest opinion defence where they have made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong?*

*Yes. It's inevitable that there will be pieces written – certainly many of my own – where new facts have been discovered and are being set out for the reader, alongside opinion on how they fit into a broader cultural and ethical picture, often in the same sentence. This is a legitimate form of writing and it seems odd that it should be excluded from the normal defenses for honest mistakes made without malice. There should be room to say retrospectively that an honest mistake was made, in a piece of this kind, and in most cases simply correct it.*

*June 2011*

## Written Evidence, Nature (EV 42)

*This document summarises the interests of the publication Nature in new defamation legislation.*

*Nature is both a scholarly journal and a magazine. It appears every week. We also publish a free online news service every day.*

*Nature has an online readership of about 2 million unique users per month. It has a print subscriber base of about 50,000. The readership is fully international.*

*The target audience is research scientists from all of the natural science disciplines (biological, chemical and physical sciences), plus anyone with a professional or personal interest in the natural sciences and the science research community.*

*Nature as a journal: We publish about 800 original research papers every year, and in so doing we are the most highly cited scientific journal.*

*Occasionally our role as a journal of original research papers overlaps with issues of misconduct, as follows.*

*It is a natural part of the scientific process that errors occasionally need to be corrected or retracted after publication. Another reason for such a retraction may be because it was discovered after publication that the data were fabricated.*

*Such a retraction may be implemented simply as a statement of withdrawal of a paper. But, where misconduct is involved, it is desirable to refer readers to an account of the circumstances behind such a retraction. This is especially to ensure that the reputations of innocent co-authors of a paper are not tarnished, and that responsibility for misconduct is appropriately attributed for the public record.*

*Such descriptions would normally be provided only after a formal enquiry undertaken by a university - it is not a journal's role to conduct such an investigation. On occasions where we have wanted to refer to such scientific controversies or even an enquiry's (sometimes disputed) outcome, we were not able to do so because of the nature of English libel laws.*

*Thus we support changes to the law that would protect us (with at least a reasonable degree of certainty), in our role as a journal, in reporting and/or linking to the outcome of university enquiries into scientific misconduct. This would make it possible to complete the academic record in relation to a paper without fear of legal action.*

*On another aspect of the Bill, **statutory privilege**, we urge that peer reviewed journals receive the same protection in Clause 5 of the Bill as scientific conferences and scientific bodies. The processes of independent quality control and attention to rigorous evidence-based argument are stronger in such journals than in many conferences. Accepting such a status would avoid the time and expense of developing a defence based on other clauses within the Bill.*

*Nature as a magazine: Our magazine component consists of about 40 pages per week of journalism and commissioned commentary.*

*Nature's journalism covers not only the results of science but also the activities of the research community. This frequently includes coverage of investigations into alleged misconduct. Examples include the fabrication of research results and other questionable or dishonest behaviour by researchers or other individuals. Such coverage is a key aspect of public scrutiny of, and sustaining public trust in, science. Our journalism has been constrained, very much against the public interest, by the current libel laws. Below we detail aspects of the current law that have proved especially constraining, along with examples of the legal difficulties we have encountered with specific articles.*

*PUBLIC INTEREST DEFENCE: In reporting on controversies that arise in the research community, we often find ourselves dealing with assertions that are vital for a full understanding of the dispute, but which we are not in a position to prove. Science proceeds through debate and criticism, and reporting such controversies is crucial for the public interest. In reporting on misconduct, we need to be able to describe the allegations. But the English repetition rule and uncertainties in relying on the public interest defence mean that we often spend great effort and expense to lower the risk on such stories by 1) trying to reduce defamatory meanings (or cutting out text), 2) trying exhaustively to investigate the truth of any assertions and 3) putting allegations to numerous contributors. (Many scientific articles have multiple co-authors, each of whom may need to be contacted to reduce the risk that any one of them will sue.) We whole-heartedly support an expanded, more certain and clearly less onerous public interest defence, as proposed by the Libel Reform Campaign.*

*Example 1—a long road to publication: See Confidential Annex.*

*Example 2—a lawsuit: We are faced with ongoing litigation and we therefore do not feel it would be appropriate to discuss it. We believe that the story was very much in the public interest, and was responsibly and fully reported.*

*Example 3, a story not pursued: A researcher who had published a widely-publicised paper in a leading journal took the highly unusual step of publishing a book specifically to disown the paper, accusing a co-author of fabricating the data behind the research. The researcher's university would not comment, citing an ongoing investigation. The accused co-author would not comment, due to the ongoing investigation. The funder of the research would not comment. The anthropologist had approached the journal to demand a retraction, or at least publish a note disassociating himself from the original publication. The journal told us that it had not proceeded with a retraction or note in part because of legal advice which suggested these actions could provoke a libel action. On balance, because of the repetition rule, the legal risks of publishing this bizarre tale – which highlights how libel law can hamper scientific debate – were too high. We still hope that this may yet see the light of day.*

*Example 4— details not published: A story about a Danish researcher– accused of research misconduct and misusing grant funding – pulled its punches based on legal advice before publication. See Confidential Annex.*

**SUBSTANTIAL HARM**

*Nature supports the need for a substantial threshold of harm to reputation to deter unmeritorious libel claims.*

*Example 5: Nature was threatened with legal action in 2010 after publishing a book review in which the reviewer disputed something in the authors' book. The authors said we had damaged their professional reputations by saying they were mistaken. They demanded an apology from us (as publisher) to the effect that they were right and the reviewer was wrong. We offered them a chance to respond on our letters page, but they declined, preferring to pursue the matter through their English solicitors. Seven months of (expensive) correspondence ensued between their lawyers and ours, and as of now, more than a year later, no lawsuit has been filed. The reviewer and the claimants were all American academics.*

*A similar issue arose in our letters section, in which we published a letter disputing a point of fact in another book review. The reviewer responded in a subsequent letter. The writers of the original letter then told us that his rejoinder had defamed them by saying they were mistaken. They later withdrew the threat.*

*Enabling scientists to air a disagreement is an essential part of Nature's role and should not put us at risk of a lawsuit. These examples suggest the need for a claim to meet a threshold of substantial harm which prevents a claim of damage to reputation based on one published sentence simply disputing a fact or saying that another academic or scientist made an error. We believe that a requirement that potential plaintiffs demonstrate that they have suffered substantial harm might help deter this kind of threat. We also believe that such examples speak to the need for an expanded public interest defence and/or suspension of the repetition rule in the context of scientific and academic disputes.*

#### **LIABILITY FOR USER GENERATED CONTENT**

*One final challenge for Nature is the question of our liability for comments posted on our website. We believe it is in the public interest to provide a public forum in which readers can discuss and question articles we publish. But on occasions the discussion can turn personal, with readers attacking each other or criticising authors or other figures in the original article. Reviewing each comment for legal risk before posting would be an onerous burden, and would slow the rapid interchange of ideas that makes online commenting a valuable contributor to the public debate.*

*So our current position, like that of many other publishers, is that comment streams for our journalism and opinion pieces are "unmoderated": Comments are posted without review, and we will remove a particular comment only if we are put on notice of a legitimate complaint about it. We worry, however, that this approach may carry risks, and we would welcome clarification of a publisher's legal responsibility for comments posted on their website.*

*We hope this information is useful.*

*June 2011*

## **Written Evidence, Dr Simon Singh (EV 24)**

### **1. Substantial harm**

I welcome the idea of an initial hurdle to deter trivial, hopeless and vexatious claims, but I fear that the proposed hurdle of “substantial” is too weak to be effective. “Substantial” merely requires non-trivial or non-negligible, whereas a test of “substantial and serious harm” would be much more appropriate. Surely, a claimant should not be resorting to the High Court unless the damage is serious.

In my own case, it remains a matter of doubt as to whether or not the British Chiropractic Association (BCA) could have suffered serious and substantial harm from my article. My article was written for the general public, whereas the BCA’s main relationship is with its members, i.e., chiropractors who share the same set of beliefs. The BCA does not trade with the public and (as far as I can tell) has suffered no financial loss in terms of losing members. A “substantial and serious harm” test would have deterred the BCA from bringing a claim, which would have saved both parties a great deal of time and money.

There are four other points to be considered with respect to an initial hurdle of a harm test:

- a) claims should be struck out if there is no prospect of success,
- b) claims should be struck out if the likely vindication is disproportionate to cost, time and process involved,
- c) there should be mandatory strike out for claims that fail to pass any of the initial hurdles, i.e., the tests of substantial and serious harm, prospect of success and vindication proportionate to process.
- d) An updated definition of defamation (or at least statutory clarification) would serve to provide a robust basis for a serious and substantial harm test to ensure that potential claimants are less likely to see criticism as defamation.

It is crucial that the final bill addresses these points in order to reduce the chilling effect of libel. Only a handful of libel cases reach court each year, only a few dozen libel writs are issued each year, but I suspect that several hundred libel threats are made each year (followed by retractions and apologies), and several thousand journalists censor their own material or do not have articles published for fear of a libel claim. In other words, a higher initial hurdle would give journalist more confidence to publish or bat away libel threats knowing that any trivial, vexatious or hopeless claim will fail at an early stage.

Of course, the costs associated with a libel case are always an important issue. This bill is not designed to reduce the costs of libel, but it can play a major role in indirectly reducing the costs of libel by removing libel cases that should never have been brought in the first place, but only if this initial hurdle is an effective one. Indeed, a weak initial hurdle will not only fail to deter undeserving claimants, it will also increase initial costs and worsen the situation.

### **2. Responsible publication on matter of public interest**

Everyone involved in the Libel Reform Campaign has urged a robust statutory public interest defence, something to replace the existing unreliable and feeble case law Reynolds Defence. It is good to see this identified in the Draft Defamation Bill, but the fundamentally serious problem remains in the current draft.

I fear that there is still room for judges to interpret the factors listed in the draft bill 2 (2) (a-h) as a check list, rather than as a basket of considerations. Hence, there is potential in years to come for broadly responsible journalists to be tripped up by one element on the list, thereby undermining the intended reform. This is a unique opportunity to provide a robust public interest defence, and I hope that the final bill will not fail in this matter. In matters of public interest, the law should give the benefit of the doubt to those raising concerns on behalf of society. This could be achieved in two ways.

- a) As long as the claimant has a right of reply, once the defendant has shown that the material was on a matter of public interest, the public interest defence should only be defeated by the claimant demonstrating malice or reckless disregard to the truth. This would be far cheaper and quicker than the current Reynolds or proposed clause 2 defence.
- b) If the claimant is not offered a right of reply, then once the defendant has shown that the material was on a matter of public interest, the onus should be on the claimant to prove that the journalism was irresponsible in order to succeed in the claim. There is a large grey area between responsible and irresponsible journalism; at the moment an article falling in the grey area fails the Reynolds test, but in future I would suggest that an article falling the grey area should be protected by the new public interest defence.

In situations where a public interest defence succeeds, but where it is accepted that important statements can be shown to be incorrect then the claimant should be able to obtain a declaration of falsity from the court.

Assuming that the final bill includes a properly robust public interest defence, my understanding is that it will be sensible to also abolish the common law Reynolds defence.

The public interest defence is of particular interest to me, because the existing Reynolds Defence failed me in *BCA v Singh*. As the author of a comment article, my writing did not come under the Reynolds umbrella, which is why I welcome the draft bill's widening of the public interest defence to cover statements of comment and of fact, and publication beyond the mainstream press.

I was fortunate in being able to risk the costs of an appeal which allowed me a fair comment defence; however, a strong and wide public interest defence would almost certainly have helped me, inasmuch as it probably would have deterred the BCA from bringing the case in the first place. The BCA might have taken the following view: "If Singh shows he is correct in his assertions then we will lose the case, but even if he is wrong we will lose because (a) this is a matter of public interest, (b) we

have been offered a right of reply and (c) we cannot show that he has been malicious or had reckless disregard to the truth. Therefore, we will not lodge a libel writ.”

More generally, a strong and wide public interest defence will help in all my future writing. I hope that I will always act responsibly, nevertheless there is always the rare chance that I might be wrong. For example, I might publish 100 articles with a 99% confidence that each article carries an accurate and fair criticism. This means that one article (1%) will be flawed, despite the best of my intentions. A weak public interest defence might mean that I would not publish any of these articles, for fear of being destroyed by a libel writ against the one flawed article. However, a strong public interest defence would encourage me to publish all 100 articles and be protected in the one case when I turned out to be wrong, despite my best efforts.

I believe that a strong public interest defence would have stopped the libel claims brought against myself, Dr Ben Goldacre, Dr Peter Wilmshurst and many others. Such a defence would have stopped us running up huge legal bills and sacrificing over year of our careers in order to defend our arguments, which were expressed in an effort to protect the public from misleading and potentially dangerous misinformation.

### **3. Truth**

I am concerned that the defence of “truth” might be taken to mean “absolute and complete truth”, as opposed to the currently accepted “substantial truth”. I like the simplicity of language, which will help non-experts appreciate the difference between a “truth” defence and an “honest opinion” defence, but the technical drafting needs to reflect that “truth” does not imply the “whole truth and nothing but the truth”.

The draft bill addresses cases where there are two different defamatory imputations; I agree with the suggestion in draft bill 3 (3) that “the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not materially injure the claimant’s reputation.” (However, it would be better if the final words read “do not *seriously and substantially further* harm the claimant’s reputation.”)

However, the draft bill does not address the problem, which occurred in my case, where there was a single alleged defamatory imputation with more than one potential interpretation (meaning). If the defendant is able to prove the substantial truth of a lesser meaning then the court should be free to determine that no libel has occurred if the difference between what has thus been shown to be substantially true and the higher unproven meaning does not *seriously and substantially further* harm the claimant’s reputation.

This would have had a major bearing on my case (BCA v Singh), because it became clear that I could prove that the BCA had been reckless in their interpretation of evidence, but the claimant’s alternative interpretation of my words as imputing dishonesty would have been harder to prove. If the judge had been able to rule that recklessness is such a serious charge that an allegation of dishonesty does not *seriously and substantially further* harm the BCA’s reputation, then the case would have ended much more quickly.

Another option emerged during a recent exchange with a legal expert. The option concerns the single meaning rule, and I believe it deserves serious consideration. The single meaning rule is artificial and unhelpful, as it forces the court to decide on a single meaning when it is quite possible that the words complained of have two possible interpretations according to the claimant and defendant. Both meanings are reasonable (or at least both are not unreasonable), yet forcing a single meaning onto the words drives the parties into an all or nothing battle. If the defendant's meaning is upheld, then claimant has no opportunity to have his/own meaning refuted. Worse still, if the claimant's meaning is upheld, then the defendant will be forced to prove the truth of a meaning that was never intended, when another perfectly reasonable and provable meaning exists. Again, this issue is very relevant to my own case.

My suggestion is that such conflicts can be resolved quickly if the defendant is willing to publicly admit that he or she never intended the claimant's meaning, but is willing to defend his or her own meaning if necessary. This could be discussed during the pre-action protocol stage and resolved promptly, thereby avoiding the issuing of a writ, or it could be the first issue to be decided in front of a judge. If the defendant's alternative interpretation is not unreasonable and not libellous, then the claimant would be forced to accept the clarification without damages. If the defendant's alternative interpretation is not unreasonable, yet still libellous according to the claimant, then the claimant would be forced to accept the clarification, but could still sue for libel on the lesser meaning.

Moreover, early resolution would be more likely if the claimant could be forced in the pre-action protocol to declare all the interpretations he/she will rely on later after the writ is issued. In my case, the BCA did not mention dishonesty in its pre-action protocol letters. Then, after almost three months, it issued its writ and only then did it allege that I was accusing the BCA of dishonesty.

#### **4. Honest opinion**

My first concern with the draft defamation bill is a potential confusion over the term "public interest", which has two different meanings in the Common Law Reynolds and the Common Law Fair Comment defence. This runs the risk of being confused in the contexts of a statutory public interest defence and a statutory honest opinion defence. The best approach would be to provide:

- a) a statutory public interest defence that covers statements of both truth and honest opinion (which has the advantage of removing the doubt that would otherwise arise over whether a public interest defence is viable depending on whether the statement will be interpreted as a statement of truth or opinion). The term "public interest" would carry its more restrictive definition, i.e., to cover issues of importance to the general public, such as health, and other public policy issues. Scientists need to be in no doubt that offering opinions on abstruse scientific matters and methods will not fail any public interest test.
- b) an honest opinion defence that is viable whether or not the statements refer to a matter of public interest.

I would like to add that my comments on meaning in the previous section on Truth are equally applicable to this section on Honest Opinion. The single meaning rule is artificial and creates an all or nothing conflict that can force honorable defendants to back down. This can be resolved if:



- (a) the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously and substantially further injure the claimant's reputation.
- (b) two distinct (but reasonable) interpretations can be resolved by the defendant accepting that he/she did not imply the claimant's interpretation, but is willing to defend his/her own interpretation.

## 5. Privilege

I welcome the extension of statutory QP to include:

*.14A A fair and accurate.*

- (a) report of proceedings of a scientific or academic conference,*  
*or*
- (b) copy of, extract from or summary of matter published by such a conference..*

However, it is critical to the scientific and broader academic community that statutory QP is extended to protect peer-reviewed academic publications. It is crucial that such publishing is not affected by libel chill in order to allow academic discussion to be open and free. As well the fundamental importance of scientific and academic freedom, such publications should be included under QP because:

- (a) peer review means that such articles have passed a quality threshold,
- (b) there is the opportunity (indeed encouragement) to offer a response, which fits in perfectly with Part II of the schedules of the Defamation Act (1996), i.e., "Statements privileged subject to explanation or contradiction,"
- (c) there is a clear duty and interest to share research findings and opinions thereon with colleagues who have a corresponding interest in reading them.

Some critics of this proposal have suggested that a so-called peer-reviewed journal with an ulterior motive could be used as a forum for libellous comments. I think there are three reasons why this reservation should not block an extension of QP to peer reviewed journals:

1. just as now, the court could determine whether the requirements for the defence were met and the defence would be struck out or would fail if the peer review process was sham or inadequate,
2. it well known in law that a QP defence would dissolve if there is evidence of malice, which includes a lack of honest belief in the assertion or the existence of an improper motive - such as personal animosity). Indeed that is what the term "qualified" refers to.
3. the benefits of a more open and free space for scientific and academic journals outweighs any remaining minor drawbacks.

It could be argued that QP for peer-reviewed journals is unnecessary, as scientists would almost certainly have access to a public interest defence, but I think it would be a mistake to adopt this view because:

1. it will be expensive, time-consuming and worrying for those at the wrong end of a libel threat to have to resort to a public interest defence, so defendants might back down even if they believe their articles are valid,

2. some forms of academic research might not fulfil the criteria for the narrow public interest definition suggested in the public interest defence, inasmuch as it is pure research, rather than technology or medicine,
3. a belt and braces approach does not hinder the rights of claimants, yet provides additional support for those who should be encouraged to express their views.

QP for peer-reviewed research could have played a positive role in *BCA v Singh*, because my main point was a comment on the lack of evidence supporting chiropractic in children, which was linked to peer-reviewed published research referred to in the same article. Comments on material covered by QP are protected under the standard fair comment defence and thus honest opinion expressed on the peer-reviewed literature would also have that protection if the reforms suggested above are adopted.

I want to reiterate that this is a crucial issue. Journal editors can give examples of material they do not publish for fear of libel or material that is gutted prior to publication. Indeed, earlier this year I was approached by an American researcher (whose name I cannot mention) who had authored a paper with a librarian (whose name I cannot mention) on the subject of impact factors, the scoring system used by librarians and academics to assess the significance of a research journal. The paper was concerned that impact factors can be massaged and manipulated in order to give a journal a much higher score than its content deserves.

The anonymous researcher cited some examples (which I cannot mention) in his paper to show how a journal might be able to unreasonably boost its impact factor. This is an issue that is of interest to all researchers, so the paper was sent to one of Britain's foremost academic journals (which I shall not name in order to avoid embarrassment). The British journal replied: "...we regret that we are unable to publish after all because unfortunately it has potential legal implications under UK libel law."

The anonymous researcher sent the paper to a leading American journal (which I will not name), which did agree to publish the paper. Initially, there seemed to be no problem, because the in-house lawyer agreed that the paper did not breach American libel law. However, the lawyer went on to demand that edits were necessary otherwise there would be a serious risk of being sued in London according to English libel law.

Because this journal had an international readership, then it had to effectively comply with an anti-free speech English libel law and water down its content. The author in question put it this way: "In this case, the dissemination of a scholarly study by an American mathematician and librarian was impacted because it could damage the ill-gotten reputation of someone who might therefore bring a suit in England!"

## **6. Single publication rule**

This is a very welcome (and probably not controversial) part of the draft defamation bill. I suspect others have already raised some secondary issues which may need to be considered. The single publication rule should cover:

1. republication of the same material by another publisher,

2. material that is transferred to an archive,
3. scholarly material which is moved from a subscription circulation to “open access” (which is clearly something that should be encouraged).

## **7. Jurisdiction & libel tourism**

Libel tourism is a problem. As well high profile cases such as NMT v Wilmshurst (the interview was in America, at an American conference, given to a Canadian journalist, for a North American online publication, about an American company, yet Dr Wilmshurst was sued in London), much of the impact takes place below the radar, with cases settled before they reach the public eye, or with cases being avoided by self-censorship.

I was made very aware of chilling effect of libel tourism when Nick Miller, health correspondent at Australia’s *Age* newspaper, interviewed me about homeopathy. He wrote up the interview, but his in-house lawyer refused to allow him to quote my harshest criticisms in case the newspaper was sued in London. Instead, he wrote an article explaining what had happened and complaining about how tough it was to be a health journalist in Melbourne when there was the threat of ending up being sued for libel in an English court on the other side of the planet. (For the record, I know that all my comments about homeopathy could be justified.)

The draft defamation bill offers more protection to non-EU defendants being subjected to inappropriate libel actions in London. However, the current drafting fails to protect a defendant domiciled in the EU in an action where the bulk of the publication and thus any potential damage has occurred outside the EU (e.g., the case of NMT v Wilmshurst).

This gap in the libel tourism part of the draft defamation bill could be addressed by adopting an element from Lord Lester’s bill (clause 13 (2)), which requires that the damage should be substantial and serious in this jurisdiction having regard to the extent of publication elsewhere.

## **8. Jury trial**

In my case, both parties agreed that we would prefer not to have a jury. Had the British Chiropractic Association demanded a jury, then it might well have forced me to concede as there would have been no opportunity to have had preliminary rulings on meaning and potential defences. Instead, the prospect of a jury would have multiplied costs and thereby forced me to concede at an early stage. Moreover, the prospect of a jury would have been damaging to the public, who then would not have heard a scientific assessment of the lack of evidence surrounding many chiropractic treatments.

I agree that it is better that judges should presume that a jury is not required, and that a jury should only be appointed in exceptional circumstances. Such an approach would speed up libel decisions, reduce costs and thereby increase access to justice.

## **Consultation and other issues**

- 1. Aren’t costs the main issue, rather than balance of the law?**
- 2. How can costs be reduced?**
- 3. How can the bill strike a fair balance on the internet?**

#### **4. Should corporations be able to sue for libel?**

#### **5. Why are early rulings on meaning and defences important?**

##### **1. Aren't costs the main issue, rather than balance of the law?**

Costs are certainly a problem. Had I lost, I would have been roughly £500,000 out of pocket. Having won, I was unable to recover over £100,000 from the BCA. Alos, none of this takes into account that I lost at least one year of earnings.

However, tackling costs would never solve the main problem, which is that the law is skewed in favour of the claimants. In my case (BCA v Singh), it is generally acknowledged that my article was correct, important, fair and on a matter of serious public interest, yet the current balance of libel law meant that the BCA felt there was a significant chance that it could win the case. Not surprisingly, every lawyer I spoke to said there was a significant chance I could lose. Indeed, for the majority of the case, it looked as if I was going to lose.

Reducing costs and not correcting the balance of libel law would merely allow writers to be silenced at a lower cost.

##### **2. How can costs be reduced?**

Despite my answer to question 1, above, it would obviously be beneficial to claimants and defendants to reduce costs. The issue of costs is outside the remit of the draft defamation bill, but the scrutiny committee might feel that it would like to contribute to this debate.

I have written two articles on the role of CFAs, which I have attached as Appendix 1 and Appendix 2. While CFAs are necessary, the 100% success fee is unnecessary and can be used to threaten opponents. Instead, CFA success fees should be limited to 25%. Furthermore, capping the recovery of legal fees and moving libel cases outside London would help to reduce costs significantly.

It would also help to reduce costs, if claimants pursued avenues for redress outside the High Court, which might become commonplace if the Press Complaints Commission had more teeth, or there were opportunities for libel tribunals, or fast-track for claims involving damages less than £10,000

Of course, I hope that the final defamation bill will be stronger than the draft bill after adopting some of the suggestions above, which would then cut costs by preventing trivial, vexatious and reputation management libel writs from getting off the ground.

##### **3. How can the bill strike a fair balance on the internet?**

Although the internet contains a great deal of sensationalism and nonsense (just like the worst of conventional media), it also contains a great deal of serious, challenging and well-researched material (just like the best of conventional media). Indeed, some of best science journalism is taking place via blogs and a great deal of conventional journalism is rooted in material that originated on the web. Moreover, the web provides forums for mothers, scientists, consumers, friends, neighbours and others to share ideas, raise concerns and build communities.

If the final bill fails to address writing on the web, it will fail to strike a fair balance between free speech and reputation in the most vibrant and increasingly important arena for discussion, debate and new ideas.

One of the key problems is that a great deal of material (e.g., blogs, comments on blogs, forum discussions, social network exchanges) take place via the medium of so-called secondary publishers. These secondary publishers merely offer a platform for material and exert no editorial control or interest in the content, yet they remain vulnerable to a libel threat. In other words, if I want to silence a blog, or a comment on a blog, or an MP's online newsletter, or a discussion among mothers about a new product, then I do not need to directly threaten the knowledgeable and confident author who is prepared to stand by their claims, but instead I issue a writ against the secondary publisher. This host does not have the time, interest or resources to check the validity of the libel threat or details of the contentious material, so it is very likely to buckle and pull the plug without even consulting the author.

Tactical libel threats against secondary publishers allow censorship that sidesteps the justice system and the author. Such reputation management chokes free speech and occurs frequently. I have close friends (who are serious scientific bloggers), who have suffered when a third party has issued a libel threat to their secondary publisher.

The authors of draft bill have asked for views on how libel law should be adapted to take into account the internet. I know that the Libel Reform Campaign has given this matter a great deal of thought and I fully endorse its proposal to incorporate a 'court-based liability gateway'. My understanding is that this has been described in detail in the campaign's submission to the Joint Committee. Hence, I will not outline the proposal, except to say that the key point is to protect secondary publishers from liability, until the claimant has demonstrated that (a) the author is unwilling to co-operate, (b) that the material is likely to be substantially and seriously damaging to the claimant's reputation and (c) that the material would not obviously benefit from an existing defence.

#### **4. Should corporations be able to sue for libel?**

The libel cases that have raised public concern over the last few years have generally concerned corporations, particularly corporations trying to silence scientists and scientific debate (e.g., *BCA v Singh*, *NMT v Wilmshurst*, *GE Healthcare v Thomsen*, *Nemesysco v Lacerda*). It seems that the way that some corporations are using libel law leads to a free speech chill and hinders scientific debate. This gives rise to a widely felt gut instinct that it is not in the public interest that corporations are able to sue for libel.

"Gut instincts" should not form the basis for a parliamentary bill, but thinking more deeply about the issue reveals several reasons why corporations should not be able to sue for libel:

- (a) It would remove the chilling impact on free speech due to inequality of arms.
- (b) It would be in the public interest to have greater discussion on matters involving corporations.

- (c) It would begin to limit the power of those who are already the most powerful in society.
- (d) It would acknowledge libel's original purpose, which was to protect the reputation of natural persons.
- (e) It would still allow corporations to sue for malicious (including reckless) falsehood and thereby achieve redress.
- (f) It would still allow corporations to obtain vindication by seeking a declaration of falsity, if such a provision were to be made available.
- (g) It would still effectively allow small corporations to sue, because an individual could sue if his/her reputation was inextricably linked to the reputation of the small corporation. There is thus no need to have an arbitrary line between large and small companies.
- (h) It would still allow corporations to complain to the PCC.
- (i) It would still allow corporations to use their budgets to counter claims by marketing, advertising and issuing press statements.
- (j) The ECHR case law has clearly demonstrated that the reputational rights attributed to non-natural persons are less and of a different nature to those held by people (who have feelings and article 8-type reputations); hence, the ECHR notes that the redress needed for companies need not be in the same form as for humans.

Removing the right to sue for libel from companies is a significant step, but the advantages for society are invaluable in terms of the rights and ability of citizen journalists and the national press to be able to hold corporations to account.

I feel that there is no need to be timid on this matter for two reasons:

- (a) there is widespread agreement that corporations should have their right to sue for libel restricted.
- (b) such a change has led to more positives than negatives in America and Australia.

### **5. Why are genuinely early rulings on meaning and defences important?**

I am not sure how this would fit into the bill, but it is an important issue. In many libel cases, the pivotal issues are decisions on the meaning of the words complained of and whether they are matters of truth or honest opinion.

In my case, my legal team were confident of the meaning of the words and less confident whether they were truth or honest opinion, so we were lured into defending against a libel action on uncertain terms. At a preliminary hearing, the judge ruled that our confidence on meaning was misplaced, and I was doubly unfortunate because the judge ruled that the adverse meaning had been stated as a fact, not an opinion – this took an entire year after publication of the original article. It took another whole year before the Court of Appeal reversed the meaning and redefined it as an opinion, not a fact.

These are not matters of life and death, and they are not rocket science, so it seems masochistic to spend so much time resolving elementary issues. In short, in the current process, both parties have to risk large amounts of money in order to resolve the key issues, at which point an adverse ruling leaves one party in serious trouble.

I would like to see both the meaning and the available defence decided at the earliest possible stage, which could be within a month of the writ being issued. There should also be a cap on the recoverable costs involved at this stage, e.g., £10,000. This would allow one party to settle after the decision without having to risk a vast amount of money. In my case, both parties paid a total of roughly £500,000 to decide the meaning and potential defences – an absurd and potentially devastating loss, in order to decide a relatively simple matter.

June 2011

## **Appendix 1**

### **Conditional Fee Agreements (CFAs) and Libel**

Today, “The European Court of Human Rights unanimously ruled that the payment of success fees of up to 100 per cent in privacy and defamation cases, under CFA agreements, constitutes a violation of the right to free expression.” ([Index of Censorship](#)) I twittered that this was important and positive news, but some followers were puzzled by my view. Here is a quick explanation as to why our current CFA arrangements are dangerous for free speech.

#### **First of all, what is a CFA?**

“CFAs were brought in under “access to justice” reforms ... They enable lawyers to take libel cases under no-win, no-fee deals whereby they are compensated for the risk of failure by being able to charge the losing side a 100 per cent uplift on their normal fees.” ([Press Gazette](#))

The good thing about CFA’s is that they enable defendants and claimants in libel cases to fight on when normally lack of funds might force them to back down. However, the bad thing about CFA’s is that (by doubling the stakes) claimants can use them to effectively bully defendants into backing down. The balance of libel law is already in favour of claimants, so a defendant is in a doubly horrendous position when facing a claimant armed with a CFA.

Before discussing whether we need to reform CFAs, it is important to mention two reforms that are fundamental, and therefore even more important. First, the balance of libel law needs to be made fairer – this is being tackled by the [Libel Reform Campaign](#). Second, the core costs of libel need to be reduced, and this is being discussed as part of the Jackson Review.

#### **Should we reform CFAs?**

Let’s look at three options:

##### **1. Getting rid of CFAs**

This is not a serious option. CFA’s encourage access to justice, so very few people will argue for this option. You will often hear the phrase “get rid of CFAs”, but this typically means getting rid of or reducing the success fee associated with CFAs, which is akin to option (3).

##### **2. Keeping current CFA arrangements with 100% success fees**

This helps poor claimants with no resources, and it can also occasionally help poor defendants with no resources. However, CFAs can backfire and damage those who relied on them. Imagine a claimant who has a CFA and wins; so far, so good. However, at the end of the case, the claimant has to pay his or her lawyer double the normal fee! Of course, this money can be claimed back from the losing side, but typically only 75% of the costs are ever recovered. Hence, the claimant is further out of pocket than would otherwise have been the case, because of the CFA.

The bigger problem with CFAs is that they are not only used by impoverished clients, but also by the rich and powerful. These wealthy individuals and corporations adopt CFA relationships with lawyers in order to intimidate lone writers or even large media outlets. Adopting a CFA means that the cost of a libel case will double and will almost certainly exceed £1 million if the case goes to trial. This means that defendants back down and apologise even if they are confident that what has been written is correct.

### **3. Reforming CFAs by reducing success fee to, say, 25%**

I think that this keeps the advantages of the current CFA landscape, while reducing the disadvantages. Let's look at four scenarios.

#### (i) Claimant with a strong case

I think claimants will still find lawyers willing to work on CFAs even if the success fee is reduced to only 25%. In fact, the 25% uplift is a fairer reflection of the lower risks associated with a good case. Moreover, the marketplace will adapt and lawyers will have to accept 25% uplift or else remain unemployed. And if one lawyer rejects a CFA deal, then another will accept it if the case is strong. Access to justice is thus preserved.

#### (ii) Claimant with a weak case

I doubt weak claimants will find a lawyer who will work on a CFA with 25%, but that is probably a good thing. Unless a claimant has a strong case, then he or she should avoid pursuing a libel action that might ultimately be self-destructive. Imagine that a weak claimant loses a case with a CFA; the good news is that there are no costs to pay to the claimant's own lawyer, but there will still be the costs of the other side, which will certainly be in excess of £100,000.

#### (iii) Defendant with a strong case

I think defendants with strong cases will find lawyers willing to work on a CFA with 25% success fee, for the same reasons outlined in (i). This will certainly be the case when libel law becomes fairer and defendants are more likely to win than they are today.

#### (iv) Defendant with a weak case

I doubt weak defendants will find a CFA lawyer, which is exactly the situation today, and which is probably not a bad thing, as explained in (ii).

What about defendants or claimants with 50/50 cases. On the one hand, I would argue that a 50/50 case is a weak case, i.e., nobody should start suing for libel from such a haphazard and uncertain starting point. On the other hand, I imagine that many lawyers would take on clients with a 50% chance of success with only a 25% success fee bonus. The alternative for lawyers would probably be twiddling their



thumbs, which earns a guaranteed zero fee and zero bonus. Also, if the cost of libel is reduced overall and the process is accelerated (thanks to a reformed and clearer libel law), then a lawyer is more likely to take on a 50/50 client; instead of risking several months of income, the lawyer is risking only a few weeks income, and over the course of the year there will be some wins and some losses. The losses will be affordable when we bear in mind that a win may end up paying a top libel barrister £800 per hour, with a 25% uplift taking it to £1,000.

## **Appendix 2**

[Lord Jackson's Review of Civil Litigation Costs was published in January 2010](#). It applied to legal costs across the board, which obviously included costs in libel cases. Recently, there was an open consultation. However, I did not make a submission to the [consultation on the Jackson Review](#), which closed on Monday 14th February, because I had been focusing on preparing for the draft defamation bill (which will be published before the end of March).

However, having just read the [submission made by Media Standards Trust](#) to the Jackson Review consultation, I did want to correct one point relating to my own case. As background, you should know that the Media Standards Trust submission argues that the current CFA system has played an important role in providing access to justice in many libel cases. While I accept that CFAs are important, I believe that the beneficial role of CFAs is exaggerated and that the chilling effect of CFAs is understated. I also feel that the 100% success fee is unnecessary and damaging to free speech.

Personally, the most worrying aspect of the Media Standards Trust submission is that it names me in a list of people described as "...some of those who successfully sought protection for freedom of speech through a CFA." The report states:

*Simon Singh - the author was sued (unsuccessfully) by the British Chiropractic Association over criticisms he made about scientific claims made by the BCA in 2008. He too was able to fight his case thanks to a CFA.*

In fact, CFAs offered me very little support, and potentially had a very negative impact on my freedom of speech. The reality is that I was threatened with libel in May 2008, but I did not receive an offer of a CFA until February 2009. At this stage, only one out of three members of my legal team was on a CFA. In other words, I had already run up enormous legal bills before the prospect of a CFA became a reality, and thereafter it applied only to a fraction of my costs.

A second member of my legal team adopted a CFA arrangement towards the end of 2010, but by this stage I had already had to bear a massive financial burden.

On the other hand, the British Chiropractic Association (BCA), the organization suing me for libel, adopted a CFA arrangement with its legal team at a very early stage.

This had a terrifying impact on me, because I faced the possibility of having to pay double the BCA's costs if I lost the case. Thinking back to that time, the existence of a CFA for the claimant came very close to forcing me to back down. The BCA's CFA came very close to ending my willingness to defend my right to free speech.

I hope that this helps to clarify the situation regarding my own case and my very partial CFA. This explanation should dispel any notion that CFAs were a boon to free speech in the case of *BCA v Singh*.

Moreover, the Media Standards Trust submission includes a reference to Hardeep Singh, who was sued for libel by his Holiness Sant Baba Jeet Singh ji Maharaj. The submission claims: "Singh pursued his case thanks to a CFA." However, having spoken to Hardeep, my understanding is that the offer of a CFA came only at a late

stage, and that he had already run up legal bills of about £100,000 prior to the CFA. Hence, the CFA clearly did not allow him to pursue the case, but rather it was Hardeep's own determination and resilience that enabled him to stand up for what he believes to be true. He took a major financial risk, and it is not clear how much of his money he will ever recoup.

It is quite possible that many other examples that claim to show that CFAs support free speech are not as they seem.

*June 2011*

## Supplementary written evidence, Dr Simon Singh (EV 52)

*I wanted to write to you following the science evidence session last month, because there was one question that I feel I did not adequately answer. I apologise for the delay in writing to you, but it has been very busy couple of weeks.*

*Towards the end of the session, Baroness Hayter suggested that the public interest defence would be a double-edged sword, and raised the example of a social worker being defamed. I think I was slightly vague in my response, because I was not sure of the sort of case being alluding to. After a bit of googling, I think it was the following case.*

Haringey Council libelled Baby Peter social worker  
<http://www.bbc.co.uk/news/10478801>

*This case was being used to illustrate a general point of concern which I will address shortly, but I think it is worth looking at this case in particular to see what might happen if this case were to arise in 2013, when a new strong public interest defence in libel actions might be in place. So, what would happen?*

1. Haringey Council might have tried to run the putative public interest defence, but (as the Libel Reform Campaign stresses) this would not be available if the defendant was malicious or reckless. In this case, either might be applicable.

(b) Improper motive; the council could be vulnerable because the social worker had criticised the council, and it is easy to see how the council's motivation might have been solely to smear the social worker.

(c) Lack of honest belief in the factual assertion or reckless disregard as to its truth; the council is vulnerable, because it seems it merely jumped to its false conclusion and totally failed to check, even though it had access to all the relevant information.

69. It is likely that a claimant would almost certainly have won at trial or (more probably) the defendant would have backed down at an early stage.

70. In the unlikely situation that the Council was successful in running the public interest defence, they would be required to provide an adequate (prompt and equally prominent) correction and an apology, and the claimant could obtain a Declaration of Falsity which the judge could direct to be printed by the Council and the papers. While the social worker would not receive damages under the new proposal, her reputation would be fully vindicated, which is the main objective of libel law. If the social worker suffered actual financial loss, then a suit of malicious falsehood would be appropriate.

71. If the Council decided not to run this public interest defence – because for example they did not wish to publish a correction – then they would have to rely on a Reynolds type statutory responsible publication in the public interest defence. Our proposed strengthening of this compared to the version in the bill is merely that the burden of showing irresponsibility lies with the claimant not with the defendant as currently.

This version of the public interest defence would also have brought about the correct result in the “council v social worker” case discussed above. The council did not carry out an investigation before making its defamatory statement, and, in any case, the statement contradicted the facts to which the council had ready access. The statement by the council was clearly irresponsible.

Although we can be confident that this particular case does not raise any problems in regard to the public interest defence proposed by the libel reform campaign, there will undoubtedly be rare cases in which a justified claimant does not get adequate vindication despite the prompt and equally prominent correction. However, the fundamental point is that this is the price we pay for an investigative press and public debate of these matters.

During the evidence session we raised the Rath v BMJ case, when the Reynolds defence was too weak to protect the BMJ, and instead allowed a dangerous vitamin pedlar to continue profiting by selling ineffective pills to patients with HIV in South Africa. The BMJ had acted responsibly and in the public interest, yet the existing Reynolds hurdle is far too high to support this sort of important and life-saving journalism. Indeed, everyone involved in the Libel Reform Campaign knows of serious public interest stories that do not surface for fear of a libel action and the precarious nature of the Reynolds defence.

*July 2011*

## **Supplementary written evidence, Dr Simon Singh (EV 53)**

I heard this week's evidence to the Joint Committee from senior judges, who stressed the importance of an early ruling on meaning (and other issues) as way of cutting costs. In turn, it was pointed out that such early rulings are only practical in the absence of a jury.

While I strongly support these two points ([1] early rulings reduce costs & [2] presumption against juries makes this possible), I would like to explain that this alone will not be sufficient to make libel affordable.

In my case (BCA v Singh), both parties agreed that we did not require a jury, so there was a preliminary hearing to rule on meaning and possible defences. This took: One year after the initial publication.  
Roughly £250,000 in total spent by both parties.

I then applied to appeal the ruling three times before eventually being allowed to go to the Court of Appeal, where I was successful. This took:  
Two years after the initial publication.  
Roughly £500,000 in total spent by both parties.

In other words, a presumption against juries and early rulings would save money, but we are still dealing with absurd levels of costs.

If the Joint Committee is going to recommend speedier resolution of meaning and other issues, then I would argue that this will require more than effectively removing juries from the vast majority of cases. I am not sure what changes in process would be required to establish meaning within, say, 3 months and for less than £10,000, but this has to be possible and it has to be the desired outcome for both genuine claimants and genuine defendants.

*July 2011*

## Oral Evidence, 13 June 2011, Q 440–469

Witnesses: **Dr Ben Goldacre**, [Author and Medical Doctor] **Dr Philip Campbell**, [Editor-in-Chief, *Nature*] **Dr Fiona Godlee** [Editor-in-Chief, *BMJ*] and **Dr Simon Singh** [Author, Journalist and TV Producer].

**The Chairman:** I restart and welcome our witnesses. Thank you for coming. If you read the transcript of our previous session, you will see that most people have fathers-in-law or partners who may have written for *Nature*. That is in addition to the declarations of interest otherwise made.

**Q440 Lord Marks of Henley-on-Thames:** I want to examine three questions about scientific discussion and debate. The first is: if we are to protect peer review with qualified privilege, how do we define peer review, if at all? Does it need a definition because other people do not understand precisely what constitutes peer review, or does it not need a definition because scientists all understand what constitutes peer review? Can I ask you to decide who answers that and how?

**Dr Fiona Godlee:** Peer review has been compared with democracy, and I am not sure how well democracy has been defined. There is an accepted view of what peer review is and is not. At the margins, there may be some discussion, but in the vast majority of scientific publication, there is very little dispute about what peer review is.

**Dr Philip Campbell:** I agree with that. The key element of peer review is independent assessment managed by experts. That is a well understood process.

**Q441 Lord Marks of Henley-on-Thames:** If that process is capable of definition, should we include it in any provision that we suggest be added to the Bill so that the public can understand?

**Dr Fiona Godlee:** I would have thought that a very broad statement of what is generally accepted to be peer review might be helpful, but to go into any specific detail would be unhelpful.

**Q442 Lord Marks of Henley-on-Thames:** My second question concerns conferences. As you know, the draft Bill suggests that the reporting of scientific conferences should attract qualified privilege. If that is right, is there a risk of the conference concept being hijacked by people who want to take advantage of the qualified privilege to defame others and do so subtly in a way that gets them out of being accused of malice? If that is right, is there a need to look for a system—perhaps a very simple one—of registration of conferences with an academic institution to ensure that only legitimate conferences are protected in this way?

**Dr Simon Singh:** Can I just go back to the definition of peer review? It is a word that the public are becoming increasingly familiar with, so I would not necessarily want to define it purely for the public's interest. It may just add to the confusion.

My feeling is that people speaking at a conference without having printed material or an abstract should not necessarily be protected by qualified privilege. What differentiates the speakers at a conference from publications or peer-reviewed material is that the material has been prodded and poked, examined and tested, and has gone through enough peer review to deserve a label of responsible publication and therefore qualified privilege and the automatic response and to and fro that

follows the publication. I would not necessarily want to protect speakers at a conference who would speak off the cuff.

**Dr Philip Campbell:** I agree with that. A system of registration does not provide a justified protection. To the extent that a conference is akin to a peer-reviewed process—that is, that papers are given which have been subject to prior scrutiny, the speakers give those papers and then you have a scientific debate about the evidence in them—that merits protection.

**Dr Fiona Godlee:** I think that I am right in saying that all of us would like to see that privilege extended to peer-review publication. It seems a bit of an anomaly to extend it to conferences but not to the fully published article.

**Q443 Lord Marks of Henley-on-Thames:** Your evidence in summary is that the MoJ has got it the wrong way round in pressing for qualified privilege for the reporting of conferences anyway. That is not necessarily something that you would suggest.

**Dr Philip Campbell:** We were speaking about people presenting at conferences.

**Q444 Lord Marks of Henley-on-Thames:** I have not come to speakers at conferences, which was my third question. There are three situations. One is peer review and you are unanimous that, in omitting that, the MoJ has omitted an important area for protection.

**The Chairman:** That is, the responsible department, the Ministry of Justice.

**Lord Marks of Henley-on-Thames:** Yes, the Ministry of Justice. The second area is speakers at conferences, whom the ministry's draft Bill does not suggest protecting. You are unanimous that they should not have protection just by being speakers at conferences.

**Dr Simon Singh:** That is, unless they are speaking to—

**Lord Marks of Henley-on-Thames:** Unless they are speaking to peer-reviewed papers which themselves have protection. The third area where protection is suggested is the reporting of conferences where speakers make the contributions. I would like to hear from you on that area as well.

**Dr Simon Singh:** I think that we agree that the draft Bill has got that broadly correct. If I am unable to go to a conference and it is material that I would like to know about, then I would like to feel that people could report on that conference using qualified privilege so that I would then have access to what is essentially a public meeting.

**Dr Fiona Godlee:** Accurate reporting of a public meeting seems to be a sensible subject of qualified privilege, in the same way that a court hearing, the GMC or some such gathering would be. It seems to make sense to include that in the definition of qualified privilege. The point I made was that it then seems odd not to extend that to the far more pre-scrutinised product, which is a peer-reviewed article in an academic journal.

**Q445 Lord Marks of Henley-on-Thames:** So you would limit the proper defendant in those cases to the speaker at the conference who himself made a defamatory statement, but exempt the non-malicious reporter of that conference?

**Dr Fiona Godlee:** If it was an accurate report of the conference.

**Dr Simon Singh:** To reiterate what Fiona Godlee has said, the peer-reviewed literature is the bedrock of science, the foundation upon which everything is built. It was a surprise not to see it in the draft Defamation Bill. Above all, that is what we would love to see embedded within it.

**The Chairman:** That has been brought up. Dr Huppert has briefed on it.

**Q446 Dr Huppert:** To be absolutely clear, in the way that Lord Marks was, is it that you would like to see peer-reviewed papers completely protected or the reporting of peer-reviewed papers? I want to be absolutely clear on what you would like to see.

**Dr Fiona Godlee:** Both.

**Dr Simon Singh:** I think reporting would automatically follow.

**Q447 Dr Huppert:** So that any peer-reviewed paper is automatically protected.

**Dr Fiona Godlee:** The first is crucial.

**Q448 Baroness Hayter of Kentish Town:** Dr Godlee, you used the word “article”, which I find much easier, but there is a certain Evan Harris, who might be known to you, who would also like this extended to comment or editorials, which I find more difficult. As we have two editors here, could you comment on the peer-reviewed articles, which are easy, as opposed to what you two add as the trimmings?

**Dr Fiona Godlee:** The word “article” extends to a piece of work. Certainly, if a research article had qualified privilege attached to it, then an editorial that commented on that would automatically—as I understand it, not being a lawyer—extend to that piece of work, too. That would be comment on a peer-reviewed research article. Journals such as the *BMJ*, and Phil Campbell can talk about *Nature*, publish many other types of content that we also peer review—not all, but most of it. Not just research but also scholarly comment and extended feature-type articles are peer reviewed. It does not have to be research.

**Q449 Baroness Hayter of Kentish Town:** I am talking about the non-peer reviewed material.

**Dr Philip Campbell:** I would not expect that to be subject to qualified privilege.

**Dr Fiona Godlee:** No, no.

**Lord Marks of Henley-on-Thames:** That concludes all three areas that I wanted to cover.

**Q450 Dr Huppert:** There are two areas that I would like to explore. Perhaps I may take them one at a time. The first is about corporations or, more generally, non-natural persons. We have had various discussions about what they should be allowed. Should they be treated, as currently, essentially as people? Should they be not allowed to take action in defamation but required to use malicious falsehood, declarations of falsity or various other things along that spectrum? Where do you all stand on that?

**Dr Ben Goldacre:** The inequality of arms between a corporation and an individual is huge. I do not see any justification for corporations being treated as if they have human rights. It is entirely reasonable to expect that they can use laws such as malicious falsehood where there is a higher bar to be able to take cases against individuals and newspapers.

**Dr Philip Campbell:** I am not sure that I have a complete answer to your question as you have asked it because there is a legal flavour to the question, which I am not qualified to answer. However, I feel that a company’s feelings cannot be hurt, so the quality of how a reputation is blemished is different. Therefore, it is arguable that libel should not apply to a company. Of course, they have to have the right to take action against someone who has been malicious or irresponsible and has, therefore, produced information in public that damages them in a substantial



way. In that sense, they have every right to sue, but the onus has to be on them to show that we have been irresponsible.

**Dr Simon Singh:** I should just remind people that some of the most concerning cases over the past couple of years have involved companies. I was sued by a company; Henrik Thomsen was sued by a company; Peter Wilmschurst was sued by a company; Francisco Lacerda, a professor from Stockholm, was sued by a company—well, his journal was; and Dalia Nield was threatened, as were bloggers like Andy Lewis and David Colquhoun. Often, companies have the greatest chilling effect because of this inequality of arms. Often they are the people that we should be challenging—in fact, the whole point is that they are not people. They are the entities—the non-natural people—we should be challenging in order to get to the truth. Having said that, what redress do they have? Declarations of falsity, suing for malicious falsehood, the Press Complaints Commission and very large advertising budgets et cetera are the ways in which companies can seek redress if a claim has been false. In theory, this hangs together as something worth pursuing.

Recently, I was at a meeting involving lawyers, academics, journalists and free speech advocates. I was surprised because it was the first time on which I had seen a show of hands on this and everyone around the table agreed, including some heavy-weight law firms, that companies should be excluded from libel. In theory, it works and the view is moving in that direction. In practice, when we look at what is happening in Australia and America, companies survive quite happily under situations where their ability to sue for libel has been removed or seriously limited.

**Q451 The Chairman:** Does that apply to all companies, from businesses to charities to large partnerships?

**Dr Simon Singh:** Yes, I think so. The area of concern that I have heard people raise is that of small organisations, such as small charities, a corner shop or a playgroup. In Australia, the solution is that the size of the company matters—more than 10 employees and the company cannot sue for libel—but that may seem arbitrary. The other way around this problem, if it is a small organisation, is that the reputation of the individual is inextricably linked with that organisation, so the individual can still sue for libel.

Again, I want to stress that I have been closely involved with the libel reform campaign. Everyone I have talked to about this is always concerned about the claim that, “We might end up being claimants one day and I would not want to be defamed unfairly and unreasonably”. It is important that we always bear in mind the claimant’s perspective, but there is certainly nothing in the current draft Bill that should worry claimants. I have looked at a couple of cases in particular and certainly a lot more could be done in favour of defendants that still would not impact on the rights of genuine claimants.

**Dr Fiona Godlee:** Two of us here speak to some extent for private commercial companies, so we understand what that means. It holds no real fear for us. Within the health sphere, it is crucial that we hold health bodies to account, and we rely on whistleblowers who are courageous enough to come forward and say when things are not going well. The NHS cannot sue, but there are a number of private health bodies that, if corporations were allowed to sue, might do so. The inequity there would be wrong.

**Q452 Stephen Phillips:** I want to take this in the direction it is going, but a little further. I want to ask Dr Singh and Dr Goldacre, in particular, what the current effect of the defamation laws as they exist in this country are on their ability to make

potentially defamatory statements in the context of popular science, which is more widely read by people like me who are not scientists? Have you personally found a chilling effect from the current law?

**Dr Simon Singh:** It happens on a regular basis. It happens within the community of people I know who are science communicators. Yesterday, I met three people who I know very well who have all had libel threats and have confronted this issue when speaking on BBC radio, when blogging to the general public and so on. The Sense about Science dossier is very valuable in this. It has a list of cases where academic scientists, but also popular science communicators, have been affected by libel chill or libel writs. One of the cases it cites is somebody who was interviewed on the BBC and was told not to talk about certain areas for fear of libel. On two occasions when I was debating with somebody, the producer said, “Do not mention this or this”. Having spent three years talking to libel lawyers week after week, I know where the line is, and I would have been nowhere near that line, yet I was told to stay well away specific topics, which meant that I was debating with people with one hand tied behind my back. It happens regularly.<sup>128</sup>

**Dr Ben Goldacre:** People are absolutely terrified. I think it is important to recognise that this is not just about where cases come to court, or even to legal letters. People make a decision not to bother pursuing a story because they know that it will be more trouble than it is worth. I could cite probably dozens of stories that I have written over the past eight years where things have been seriously delayed by what I felt were quite spurious legal threats by companies. If I had not been willing to spend the extra time on pursuing them, they would not have gone through. It is also worth recognising that pop science today does not just mean things that are published in newspapers, in books or on the radio or television. An enormous amount of incredibly valuable material comes out of blogs. It is not a kind of Wild West of people randomly defaming people. It is often very serious work by academics who have taken it upon themselves—for no payment, but just out of a sense of passion for science—to communicate science to the general public. There are several cases: Andy Lewis submitted a very good piece of written evidence to the committee. There are several more cases where people have been silenced. Science is all about critically appraising the evidence for other people’s ideas and practices. That is what scientists do, so it is inevitable that in the process you will come up against people who do not like what you say about their ideas and practices. Often in pop science, we are writing about things that are pertinent to real-world health decisions that people make for themselves. Medicine is not just about treatments given by doctors to patients. Medicine is also about decisions that individuals make about their own health-risk behaviours. Where they have been misled, it is an important public health issue to ensure that people are able to give clear advice or to criticise bad advice.

**Dr Simon Singh:** Some of the best journalism is happening on blogs and is about things that are not being covered in the mainstream press. Things that are written about on blogs get picked up by the mainstream media. There is a wonderful example of a teenager in Wales, Rhys Morgan, who wrote about something called Miracle Mineral Solution. It got picked up by the *Daily Mirror* and then by “The One Show”. That product has now been banned in Kenya, and trading standards over here are looking at it. Had the person behind Mineral Miracle Solution been quicker off the mark, he would have been quite smart to threaten young Rhys with libel. There are many cases where people have been threatened with libel. Andy Lewis

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<sup>128</sup> Simon Singh has asked to add: Although the Sense About Science dossier of libel incidents involving scientists is valuable, it is far from complete. I know of several cases personally that do not appear in the dossier, sometimes because the scientists in question do not want to go public.

has been mentioned. There is also David Colquhoun, who is a Fellow of the Royal Society and a professor at UCL, Martin Robbins and so on. Libel happens to *Nature*, the *BMJ*, large journals, small journals, newspapers and blogs—in every area.

**Q453 Stephen Phillips:** Let me come back to the internet in just a moment. In terms of this unequal playing field between, on the one hand, what might be called the big companies engaged in the scientific arena and, on the other, individuals who want to write critically about their products or indeed anything else, is there a problem with the law of defamation or is there a problem with the way in which the courts approach defamation? What is the actual chilling effect?

**Dr Ben Goldacre:** I think that one very important issue here is that many of these stories are about serious and substantive issues of science, evidence and health that are very clearly within the public interest. While it is important to draw a line for qualifying privilege around peer-reviewed journals or academic conferences, in my view wherever someone is writing critically about ideas and practices and it is clearly in the public interest that they do so, the bar should be set very high for anyone trying to sue them for libel. If a public interest can be shown, claimants should have to show malice or recklessness on the part of the person making assertions about them if it turns out that they were wrong. I think that people should certainly be very fulsome in giving generous corrections where they have been shown to be wrong, but I think that wherever there is public interest—that would include almost all the pop science and academic situations that I can think of over the past 20 years—the claimant should have to show malice or recklessness.

**Dr Simon Singh:** Costs are clearly an issue—costs need to be driven down, cases need to be speeded up and case management can be massively improved—but, in all these cases where people have been sued for libel, the claimants thought that they had a real chance. In my case, when the British Chiropractic Association sued me, the law was so gray and so messy that most lawyers thought that the case could have gone either way. When the case was eventually resolved, it looked like it should have been a slamdunk from day one—the BCA essentially removed the material and my views have been vindicated completely. What should have been a slamdunk became an horrendous mess because the case law is so fuzzy. That is why the Bill is so welcomed by all the people who have faced these issues because it will bring clarity and common sense to the law. Hopefully, the sort of measures that will be introduced—by providing a high hurdle in Clause 1, by having a strong public interest defence and by, we hope, stopping corporations suing—will block those cases and stop these things happening, while always protecting the right of claimants to sue in justified cases.

**Q454 Stephen Phillips:** I promised to come back to the issue of the internet, although others on this Committee may have a greater interest here than I do. What would your general suggestions be for how we ought to deal with the internet in the context of defamation in English law?

**Dr Simon Singh:** Although some people can publish on the internet as, for example, a blogger for *Nature*, the fundamental problem is that probably 99 per cent of bloggers are not hosted in that way. Such blogs do not have an editor but just some ISP or other web host that carries their material. The web host has no knowledge of what is being written and does not know and has never met the blogger. That means that the web host becomes very vulnerable to a libel threat. If someone does not like something that I have written on my blog, they can threaten me with libel and I might stand up to them. However, if I do that, they can go to my

web host, who is getting £10 a month, and the web host will pull the plug on my blog. So there is censorship happening that sidesteps both the author and the legal system. That is the fundamental problem that we have. There are at least two studies that show clearly that web hosts will just pull the plug without going into any examination of what is going on.

Similarly, if an MP has a newsletter on their blog and I do not like what it says about me, I could threaten the MP with libel. If the MP stands by what has been written, I might take down the newsletter by going to the web host, and there is virtually nothing that you can do about that. Rather than making web hosts so vulnerable, I think that the draft Defamation Bill needs to make the author vulnerable. If the claimant cannot contact the author or the author refuses to do anything, then I think that it is the job of the claimant to persuade some court-based process that he has been substantially harmed and that the words are defamatory. At that point, if the claimant can convince the court that that is the case—this is a cheap, paper-based system—the web host or secondary publisher should become liable.

**Q455 Stephen Phillips:** The possible difficulty with that is that it takes time. Given the nature of the internet, someone who has been very badly defamed then has something which exists for ever out there in the public domain that is very harmful to their reputation.

**Dr Simon Singh:** It will certainly not stay there for ever.

**Q456 Stephen Phillips:** It may have been picked up by others.

**Dr Simon Singh:** Once it starts being picked up by other people, they become liable. That is the key issue. I get told that I am in the pocket of the big pharmaceutical companies all the time by people here, there and everywhere. If that went beyond mere tittle-tattle or comments on somebody's blogs to a major publisher who I can identify, I would consider taking action. The rights of claimants are very important, and the process of going through the court to have a web post taken down can be as quick or as slow as we decide it to be. Most web hosts will be responsible. If something is obviously defamatory, they will quite sensibly take it down if they are told about it.

It is always really important to look at the other side. What happens if the final bill does not do anything in this area? Very brilliant writers are having their material removed. Not just brilliant writers, writers who are, writing about incredibly important matters of public interest are having their material removed, yet none of us get to hear about it.

**Dr Philip Campbell:** *Nature* pursues a twin-track approach for certain commenting on our articles.

**The Chairman:** I must stop you. There is a Division in the Lords, and we will restart as soon as we get our Peers back.

*The Committee suspended for a Division in the Lords.*

**Q457 The Chairman:** We restart. Mr Phillips had finished. I will ask one question and then come across to Dr Huppert as well. Dr Singh, you called for the single meaning rule to be reformed. Is the current situation a problem?

**Dr Simon Singh:** I do not know if I am alone on this but other people do not seem to have really focused on it. The single meaning rule says that if I write something, then as the defendant in a libel action I say it means this and the claimant says it means something else. In the concrete example of *BCA v Singh*, I said—

**Q458 The Chairman:** This is the chiropractors who said that their talents could cure things which were improbable.

**Dr Simon Singh:** Exactly. They said that I called them dishonest. I said that they were reckless in promoting these treatments. What did I mean? Was the general interpretation recklessness or dishonesty? In the real world, we understand that words have different nuances and meanings to different groups of people and yet the court forces us to have a single meaning. If the court takes the BCA meaning, then I am in huge trouble. If the court takes my meaning, then the BCA are in huge trouble. The single meaning rule forces this confrontation or ups the ante enormously. It strikes me that a quite reasonable way forward is to say that we have two meanings here that are both quite reasonable. The claimant is upset about one of the meanings. That gives the defendant an opportunity to say, "That is not the meaning that was intended and I am willing to clarify that. The intended meaning was recklessness. If you want to sue me for that, you can".

That approach would not just have saved me two years of my life and a vast amount of money and stress, but it would also have saved the British Chiropractic Association a vast amount of money and stress, too. On this approach of abandoning the idea that there is a single meaning, I was talking to Professor Mullis who is a learned academic in this area. I was surprised to hear that he felt, from an academic point of view, that this was a perfectly sensible and viable way forward that he himself had been considering.

**Q459 The Chairman:** To have more than one meaning?

**Dr Simon Singh:** To have two meanings and then to resolve the situation by declaring one to be off the table because it was never intended and one to be still on the table if people still want to fight about it.

**The Chairman:** If I could turn to the issue of authors—

**Dr Simon Singh:** Can I just add one really annoying thing about this? Ben, I think there was an issue of meaning in your case which could have gone horribly either way. In nearly every case that I have talked to people about, the critical interpretation of one word going one way or the other could have been make or break. I am not at all saying that you have a reasonable meaning versus a strained meaning that is clearly not sensible but when there are two reasonable meanings, let us sort it out in a quick, easy way.

**Q460 The Chairman:** I was going to turn to authors abandoned by publishers, if I can use a sort of longhand. Can anything be done to stop independent authors being left to defend libel actions without the backing of their publisher, newspaper, magazine or journal?

**Dr Ben Goldacre:** There is a much more important issue here: the whole nature of publication is changing. It will never again be the case that publishing is a matter only for large institutions such as newspapers and book publishers. The reality is that individuals will make assertions on their blogs, on internet forums, and so on. There is a real problem with libel law not being fit for purpose for that because it is often a sledgehammer to crack a nut with individuals making publications on a low readership outlet. I do not mean to trample your question, but the question is really: can individuals go it alone? The answer is that they cannot. Simon going it alone, having to defend his case in the *Guardian*, is just one example of that. Individual people really have no access to a meaningful defence with libel law. They will always give in. I run a discussion forum on my own personal website which is not a money-

making thing. I provide it because I think that useful discussions happen there. Periodically, people will make very grand and lavish legal threats. In almost every case, they make an absolute point of saying, "As you know, even if you successfully defend this, it will cost you tens if not hundreds of thousands of pounds so just take it down now". That is happening all over the internet.

**Dr Philip Campbell:** I cannot comment on what the law can or even should do on this point but it is our company policy to be supportive. I would be extremely uncomfortable about abandoning anyone with whom we had worked in partnership in a publishing activity, leaving them to slog it out. I feel that there is a joint responsibility. We would act that way. However, there are particularities in every case that are so sensitive and could go in so many different ways that to come out with a law about it would be difficult. If we can somehow express that joint responsibility, I can see cases that would have gone better as a result.

**Dr Ben Goldacre:** It is worth clarifying, in terms of inequality of arms, that Phil Campbell is the editor of *Nature*, which is probably the biggest academic journal in the world. Other publications are smaller and less able to make decisions like that. As far as I know, no local paper has defended a libel action in several years. Small publishing outfits, and even bigger ones, are increasingly having to accept that they cannot defend legitimate criticisms that they have raised in the public interest. Not being able to back up one individual is just an instantiation of that wider problem.

**Q461 The Chairman:** To summarise, are you commending to Parliament or to the judges a system where an individual can answer a claim without having to have the backing of a large organisation, a big bank, a big insurance company or someone else behind them?

**Dr Simon Singh:** Francisco Lacerda had published in a small journal and no big pocket to help him; Peter Wilmshurst had no one to help him; and David Colquhoun had no one to help him. A lot of people have no one to turn to. In rare cases, there is someone to turn to. Mine was one of those rare cases where I published in the *Guardian* and the *Guardian* did not finance the case. Why did it not do that? It was not being sued for libel. Its legal advice was different from mine and it did not think that the case was winnable. Had it got involved and lost, it could have been answerable for £500,000, which would have cost 10 years' worth of journalism jobs. These sums of money scare the hell out of major publishers as well. The *Guardian* has stood by as many libel claims as anyone else. It has been very decent and has a great deal of integrity. It stood absolutely by Ben when they, too, were sued. The problem is not with the publisher and the solution is not to tie authors to publishers. The solution is to stop these cases, which should never have been brought in the first place. That is my gut instinct.

**Dr Ben Goldacre:** That is right. If we had a very clear public interest defence where, if you raised legitimate concerns in the public interest, they would have to show malice or recklessness, you would be saved in a lot of cases. You can vanish the problem away from that side. If you are asking whether we should make individuals completely free to say whatever they want, I am not sure that I would necessarily want that. However, it is worth recognising that, even when you are defended, the amount of time, effort and money that goes into a case like this is phenomenal. I do not have a particular hard-luck story to tell but, when I was being sued by Matthias Rath for raising concerns that I think were very much in the public interest, I had to spend a very large amount of time dealing with that—certainly, hundreds of hours and possibly more. I had to cancel other work and give up all my personal life. There is no recompense for that. I am not paid a wage by the *Guardian*;

I am paid just a couple of hundred quid for writing a column. So it can take huge amounts of your time even if the legal fees are being paid. That is another example of how even successfully defending a case in which what you said was legitimate and valuable, as well as just defensible, can cost you dearly.

**Dr Simon Singh:** Peter Wilmshurst is not here, possibly because his case is still technically ongoing. But here is a man who for five years—every weekend, every holiday and every evening—has had his life taken over by a libel case. He has a family to support. He has a job and has been forced to move operations. I know of at least two other doctors who have said to him, “We know of things we should have spoken out about but which we did not speak out about, which have led to the death of patients. The reason we could not do this was because we could not risk our houses and our livelihoods going through the sort of thing you have been through”.

**Dr Ben Goldacre:** That is extremely important. From looking at cases like Simon’s, Henrik Thomsen’s, Peter Wilmshurst’s and mine, people now know that, even when you are successful, the costs are so great that the sensible and responsible thing for your immediate colleagues, whom you will be letting down if you are taken out of work, and for your family may be to cave in or to never raise concerns in the first place.

**The Chairman:** The example I have used before is of Dr Richard Doll and Dr Bradford Hill who in 1950 raised the issues of smoking, heart disease and lung diseases, and within six months raised the issue of asbestos. One can think of how knowledge two or three years late can destroy many more lives.

**Q462 Baroness Hayter of Kentish Town:** Some of what you describe is exactly the same for the people who have been libelled. We think of social workers, teachers and doctors whose lives can equally be destroyed by what is written about them. I am sure that the authors of those papers would say that they had written it in the public interest. It just happened to be untrue and to have ruined those people’s lives. How do you balance that if you simply say that it is in the public interest to make allegations which turn out to be false against a teacher, a social worker or a doctor? How do you balance their interests?

**Dr Ben Goldacre:** If you say something about someone which is wrong, you should be generous in giving a correction and an apology. I do not think that there is any excuse for people not doing that. I am quite happy with the full weight of the law coming down on them if it is genuinely true that they got something completely wrong. But where someone was not irresponsible or malicious and, with the best of intentions, gave an honest opinion on facts that they honestly believed to be true and took reasonable steps to ensure that they were true, it should be acceptable that, in the public interest, people will occasionally make mistakes and correct them subsequently.

**Q463 Baroness Hayter of Kentish Town:** By going through that, you have said that they have honestly tried and have checked their facts. In a sense, why it costs so much is because you have to prove all that. Meanwhile, the life of the person on the other side has been destroyed, and they have had to move and all of that. Do you have some understanding for those people who are maligned in the press in that way?

**Dr Ben Goldacre:** Yes, of course. I suppose I struggle because I cannot think of any examples of cases where people have been maliciously, recklessly and falsely accused of something that was untrue. I am sure there are lots, but I just do not—

**Baroness Hayter of Kentish Town:** Social workers in Haringey, by way of example.

**Dr Ben Goldacre:** I do not know about that.

**Q464 Baroness Hayter of Kentish Town:** It is about the balance. What you are saying is quite complicated because you are saying that they have done it responsibly, it was in the public interest and they checked their facts, but they happen to have got something wrong. Unfortunately we have to balance the person who has suffered as a result of that.

**Dr Ben Goldacre:** I think it is quite rare that it is an individual in the stories that we have come across and that we have been defendants in.

**Q465 The Chairman:** Are scientists normally challenged by vested interests?

**Dr Ben Goldacre:** Yes. I was thinking about Matthias Rath.

**Dr Fiona Godlee:** I was going to say, as a counterpoint to Ben's experience of being sued by Matthias Rath, that the *BMJ* was sued by Matthias Rath, and we lost. We made an error in a news report of a case he was defending in another country, and we were very willing immediately to correct that news report, which was written by a respected journalist who happened to have made a single error. Matthias Rath did not want us to correct it; he wanted to sue us. He sued us, and we had to pay him £100,000, which he was then, no doubt, able to put to his case against Ben a few years later. The *BMJ* indemnifies all its authors by its provisions. It was a case where, had a very rapid and fulsome correction been made, it would have avoided a great deal of time, effort and unnecessary expense.

**Q466 The Chairman:** If someone said, "I'm sorry; I made a mistake", in public, whether or not it was agreed with the person making the claim, would the law, either by statute or by common sense, sensibly say, "You have got your reputation back. They said this in the open. What are you claiming for?"?

**Dr Fiona Godlee:** Exactly.

**Dr Ben Goldacre:** Unless you can actively show that they were being malicious and reckless.

**Dr Simon Singh:** The error here was based on an erroneous court record in Germany. Although the *BMJ* was working with a German journalist with a good reputation, the consequence was a £100,000 bill for the *BMJ* and a very strong reluctance to talk about Matthias Rath in future.

**Dr Fiona Godlee:** We had been very interested in Matthias Rath. He is a person who anyone interested in health internationally would be interested in discussing and sharing with the public what he was doing. As Simon has explained, this error prevented us doing that. For a year or two, I felt that I could not really go down that route.

**Dr Simon Singh:** You and Ben would know much better than me about this, but we are looking at hundreds of thousands of people who take his treatments who would, I think, be adversely affected or waste their money. He was offering treatments for people with serious conditions, and they do not get to hear the full story behind Rath's remedies because if you get one tiny bit wrong, you end up being sued for libel.

**Dr Ben Goldacre:** It is another interesting example of how large organisations—Matthias Rath sued as an individual but he has a large international organisation selling large volumes of these vitamin pills—have access to a huge number of outlets and to ways of supporting their reputations. He was taking out full-



page adverts in national newspapers saying that the pharmaceutical industry wants to kill you and that the answer to the AIDS epidemic is here and it is vitamin pills. People continued to buy cigarettes after Bradford Hill and Doll showed that they caused lung cancer and unambiguously really do kill you, so the kinds of insults that these people are subjected to by legitimate investigative journalism, even in the cases that they feel the greatest sting from and which they sue on, do not make a great deal of difference to their business prospects.

**Dr Simon Singh:** I was very mealy-mouthed. I said tens of thousands of people have adverse outcomes. Do you know better?

**Dr Ben Goldacre:** He was taking out large adverts in national newspapers in South Africa and was part of a broader network of people promoting AIDS-denialist ideas.

**Dr Fiona Godlee:** Influencing the President of South Africa to do exactly that. I think we can say millions of people were affected.

**The Chairman:** I think we have the picture. I was going to bring in Dr Huppert first, then Lord Marks and then Chris Evans.

**Q467 Dr Huppert:** I think we have headed towards what I wanted to raise, which is the Reynolds defence—Clause 2 of the draft Bill—of responsible publication on matters of public interest. Dr Singh, you describe the Reynolds defence in your submission to us as unreliable and feeble. Do you welcome codifying it? Do you think that the law as written in the Bill at the moment goes far enough? How far would you like to see it to go?

**Dr Simon Singh:** I certainly welcome its broadening. Previously Reynolds was really applied to news pieces. My piece was a comment piece, and now under the new Reynolds I would have access to it. It is broader, which is good, but is it deeper? Does it give more support? I am not sure that it does because it sort of looks like the old Reynolds. It is a series of things to be ticked. I know that the Bill says that the court may consider these points in general, but that is exactly what the House of Lords said about Reynolds. We then ended up with judges still trying to tick all the boxes and people failing on one or two of those boxes. I fear that this is a once-in-a-century chance to make libel laws decent again.

English and Welsh law is something to be very proud of, but you meet lawyers who say that the libel bit is just embarrassing. We have got it badly wrong. You can try to codify Reynolds, and in five years' time we might be back where we started. If we take the approach of saying that if this is a matter of public interest and that it is something that the public should know about for health, environmental and all sorts of other reasons, then the question should be whether the claimant can show that the journalist has been irresponsible. If there is a benefit of doubt, let us give it to the journalist or the blogger who has been brave enough to try to expose something or challenge something.

**Dr Philip Campbell:** I was going to put in a memo—and I will—which gives examples of stories where we have been held up by uncertainties or have not proceeded because of uncertainties in the Reynolds defence. I echo what Simon said in the sense that if it is a public-interest story we have a strong corrections policy, which is the first point of call. After that, the question is of irresponsible journalism, as proved by other people. The fact that it is in the public interest, as demonstrated by us, is the right way to tackle most of those cases.

**Dr Ben Goldacre:** Outside of public interest and outside of a company suing, codifying Reynolds is an okay thing to do. For almost all of the situations that we will be involved in, wherever there is public interest, the onus should be on the claimant

to demonstrate malice and recklessness. Codifying Reynolds does not really do the job because you are still having to go to court and prove that you did all the Reynolds stuff, which takes tens, if not hundreds, of thousands of pounds. You will not get back the money or the time even if you win.

**Dr Simon Singh:** There is an argument that it would be doubly confusing because there is a checklist and, because you are broadening it, the checklist varies from the blogger who is doing it in their spare time compared to the front page of the BBC News website. The checklist will constantly vary. That will also be worrying.

**The Chairman:** We are going to have to be rather brief as we are under pressure from both Houses. Lord Marks, you had a question.

**Q468 Lord Marks of Henley-on-Thames:** It is quite a short question. I want to come back to the issue of web hosts and take-down procedure, in the light of something that Dr Singh said. You talked about a quick, paper-based court procedure. Would any of you see merit in or have objections to a prior system of simple challenge whereby a claimant could write to a web host saying, “I challenge this. It is defamatory of me”. The web host would then be under an obligation simply to put up alongside the story a notice that said, “We have received a challenge from this claimant who says it is defamatory of him”. Some people would leave it there but that would then hold the position for any further proceedings to be taken or a paper procedure to be gone through.

**Dr Ben Goldacre:** I do not think you can do that to the web host because it is technically problematic. The web host literally rents you some space on the hard drive of a computer. They do not have the passwords or a log-in for the blog or forum. They have no way of modifying the things that are on that set of web pages. The only thing that they can do is turn the whole thing on or off. That is the only thing that a web host is really able to do. It would be useful to say that if you get in touch with the person who runs the forum or blog, then they have to put up something saying that somebody has complained. Simon’s suggestion has value in that it puts a modest, tiny road bump in for claimants. Apart from anything else, they have to aver in court that what they say in their complaint is true. In quite a few cases, especially in internet bickering, you get very long, melodramatic threats.

**Q469 Lord Marks of Henley-on-Thames:** I see the point that you make there and accept that it may be the blogger that is correctly addressed rather than the web host. Is it not sensible, in view of the fact that the road bump as you put it is actually quite expensive—any court procedure is quite expensive and indeed rather forbidding—to allow at least an orange traffic light to appear alongside the story to hold the position, which would then probably be left there?

**Dr Simon Singh:** If the next step is a major libel action—

**Lord Marks of Henley-on-Thames:** No, the next step would be your suggested court procedure.

**Dr Simon Singh:** Okay, if ultimately a major libel action is what we are trying to avoid, I would describe an application to court to ask a webhost to have material removed as a minor road bump. It could be a matter of just a few hundred pounds. If somebody wants to stop my free speech, I think a minor road bump is fair enough. Also, I have just realised that almost every blog has a comments section. If people feel that they have been defamed, they can say, “I am the person that this is written about. I feel I am defamed and, worse still, if anybody else builds on this and repeats it I may take serious legal action”. That system already exists.

**The Chairman:** I thank you all. Parliament recognises the responsibility to try to make sure that fewer people go through the absolute hell which well-meaning scientists trying to do things in the public interest have been put through. We recognise the responsibilities on editors and publishers as well. We cannot promise to solve anything but we are very grateful to all four of you today. Thank you.

## **Kenneth Clarke MP, Lord McNally and Jeremy Hunt MP**

### **Written Evidence, Lord McNally (EV 47)**

*I am writing to provide some of the further information requested by the Committee in relation to the oral evidence given by the Justice Secretary, the Culture Secretary and I on 15 June.*

*As requested, I attach a detailed note on the new preliminary court procedure that we are proposing. I understand that the Committee is prepared to allow us a little more time to provide a note on ECHR issues in relation to the ability of corporations to bring defamation claims and in relation to a requirement by the courts for a defendant to publish an apology, and I will write again with this shortly.*

*The Committee has also asked whether Clause 1 of the draft bill is intended to raise the threshold in terms of what is defamatory, or whether it is intended to be a restatement of the law as it stands. As indicated in the consultation paper accompanying the draft Bill, our intention in introducing a statutory substantial harm test is to reflect and strengthen the current law. The provision in Clause 1 is intended to reflect the common law, as articulated by the courts in cases such as *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), *Sim v Stretch* [1936] 2 All ER 1237, and *Jameel v Dow Jones & Co* [2005] EWCA Civ 75. However, we believe that establishing a substantial harm test in statute for the first time will give this requirement a new prominence, and that this will help to discourage trivial and unfounded claims being brought.*

#### **Note for Draft Defamation Bill Committee on procedural issues**

##### *Introduction*

1. The Committee asked the Ministry of Justice for a note on the following:

“Any further information on the changes to the Civil Rules of Procedure that would be introduced in order to implement the new early resolution procedure envisaged in Annex D of the consultation paper, with particular emphasis on how the new procedures would differ from the existing ones.”

2. The consultation paper seeks views on the possibility of introducing a new procedure (or, depending on how the proposals fit with existing structure, amendments to existing procedure) in the High Court to channel all issued claims through a process whereby early rulings can be given on key issues which currently contribute substantially to the length and cost of the proceedings.

3. We have not as yet been in a position to analyse all the responses received to our public consultation on this issue, which together with any recommendations made by the Committee will of course influence how this proposal is developed. It is also not possible at this stage to provide information on the detailed changes that may be required to the Civil Procedure Rules (CPR), as that will depend on the ultimate structure of the new procedure. However, this note provides general information on how it is

currently envisaged that the procedure will operate and how this inter-relates with the existing procedures in defamation cases.

### **The new procedure**

1. The main preliminary issues which we envisage being determined under the new procedure are:
  - Whether the claim satisfies the substantial harm test where this is disputed
  - What the actual meaning of the words complained of is and whether that meaning is defamatory
  - Whether the words complained of are a statement of fact or an opinion
2. Prior to the commencement of proceedings we envisage amendments being introduced to redesign and strengthen the Pre-Action Protocol for defamation claims to improve the information provided by the parties and assist them in formulating their arguments in relation to the preliminary issues covered by the new procedure.
3. The first step in the process is the filing and service by the claimant of the claimant's statement of case (which may be incorporated in the claim form, but is more usually in particulars of claim served subsequently). Currently CPR Practice Direction 53 (which supplements CPR Part 53 on defamation claims) requires the statement of case (among other things) to specify the defamatory meaning which the claimant alleges that the words or matters complained of conveyed, so that any issue as to meaning can be addressed early (although the extent to which this can be determined is currently subject to the right to jury trial). Under the new procedure we would envisage the statement of case also having to include information on:
  - The harm which it is alleged has been caused or is likely to be caused by the words complained of
  - Whether the claimant considers the words complained of to be matters of fact or opinion
  - Whether the claimant wishes to seek jury trial (if necessary - see paragraph 13 below)
4. The next step is the defendant's filing of a defence (frequently preceded by an acknowledgement of service for reasons of timing). The key issue at the outset will be whether the substantial harm test is satisfied. If the defendant does not consider that the statement of case demonstrates substantial harm he could raise this in the defence (or in the acknowledgement of service if that precedes the defence) and apply for the claim to be struck out under Rule 3.4.
5. This issue would then be listed for hearing by the judge. If the judge decided that the substantial harm test was not met, he would then strike out the claim. As explained in oral evidence by the Justice Secretary and Minister of State this would follow as a matter of course, and we do not envisage any need for a mandatory strike-out provision on the face of the Bill. It should also be noted that a defendant could equally apply for summary judgment under CPR Part

24, and such applications are often combined with an application to strike out a claim or part of a claim.

6. If the judge decided that the substantial harm test was met, or that it was not possible to reach a decision at that stage on the evidence available, then the case would proceed to allocation. We will consider the need for a specific provision in the Rules to make clear that if the defendant unsuccessfully seeks strike-out on the basis that the substantial harm test is not satisfied, this does not prejudice the submission of revised or further particulars of the defence. Following submission of the defence, under Rule 26.3 the court serves both parties with an allocation questionnaire. Each party is required to file the completed questionnaire no later than the date specified in it, which shall be at least 14 days after the date when it is deemed to be served on the parties (the date set by the court for this will reflect the overall management of court business). When the allocation questionnaires are returned, an initial case management hearing is fixed.
7. Under the new procedure, the parties would be able to use the allocation questionnaire to indicate the issues which are in dispute and should be determined at an initial case management hearing. As noted above, the core issues which are likely to be relevant here are the meaning of the words complained of and whether they are fact or opinion. There may also be scope for other issues to be determined at this stage such as whether the publication is on a matter of public interest and whether the defence of qualified privilege is available. If there has already been a strike-out application in relation to the substantial harm test which the court has decided that further evidence is needed, that could also be considered further at this stage (and an application for summary judgment could be made, depending on the state of the evidence).
8. We will consider any amendments that are needed to the allocation questionnaire to reflect the new procedure. In addition, the parties are currently required in the allocation questionnaire to provide cost estimates stating figures for the base costs which they expect to recover from the other party if they are successful. We will consider in the light of the costs budgeting pilot which is currently taking place whether consideration could also be given at the initial case management hearing to cost budgeting (in the event that the case proceeds).
9. In order for the court to make a decision on the meaning of the words complained of there will be a need to decide whether the case is one which should be heard by a jury. We have consulted (at paragraph 99 of the consultation paper) on whether – in addition to removal of the presumption in favour of jury trial – the Bill should provide that the determination of meaning is a matter for the judge alone, whether or not it is decided that jury trial is appropriate in relation to other issues. Subject to the conclusions reached on this point in the light of consultation and any recommendation by the Committee, if necessary we would propose that the claimant and defendant should be required to indicate in the statement of case and the acknowledgment of service whether they wish to seek jury trial, so that the court can make a decision on this at the initial case management hearing

before considering the issue of meaning (Rule 26.11 currently requires an application for a claim to be tried with a jury to be made within 28 days of service of the defence so this will need to be amended).

10. We would expect that decisions reached by the court at the initial case management hearing in relation to meaning and fact/opinion will lead to many cases settling by agreement between the parties. In this context, we will consider the interface with the existing offer of amends procedure established in the Defamation Act 1996 to ensure that this dovetails with the new procedure and continues to operate effectively.
11. In addition the summary disposal procedure under sections 8 and 9 of the Defamation Act 1996 and Part 53 of the Rules will be available either of the court's own motion or on application by either party. Under this procedure the court can dispose of the claim summarily where it is satisfied that one or other party's case has no realistic prospect of success. Where the court is satisfied that summary judgment should be given in favour of a claimant, it can grant summary relief in a number of forms, including a declaration that the statement in question was false and defamatory of the claimant; an order that the defendant publish or cause to be published a suitable correction and apology; damages not exceeding £10,000 (or such other amount as may be prescribed by order of the Lord Chancellor); and an order restraining the defendant from publishing or further publishing the matter complained of. This should also assist in the speedy disposal of cases where resolution of the preliminary issues shows that one party's case is clearly stronger than the other.
12. We have discussed the practical implications of the new procedure with members of the senior judiciary with experience in defamation cases prior to the consultation, and will continue to liaise with them in developing detailed arrangements and in encouraging a proactive approach to case management in these cases. We will also assess developments in relation to the voluntary early resolution scheme devised by Alastair Brett which has just been launched. In principle we consider that a voluntary approach of this type and other options for alternative dispute resolution can complement the new court procedure and be available as an alternative to court proceedings for the parties to use to settle their dispute if they wish.

*July 2011*

## **Written Evidence, Lord McNally (EV 50)**

### **Questions raised by joint committee**

*Further to my letter of 28 June, I am writing to provide the further information requested by the Committee in relation to the oral evidence given by the Justice Secretary, the Culture Secretary and I on 15 June.*

*As requested, I attach notes on ECHR issues in relation to the ability of corporations to bring defamation claims and in relation to a requirement by the courts for a defendant to publish an apology.*

*I hope that these notes and the other information which we have provided meets the Committee's needs. We would of course be happy to provide any further information on these and other issues which the Committee may wish to request.*

## **Would a requirement by the courts for a defendant to publish an apology contravene the European Convention on Human Rights?**

### *Availability of apologies as a remedy under the current law*

1. Courts are already able to order a defendant to publish an apology under English law albeit in only limited circumstances. The summary procedure in ss.8-10 of the Defamation Act 1996, enables the Court to order that the defendant publish a suitable correction or apology (s.9(1)(b)). However, the usual remedy in defamation actions is damages. Mandatory apologies are not used outside of the summary procedure.
72. In a case against a public authority under the Human Rights Act 1998, there is scope for a court to order a public authority to make a public statement apologising for its conduct in acting incompatibly with Convention rights (e.g. for breaching an individual's right to reputation under Article 8). Section 8 of the Act provides: "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make *such order*, within its powers *as it considers just and appropriate*." However, though possible, such a remedy would be unusual.
73. There is a substantive difference between an apology by the defendant and a court requiring a declaration of falsity to be published. It is implicit in an apology that there be an expression of regret by the person making it, acknowledging that they had done something wrong. On the other hand a declaration e.g. a declaration that a statement is false, would involve a statement of fact. Expressing regret would not be a necessary component of this. Similarly a court ordering the defendant to publish a summary of its judgment would be different. (This broad point was made by Desmond Browne QC in his evidence to the Committee on 22 June at page 50).

### *Article 10 implications*

1. Post-publication sanctions such as requirements to publish apologies, rights of reply etc are prima facie interferences with the right protected by Article 10(1). Article 10(1) provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.



For example, in *Kubaszewski v Poland* (Application no. 571/04) a requirement to publish an apology was found to be an interference with Article 10(1) and in *Ediciones Tiempo v Spain* (1989) 62 DR 247 the Commission on Human Rights considered that a court injunction requiring the publisher of a magazine to publish a reply to an article published in one of its previous editions could be regarded as an interference with its freedom of expression.

74. However, such interferences can undoubtedly be justified under Article 10(2) in some circumstances. Article 10(2) provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

*Melnychuk v Ukraine* (Decision of July 5 2005) and *Cihan Ozturk v Turkey* (Application no. 17095/03) demonstrate that requiring a publisher to publish an apology can be legitimate in some circumstances. *Melnychuk* concerned a domestic law providing for a qualified right to reply but the Court also remarked on the circumstances in which it might be legitimate to order an apology in a defamation case:

“...as a general principle, newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. However, there may be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case.”

In *Cihan Ozturk* a payment of a large sum in damages was ordered by the domestic court but the Strasbourg Court suggests that requiring the publication of an apology would in that case have been preferable:

“33. Bearing in mind the amount of the compensation which the applicant was ordered to pay, together with the editor-in-chief of the magazine, the Court observes that the sanction imposed on the applicant was significant. This could deter others from criticising public officials and limit the free flow of information and ideas (see paragraph 13 above). The national courts might instead have considered other sanctions, such as the issuance of an apology or publication of their judgment finding the statements to be defamatory. Indeed, the order issued by the Fatih Criminal Court for the publication of the letter of correction sent by Ms G.B. would appear to be a sufficient remedy in the circumstances of the present case...”

75. When assessing under Article 10(2) whether a requirement to publish an apology is a justified interference with freedom of expression, the Court will consider whether there was a “pressing social need” for it. In this context, it is relevant to take account of the Article 8 rights of others (i.e. their rights to protection of reputation as part of the private life aspect of Article 8). The

publication of an apology could offer a significant form of protection for the Article 8 rights of others. In *Cumpănă and Mazăre v Romania* (Application no. 33348/96) the Court set out its approach:

90. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued” (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI). In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-48, § 51).

91. The Court must also ascertain whether the domestic authorities struck a fair balance between, on the one hand, the protection of freedom of expression as enshrined in Article 10, and, on the other hand, the protection of the reputation of those against whom allegations have been made, a right which, as an aspect of private life, is protected by Article 8 of the Convention (see *Chauvy and Others*, cited above, § 70 *in fine*). That provision may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI, and *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, p. 1505, §§ 61-62).

76. Whether a requirement to publish an apology is proportionate will depend on all the circumstances. This is likely to be influenced by the requisite content of the apology and whether or not its form has an excessive deterrent effect. Requiring the publication of factual information such as a summary of a court’s decision will often be proportionate. For example, *Hachette Filipacchi Associes v France* (Judgment of 14 June 2007) concerned the publication in *Paris-Match* magazine of an article about the murder of a prefect in Corsica. The article was accompanied by a graphic photograph of the body. The French Court of Appeal ordered the publication in *Paris-Match* of a statement worded as follows:

“... in bold characters half a centimetre high, under the heading “Publication of court judgment”, in a box measuring 15 x 7.5 centimetres:

“In a judgment of 24 February 1998, the Paris Court of Appeal ordered the publication of the following statement:

*The photograph of the body of Claude Erignac lying on the ground in a street in Ajaccio which appeared in edition 2543 of the weekly Paris Match, dated 19 February 1998, was published without the consent of Claude Erignac's family, who consider its publication as an intrusion into the intimacy of their private life”*  
...”

This is a factual statement setting out what the court has ordered and what the family’s views on the publisher’s actions are (this would appear to fall short of a true apology because it involves no requirement to express regret on the part of the publisher). The Strasbourg court recognised that requiring the publication of this statement was an interference with freedom of expression. The measure was intended to achieve the legitimate aim of “protecting the rights of others”

(i.e. the Article 8 rights of the victim's family) and it found no violation of Article 10, in particular noting the "duties and responsibilities" of the press and the proximity of the publication to the time of the victim's death which intensified the trauma experienced by the family.

77. In some circumstances it may also be proportionate to order that a publisher publish information that it knows to be false. In *Ediciones Tiempo* the publishing company claimed that the reply which it was required to publish included statements which it knew to be false and that this constituted an unjustified interference with its right to freedom of expression. However, when considering that the purpose of the court order was to protect the reputation and rights of others, the court noted that the aim of the right of reply was to afford everyone the possibility of protecting himself or herself against certain statements which are disseminated by the mass media and which are likely to be injurious to his private life, honour or dignity. The right of reply offered a guarantee of pluralism which must be respected. The Commission noted that:

"...the judicial measure complained of was proportionate to the aim pursued since the applicant company was not obliged to amend the content of the article and had the opportunity to insert its own version of the facts once more when it published the reply of the person criticised. It cannot claim therefore that its freedom to impart information was restricted more than necessary.

...Furthermore it takes the view that Article 10 of the Convention cannot be interpreted as guaranteeing the right of communication companies to publish only information which they consider to reflect the truth, still less as conferring on such companies powers to decide what is true before discharging their obligation to publish the replies which private individuals are entitled to make..."

It is notable that in assessing the proportionality, the Commission attached particular importance to the fact that the publisher, if it disagreed with the facts in the reply, was free to also re-publish its own version. Were a publisher to be required to publish an apology i.e. an expression of regret, in which it did not believe, it would totally undermine the purpose of that apology if the publisher were to be free to publish alongside a statement of the publisher's true opinion. So the implication is that an apology would involve a more substantial interference with the editorial discretion of the publisher and this will be more difficult to justify as a proportionate interference with freedom of expression.

78. However, we have identified one case in which the Strasbourg Court appears to accept that the inclusion of a requirement to express regret was proportionate. In *Myrskyy v Ukraine* (Application no.7877/03) the Ukrainian court ruled that publication of the following disclaimer and apologies by a newspaper and academic would constitute sufficient compensation to the plaintiffs:

*"The statement of Rudolf Myrskyy published in the article 'Judaephobia at the political level?'...is untruthful. The editorial office and the author sincerely regret*

*having published it and offer their apologies to the founders of the Party of Ukrainian Unity”.*

The Strasbourg Court found that this penalty was slight (although a violation of Article 10 was found for other reasons):

“40. As to the nature of the interference, the Court notes that the proceedings against the applicant and the newspaper were civil rather than criminal... Further, the applicant was not ordered to pay damages to the plaintiffs, and was not, it appears, required to pay for the insertion of the apology in the newspaper. Accordingly, the interference with the applicant’s rights, although it did take place ... was rather limited.”

79. There are instances where the Strasbourg Court has found that the domestic courts have overstepped their margin of appreciation in requiring that an apology be published. For example, in *Kubaszewski v Poland*, a Polish newspaper published an article about a councillor accusing a Municipal Council Board of money laundering. The article cited a statement made by the councillor. The court ordered the councillor to publish an official apology for his allusion to money laundering in the newspaper and to make the same apology at the next session of the Municipal Council. The court accepted that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of individual Board members. However, the Court noted that there is little scope under Article 10(2) for restrictions on political speech or debate on questions of public interest and in this context the State’s margin of appreciation was narrower. It observed that the courts had failed to take into account the fact that politicians should have shown a greater degree of tolerance in the face of criticism and the crucial importance of free political debate in a democratic society. The requirement to publish an apology was a violation of Article 10. Similarly in *Karsai v Hungary* (Application no.5380/07) the Court found a violation of Article 10 where a Hungarian historian was ordered to publish a rectification of a statement included in an article which criticised the right-wing press for praising a former Prime Minister who had co-operated with Nazi Germany and for making anti-Semitic statements. These cases demonstrate the importance of context. It will be more difficult to justify the ordering of apologies where the facts of the case concern the exercise of political speech or debates on matters of public interest.

80. Ultimately, a court would need to decide what was appropriate on the facts of each case and any new power to enable courts to order an apology would need to be sufficiently flexible to facilitate this.

## *Conclusion*

1. It would not be contrary to the ECHR to make a requirement to publish an apology available to courts as a general remedy in defamation proceedings. However, this would need to be sufficiently flexible so as to be capable of being exercised in a Convention-compatible way. Consideration also needs to be

given to what is meant by an apology. It is easier to justify requirements to publish purely factual statements such as that in the *Hachette* case but the law is less clear as to the extent to which it is legitimate for a court to require the publisher to set out a statement of regret (which may be insincere).

### **Would depriving corporations of any right to sue in defamation contravene the European Convention on Human Rights?**

1. Trading corporations can sue in respect of defamatory matters which can be seen as having a tendency to damage them in the way of their business. This note focuses on such commercial corporations but it is important to recognise that the term “corporation” is broader and also includes other forms of bodies. The ability of other forms of corporations to sue in defamation varies. Non-trading corporations e.g. charities can sue in respect of imputations which are damaging to property or finances. However, following *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, governmental bodies e.g. local authorities cannot sue in defamation.

81. The most relevant articles of the ECHR to consider here are Articles 6 (right to a fair trial), 8 (right to respect for private and family life) and 14 (prohibition of discrimination).

#### *Article 6*

1. Article 6(1) provides

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

82. Companies can be the victim of infringements of Article 6. However, Article 6(1) is concerned with procedural fairness, rather than with fairness of the substantive law. There is a difference of approach depending on whether there is an interference with a future cause of action (which is a matter of substantive law) or with an accrued cause of action (which is a procedural matter). In *Matthews v Ministry of Defence* [2003] 1 AC 1163 Lord Bingham of Cornhill observed at paragraph 3:

“...the Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law; it does not itself guarantee any particular content for civil rights in any member state: ...Thus for purposes of article 6 one must take the domestic law as one finds it, and apply to it the autonomous Convention concept of civil rights...”

*Matthews* concerned a Navy mechanic who issued a claim for damages for personal injuries against the Ministry of Defence because of asbestos-related disease. This was resisted on the basis that section 10 of the Crown Proceedings Act 1947 exempted the Crown from liability. The House of Lords held that section 10 imposed a limitation which operated not as a procedural bar but as a matter of substantive law under which the claimant had no civil right to which Article 6 ECHR might apply. Section 10 was not intended to confer on servicemen any substantive right to claim damages against the Crown but rather had maintained an absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. *Roche v UK* (2006) 42 EHRR 30 also concerned a member of the military who was prevented by the Crown Proceedings Act 1947 from suing the Crown in tort. The Strasbourg court also concluded that section 10 was a provision of substantive law and the applicant did not have a civil right recognised under domestic law which would attract the application of Article 6(1).

83. In contrast, in *Stran Greek Refineries v Greece* (Application No. 13427/87) and *Acimovic v Croatia* (Application No. 61237/00) there were interferences by the State with accrued causes of action and violations of Article 6(1) were found on the basis of deprivation of the right to a court. In *Stran Greek Refineries* the Court held:

49. The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art. 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute...

50. In conclusion, the State infringed the applicants' rights under Article 6 para. 1 (art. 6-1) by intervening in a manner which was decisive to ensure that the - imminent - outcome of proceedings in which it was a party was favourable to it. There has therefore been a violation of that Article (art. 6-1).

In *Acimovic* the applicant brought civil proceedings against the State because the Croatian army had wrecked his house and removed possessions. That claim was stayed when the State passed legislation requiring this and only years subsequently was a new Liability Act enacted. The Court said:

28. As to the standards of protection guaranteed by Article 6 § 1, the Court reiterates that it embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

29. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State...

The Court was concerned that the Croatian State had failed to enact the Liability Act in a timely manner and therefore the claimant had been left in a prolonged period of uncertainty. This meant that the degree of access afforded under national legislation was not sufficient to secure the applicant the "right to a court" and there had been a violation of Article 6(1).

84. Depriving corporations of the right to sue would mean abolishing an existing cause of action. As *Matthews* demonstrates, the absence of a substantive

civil right does not in itself raise questions under Article 6. Article 6 issues will arise if, in removing a civil right, this interferes with pending proceedings (as in *Stran Greek Refineries* and *Acimovic*). However, States have a margin of appreciation in imposing limitations on rights of access to court and it may be possible to justify such a restriction. For example, in *Golder v UK* (1975) 1 EHRR 524 (which concerned restrictions on the ability of a convicted prisoner to bring proceedings in defamation against a prison officer) the Court observed that the right “*by its very nature calls for regulation by the state, which may vary in time and place according to the needs and resources of the community and of individuals*” (at paragraph 38). It might also be possible to effectively manage the consequences of the interference through proper transitional provisions.

## Article 8

### 1. Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

85. The first point to consider is what sort of Article 8 right is relevant in this context. In a defamation case, companies will be concerned to protect their commercial reputation from being harmed – and reputation is something which is protected by Article 8 as has recently been made clear in *Ahmed and others v HMT* [2010] UKSC 1:

[39] As the European Court's judgment in *Karakó* itself shows, in *Petrina v Romania* (application no 78060/01), 14 October 2008, the court had confirmed, at para 19, that the right to protection of reputation is a right which, as an element of private life, falls within the scope of art 8 (“le droit à la protection de la réputation est un droit qui relève, en tant qu'élément de la vie privée, de l'article 8 de la Convention”). The court had gone on, at para 29, to survey its previous case law, ending up with the statement in *Pfeifer v Austria* (2007) 48 EHRR 175, 183, para 35, that “a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity . . .”.

86. In *Steel and Morris v UK* (2005) App no.68416/01, [2005] EMLR 15 the European Court of Human Rights considered whether as a matter of principle large multinational companies should be deprived of the right to protect themselves against defamatory allegations:

[94] The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of

a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, p. 53, § 75). However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-21, §§ 33-38).

87. If companies were to be denied the right to sue in defamation, it might be argued that the state has not discharged its positive obligation under Article 8 to ensure effective respect for private life. In *Stubbings v UK* (Application no. 22083/93) the Court said:

62. It is to be recalled that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (*ibid.*, para. 23).

63. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is in issue. It follows that the choice of means calculated to secure compliance with this positive obligation in principle falls within the Contracting States' margin of appreciation ...

In some circumstances Article 8 may require states to make civil remedies available. In *Stubbings* the applicants had been sexually abused as children and sought damages for psychological injury and claimed they were denied access to court as a result of the operation of the Limitation Act 1980. The Court found that an effective remedy was available because there was the possibility of criminal remedies and also civil remedies provided the civil remedy is sought within the relevant statutory time limit – Article 8 did not necessarily require that States fulfil their positive obligation to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation.

88. Although the margin of appreciation is generally wider when it comes to positive obligations, there may be an argument that it is less easy to justify deprivation of a civil remedy when the state used to make such a remedy



available but then abolishes that protection without replacing it with anything. It might also be said that it was disproportionate to give companies no means of protecting their reputations when false allegations could potentially cause them significant financial harm. The potential seriousness of such harm was remarked on by Lord Bingham in *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44:

[25] There are of course many defamatory things which can be said about individuals (for example, about their sexual proclivities) which could not be said about corporations. But it is not at all hard to think of statements seriously injurious to the general commercial reputation of trading and charitable corporations: that an arms company has routinely bribed officials of foreign governments to secure contracts; that an oil company has wilfully and unnecessarily damaged the environment; that an international humanitarian agency has wrongfully succumbed to government pressure; that a retailer has knowingly exploited child labour; and so on...

Of course, it may well be that seriously injurious statements such as these are substantially true and/or made in the context of a responsible publication on a matter of public interest, in which case the publisher would have a defence to a defamation action. However, it might also be the case that the statement is utterly baseless and the company faces the prospect of going out of business and making its employees redundant as a result.

13. On the other hand, paragraph 95 of the judgment in *Steel v Morris* might be interpreted as suggesting that the state's margin of appreciation in deciding whether to make a remedy available to large multinationals to enable them to defend themselves against defamatory allegations extends as far as deciding to offer no remedy:

[95] *If*, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for...

It might also be argued that the remedy of malicious falsehood would still be available to companies so they would still have a civil remedy to enable them to protect their reputations. However, it is more difficult to bring a successful malicious falsehood action because of the requirement to prove malice so the extent to which this is a truly effective remedy is debateable.

89. In conclusion, it is not clear that depriving companies of the right to sue in defamation would certainly contravene Article 8. However, in light of the fact that companies have significant reputational interests, that such interests are protected by the private life aspect of Article 8, that serious repercussions could flow if there is no effective means for companies to protect their reputational interests and the UK may have a positive obligation to ensure effective protection for private life interests in this context, there are powerful arguments to suggest that a blanket denial of this right would contravene Article 8.

## Article 14

### 1. Article 14 provides

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It has been suggested that it would be incompatible with the Convention to discriminate between natural and legal persons (see the evidence to the Committee of Lord Lester on 27 April 2011 (at page 8)). We are not aware of any cases where it has been said that it would be incompatible with Article 14 to treat legal persons differently from natural persons. However, we would be happy to consider any particular authorities which others can identify.

90. Subject to this, there may well be good reasons to give companies more limited rights to sue in defamation than natural persons so it may be possible to objectively justify this, or indeed companies and natural persons may not be comparable in this context for Article 14 purposes. We note that there are many cases where it has been found to be legitimate to treat different types of persons differently. For example, in *Lithgow v UK* (1986) 8 EHRR 329 it was legitimate to treat different types of companies differently. In that case owners of companies claimed that they had been the victims of discrimination because the same method of valuing companies nationalised under the Aircraft and Shipbuilding Industries Act 1977 had been applied both to companies which were growing and to those which were in decline. The Court held that the difference in treatment had an objective and reasonable justification. There are also some cases where the Court has found no breach of Article 14 on the basis that the applicant has failed to show that he or she has been treated substantively differently and less favourably than others who are relevantly similarly situated (e.g. *Van der Musselle v Belgium* (1983) 6 EHRR 163)).

**Supplementary questions were received via officials to the Committee following the oral evidence session:**

**Would limiting the right of corporations to sue to**

**(a) where they suffer actual substantial financial loss\* (either provable specific loss or a provable downturn in business caused by the libel); or**

**(b) to actual or likely financial loss\*; contravene the European Convention on Human Rights?**

**\*Financial loss for these purposes would (or may) not include either expenses incurred in mitigation of damage or mere injury to goodwill.**

1. Limiting the right of corporations to sue to where they suffer either provable actual substantial financial loss only, or alternatively actual or likely financial loss, raises Article 8 issues and possibly also Article 14 issues.

*Requiring proof of actual substantial financial loss*

91. The principle of requiring proof of financial loss in order for a defamation action to get off the ground is an issue with which domestic courts have grappled in a series of cases. In *South Hetton Coal Co. Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, Lord Esher MR held it is not necessary for a company to prove any particular damage (this is the same position as for individuals) but there must be a tendency to damage the trading company in the way of its business.<sup>129</sup> In *Jameel v Wall Street Journal Europe SPRL* [2006], the newspaper contended that the *South Hetton* rule entitling a trading corporation to sue in libel when it can prove no financial loss is an unreasonable restraint on the right to publish. Lord Bingham concluded that companies should not be required to prove financial loss for two main reasons (and provided that where no actual financial loss was suffered, any damages awarded would be modest):

[26] First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value which the law should protect. Nor do I think it an adequate answer that the corporation can itself seek to answer the defamatory statement by press release or public statement, since protestations of innocence by the impugned party necessarily carry less weight with the public than the prompt issue of proceedings which culminate in a favourable verdict by judge or jury. Secondly, I do not accept that a publication, if truly damaging to a corporation's commercial reputation, will result in provable financial loss, since the more prompt and public a company's issue of proceedings, and the more diligent its pursuit of a claim, the less the chance that financial loss will actually accrue.

92. As with the option discussed above of depriving companies of the right to sue in defamation altogether, it is relevant to consider whether this would be compatible with Article 8. It might be argued that the state had not fulfilled a positive obligation to ensure effective protection for the private life aspect of Article 8 because in practice the threshold for bringing a claim is placed too high. It would be easier to justify such a requirement than it would be a total deprivation of the right to sue but Lord Bingham's comments suggest that including a requirement of proof of actual substantial financial loss before a claim may be brought could pose a serious impediment to a company's

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<sup>129</sup> The Faulks Committee on Defamation, in its Report (Cmnd 5909, March 1975), para 336, recommended amendment of the *South Hetton* rule. The Committee recommended libel actions by trading corporations be limited to cases where the trading corporation could establish either that it had suffered special damage or that the defamation was *likely* to cause it financial damage.

ability to bring an effective claim to protect its corporate reputation so there is significant reason to be doubtful as to the compatibility of this. Similarly an argument might be made that it would be a breach of Article 14 rights to treat companies differently from natural persons in this respect. For the reasons given above, this argument does not appear to be very strong.

### *Requiring actual or likely financial loss*

1. Baroness Hale's judgment in *Jameel* gives a persuasive indication that limiting the right of corporations to sue to where they had suffered *likely* financial loss would be compatible with the ECHR. She said:  
[157] As none of the authorities cited by Lord Keith [in the *Derbyshire* case] was binding upon this House, and the question of non-governmental corporate bodies was not before the House, it is open to us to take the matter further. It would require very little amendment to Lord Keith's formulation for us to reflect the recommendations of the Faulks Committee. Thus for the words "which can be seen as having a tendency to damage it in the way of its business" we could substitute "which can be shown to be likely to cause it financial loss". Indeed, Mr James Price QC, on behalf of the Claimants, was keen to stress that Lord Keith's formulation was already something of a barrier to companies which could not show such a tendency. We cannot know whether Lord Keith, had the matter been in issue, would have accepted the invitation to require that corporations produce at least some evidence to support the likelihood that their pockets would indeed be injured in some way.  
[158] My Lords, in my view such a requirement would achieve a proper balance between the right of a company to protect its reputation and the right of the press and public to be critical of it. These days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw. The power wielded by the major multi-national corporations is enormous and growing. The freedom to criticise them may be at least as important in a democratic society as the freedom to criticise the government.
93. While an express statutory requirement to show at least likely financial loss would be a limitation on the ability of a corporation to sue in defamation and therefore an interference with Article 8 rights, there may be good reasons to conclude that this could be justified as necessary in a democratic society in pursuit of a legitimate aim. This would be in order to strike a fair balance between companies' rights to reputation and the right of others to freedom of expression. The risk of this being incompatible with Article 14 seems negligible.

*July 2011*

## Oral Evidence, 15 June 2011, Q 470–254

### Evidence Session VIII

#### Members present

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
Rehman Chishti MP  
Stephen Phillips MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witnesses: **Kenneth Clarke MP**, [Lord Chancellor and Secretary of State for Justice]  
**Lord McNally**, [Minister of State, Ministry of Justice] and **Jeremy Hunt MP**  
[Secretary of State for Culture, Olympics, Media and Sport].

**Q470 The Chairman:** On behalf of the Committee, I thank all three of you very much for coming. We all understand the demands on your time and we appreciate the fact that you were willing to carve out time to be with us. Clearly, having asked us to do this investigation, you will understand that input from the senior Ministers is an important part of our consideration, so we are grateful to you. As a courtesy, I remind you that we are being broadcast.

Let me start, if I may, with a question to you, Lord Chancellor. One of the things that we have discovered thus far is that there is an element of overlap between privacy and defamation. We have been asked to look at defamation. We are not confused—we have not been asked to look at privacy—but there is an element of overlap and sometimes privacy may be used to protect reputation. Could you help us to understand what sort of overlap you think exists between privacy and defamation? Is it possible to separate the two?

**Kenneth Clarke MP:** There is overlap to a certain extent, as both headings can involve anxieties about the reputation of the person involved. I accept your question entirely, but proper analysis would show that there is a clear distinction between defamation and privacy. Defamation involves the untruthful and unjustified assertion of facts that would damage the victim's reputation. As for privacy, the assumption is that the claim is accurate. What matters is whether, despite the fact that it is accurate, as it were, the victim can assert that it should not be published for anyone else to see. For that reason, the Government intend to proceed with the draft Defamation Bill and to refer to the new Committee the whole question of privacy, particularly in the context in which it has recently attracted a lot of publicity.

**Q471 The Chairman:** Secretary of State, is the concept of public interest still relevant and viable in the 21st century? Sometimes it seems to get confused with what might interest the public. Would we be advised to hang on to the concept of

public interest, or would it be more practically helpful if we just focused more on whether something is true and defensible?

**Jeremy Hunt MP:** I believe that the importance of public interest remains undiminished. I think that you are absolutely right, Lord Chairman, to talk about the difference between public interest and what interests the public. The very difficult balancing act that we have is to make sure that, in protecting people's privacy, which we are obliged to do under law—that is what the next Committee will consider—we do not inadvertently undermine the public interest, which comes from having a free press. That free press is sometimes slightly chaotic and sometimes steps over boundaries here and there but none the less is intrinsically effective in holding to account those in power. That is a very important function of the way in which our democracy has worked. Public interest is in having a free, open and transparent democracy and holding people to account. How we make sure that we get the balance right between that and the privacy issues that the Lord Chancellor talked about will be considered by the next Committee.

**Q472 The Chairman:** But would that free and effective democratic process of media and the rest be damaged if we got rid of the concept of public interest and replaced it with the concept of truth and writing what the media thought was defensible?

**Jeremy Hunt MP:** That is a matter that we need to consider carefully before we proceed with any changes in the legislation. That is probably more a matter for the Ministry of Justice than for my department. My interest as Secretary of State is to make sure that, whether it is protected through public interest or through a truthfulness concept in law, whichever route we go we still have a free press that is able to hold power to account.

**Q473 The Chairman:** Lord Chancellor, do you have anything to add?

**Kenneth Clarke MP:** Essentially what you are talking about is defamation. I am not quite sure exactly what question you are asking. The idea that in the law of defamation we get rid of the public interest defence is not remotely what anyone is contemplating, for all the reasons given by the Secretary of State. This is a long-established, important and defensible principle of law. The draft Bill covers the whole question of responsible publication in the public interest as relevant to defamation. In terms of the Defamation Bill, which I thought was the main purpose of this hearing, although I expected to get into the issue of privacy as well, Lord McNally may want to add something. I regard myself as being familiar with the Defamation Bill, but he has done all the heavy lifting and he might want to answer your question about why both truthfulness and the public interest are relevant to defamation and remedies for it.

**Q474 The Chairman:** Let me assure you, Lord Chancellor, that we have exactly the same understanding of our role as you do. "Public interest" is a phrase that gets bandied around, but it does not frequently get defined. My question was whether, if it was to be replaced by something that focused on truthfulness and defensibility, that might make it easier for people to understand and whether we ought to be offering you advice on what constitutes the public interest in definitional terms.

**Kenneth Clarke MP:** I will have a go, speaking for myself, and then Lord McNally can amplify it if the Bill puts it differently, which I do not think it does. What I mean by the public interest is what is actually in the interest of the public good. As the Secretary of State said, there is a difference between the public interest and what interests the public if they get the chance to hear or read it, which is a much wider

question. The concept of public interest is based, again as the Secretary of State said, on the values that we all know are important to our society—in particular, unfettered freedom of speech if you are behaving responsibly and you are pursuing a matter that is of relevance to the general public good. I have been a non-practising lawyer for a long time and that is more of a lay man's description than a legal description, but public interest has been at the heart of the law of defamation for as long as most people can remember and is being readdressed in the draft Bill that we have produced. On the question of the truth and accuracy of what is being said—what used to be called justification—we are simplifying the matter and making it clear that truth is what we are talking about. The question of truth is also absolutely essential. If what you print is true, no one can possibly take an action for defamation. If what you say is true but extremely damaging for the person who sees it blazed in the newspapers, you are back to privacy: is he entitled to suppress it even if it is true? I hope that I have not gone on for too long, but that is where I think we are.

**The Chairman:** Let us move on to the Bill itself.

**Q475 Lord Morris of Aberavon:** Is there a danger of confusing public interest and the interest of the public, whether it be privacy or whether it be defamation? At the end of the day, somebody has judicially to determine what the public interest is. More modestly, I had to do it as Attorney on an almost daily basis. This is very much a subjective matter. As for the peccadilloes of a footballer, for example, unless he has set himself up as a bastion of respectability, there is no public interest in the publication of what he is up to, is there?

**Kenneth Clarke MP:** I am going to hesitate to go into detail on quite a lot of these questions. We are setting up this new Committee precisely so that it can come back and give opinions. I have previously expressed the view that, in the case of a footballer or a soap opera star, it is seriously to be questioned whether the public good is affected by their private life. I should add, without being too informal about this, that when I watch a football match, it is nice to know that the manager is insured and that the private lives of all the footballers are impeccable, but I do not think that it is particularly relevant and it does not bother me too much when I am sitting in the grandstand. With public figures, there are all the arguments about how something can be relevant. Are they asserting standards that they are not following privately? Could they be subject to blackmail? Could security risks be involved in a public figure behaving in this way? All kinds of things come in. You say “subjective”, but each individual case normally has been decided on its merits. The judge has given directions if there has been a jury. We all know what we are talking about when we talk about the public interest. In every individual case, quite often one of the serious issues that has to be determined in the litigation is whether the public interest existed.

**Lord McNally:** Our starting point on this Bill never was to produce a massive new block of law. All three parties prior to the election had committed themselves to looking at the law of defamation. We were lobbied on various sides about how the present law would be better in certain circumstances if it was put into statute—I am speaking as a non-lawyer, so if I use the wrong terms I apologise—rather than common law. We were told that it would be better if some of these things were clarified in statute. We are not attempting to produce a new balance in the law; it is more a consolidation and clarification. Where there are difficult areas, which we might go on to later, such as the internet, we are genuinely looking for help and guidance. In the main balance, this is a consolidating and clarifying measure.

On the question of public interest, the temptation to rely on truth is attractive, but we all know that the truth can be many-sided. In many of these cases, as we freely accept, it will be the judge who makes the decision. Partly the Bill aims to put in a process that will cut out trivial cases and clarify at a very early stage what is being complained of, which we hope will help the process.

Because I am not a lawyer, let me rely on the brief. It says that Clause 2 of the Bill provides for a new statutory defence to an action for defamation of responsible publication on a matter of public interest. It is based on the existing common-law defence established in *Reynolds against Times Newspapers*. The clause provides for a defence to be available in circumstances where the defendant can show that the statement complained of formed part of a statement on a matter of public interest and that he or she acted responsibly in publishing that statement.

**Q476 Lord Morris of Aberavon:** Lord McNally anticipates my question, but I am sure that the other witnesses will have something to add. Having heard what Lord McNally has said, would I be right in describing the Bill as relatively modest in its changes? There are two changes—single publication and the jury trial, where the onus has changed—but otherwise the Bill is no more than a restatement, perhaps with the hope of improvement, of the existing law. Is that right?

**Kenneth Clarke MP:** I think that that is right. It is meant to be a modernisation and simplification of existing law, as Lord McNally said. We are describing it in more modern language, but it is not really intended to shift the question of public interest, truth or any of the things that we have just touched on. As you say, the changes of substance include juries being less widely used, which will have a big effect on the cost. At the moment, that is both a deterrent to plaintiffs and a great burden for unsuccessful defendants. Jury trials really should not in this instance be anything other than a most unusual occurrence. The single publication rule is new, I think, and the substantial harm test is new. Those seem to me to be the biggest changes that we have made.

We are also changing the Jackson rule on costs, which is very relevant to defamation actions. One of the things that most concerns me is that, at the moment, too many of these actions involve very rich people or organisations and comparatively prosperous newspapers and media organisations. For all of them, the burden of costs is far too high. Sometimes the length is too great. There will be an improvement in the law if this is made a little less daunting and expensive. Also there is the process for giving the judge more power to move towards an early resolution of matters of fact and so on. That is also aimed at making the whole thing more user-friendly to all parties, so that eventually this does not take for ever and does not cost as much as it tends to at the moment.

**Lord McNally:** Just on that, my brief when I was told to prepare this Bill was that it was modest and consolidating. I have two points, though. First, the lobbying that we had from the media was on costs—somebody might be awarded a trivial amount of damages but the media company defending itself might find itself with millions of pounds in costs. As the Lord Chancellor said, we hope that with the Jackson reforms we have addressed that. The scientific and academic community complained that some of the vagueness of the law allowed for what it described as a chilling effect on reasonable academic and scientific discourse in journals and the rest. Certainly the feedback that we have had from the academic and scientific community—I do not know what evidence the Committee has taken on this—is that this moves in the right direction in addressing the chilling effect. For the rest, it is trying to put into statute some areas that have already been established by common-law decisions.



**Q477 The Chairman:** Just before I come to Mr Phillips, I have a question for the Lord Chancellor, just for clarification. The editor of the *Guardian* told us that he would have been more comfortable if the Jonathan Aitken trial had been in front of a jury. In light of what you say, should we assume that you would wish us not to pay too much attention to that thought?

**Kenneth Clarke MP:** We are not ruling out jury trial, but it is extremely expensive and makes a case much longer—there is no getting away from that. Sometimes in a case, one party or the other might think that they are advantaged or disadvantaged by having a jury trial, but you have to guard against the danger that sometimes people start opting for jury trial precisely to deter the plaintiff. It is rather like putting extra stakes on the table if you are playing a game. Occasionally the message is, “It will cost you a lot more if you wish to take us on in this action”. I make it clear straightaway that I am not commenting on Jonathan Aitken against the *Guardian* or anything of that kind. I prefer the whole process, wherever possible, to be done reasonably quickly without excessive expense, so that it is reasonably accessible as a form of law without people having to pay up when they really think that they should not or when they are not prepared to take the risk to their newspaper’s finances. We do not want people to be deterred from claiming by a clear threat that it will cost them £1 million or more if they do not succeed. We all know that there have been examples of people being ruined by bringing unsuccessful defamation actions.

**Q478 Stephen Phillips:** This is really a question for the Lord Chancellor and Lord McNally from the sponsoring department. A number of times in your evidence, you have described the objectives of the Bill as modest and consolidating, but what is the point of consolidating the common law in this area? Given that the effect of consolidating it in statute will be to crystallise the current position, will that prevent the incremental development of the law in future to respond to developments in society?

**Kenneth Clarke MP:** To be fair, I think that I will let Lord McNally handle that. The objective was to clarify the situation and put it in modern language in statute without seeking to change the law. There are practitioners who, I am sure, will say that this is quite unnecessary, because they have understood the Reynolds defence and can give all the advice that you require on it as it has evolved over the years. I think that Lord McNally will probably agree that to the lay man it is not readily accessible sometimes and there are people who think that it should be clarified. On the second point, inevitably the law will evolve, because the courts will start to interpret the legislation. Anyway, having said that I was going to leave it to Lord McNally, I wonder what he has to say, as he has been able to devote more time to it.

**Lord McNally:** As I say, I am a non-lawyer sitting next to a QC who is Lord Chancellor—

**Stephen Phillips:** And being questioned by another.

**Lord McNally:** Well, there you are.

**The Chairman:** It has a sort of chilling effect.

**Lord McNally:** It certainly does. All that I can do as a humble lay man is to take advice. The advice that I had on taking office was that there was a general opinion among all three political parties that our law on defamation needed clarifying and that the best way to do this would be through a modest consolidating Act, which clarified more what was in common-law decisions. I agree that, once you put something into statute, you are crystallising it to a certain extent, but the balance of pleas that we were getting, both from the media and from groups such as Index, was

that the law was not in a fit state as it stood and that this was the way forward. I claim some credit from my own experience, in that the way I approached this Bill was to go out to wide consultation by the department and to argue strongly that a Committee such as this should be set up. As you rightly say, doing this through statute is in many respects a one-shot solution—we do not get slots for legislation that often—so I really want to get this right. That is why we freely acknowledge that, in many parts of the Bill, what is being suggested is simply consolidation. We are open to suggestions about where it can be toughened up and, quite frankly, we acknowledge that we have so far not come up—by ourselves or in any evidence that we have received—with a convincing way of putting into statute certain areas that we are trying to cover.

**Q479 Stephen Phillips:** Obviously the Committee has heard a lot of evidence, including this morning, about the costs associated with defamation proceedings in the High Court. Are you not concerned that seeking to consolidate the existing common law will inevitably lead to further litigation, with very substantial costs involved, as to what Parliament means and, indeed, as to whether it has effectively managed to consolidate the common law or whether it has sought to change the law?

**Lord McNally:** There is always a danger with legislation that it all gives work for the working class to do. I have heard that given as evidence. I am hoping that the structure of the Bill, which front-loads some of the clarifications, will front-load some of the costs. The way that the Bill is set out, giving judges the ability to clarify and in some cases to strike out complaints before they get too far, means that the general impact will be to have a chilling effect on the idea that somehow defamation is an alternative to winning the lottery. As the Lord Chancellor said, it is a high-risk exercise for both sides. I hope that this is a clearer process. The removal of the jury, except in extremis—the judge can still consent to a jury trial—allows for earlier attempts to mediate and to find alternatives to what will remain a very expensive and risky area of the law.

**Q480 Stephen Phillips:** Finally, in the context of costs, which are extremely important—the Committee may form the view that cost is a deterrent both to plaintiffs and defendants—are we entitled to amend the procedure that is adopted for the trial of libel actions and, if so, what measures should we consider?

**Lord McNally:** One of our intentions is to look at the procedure. If your thought is to move to some kind of specialist courts or tribunals as an alternative, I do not think that we are convinced of that. Libel trials tend to go before judges with experience in that area, sometimes at the cost of publicity for the judges concerned. Nevertheless, that so far is the balance that we have come to—it is better to leave it as a process for the High Court. As the Lord Chancellor indicated, we also think that by front-loading some of the clarifications we can encourage mediation and arbitration as means of settling these things, rather than going through a full court process.

**Q481 Stephen Phillips:** My final question is whether mediation should be compulsory in all defamation actions.

**Lord McNally:** I think that we are going to ask for your advice on that. I am tempted by that, as we are looking in other parts of the law at encouraging mediation as an alternative. Certainly, in disputes with the media—this may tread on Mr Hunt's territory—I think that a credible Press Complaints Commission, which had general respect and could deliver non-legal but fast justice in areas where people complained

of press abuses, is preferable to the law. The Press Complaints Commission would claim that in 98% of cases it offers that service. I have always been worried about the 2% where it does not. You may have had the same evidence but, if most complainants want a rapid correction of what they think has been an offending article, mediation offers a cheap and hopefully speedy way of addressing that.

**Q482 The Chairman:** Just before I call Mr Chishti, may I ask the Secretary of State whether the Press Complaints Commission ought to be beefed up to handle more explicitly mediation-type work?

**Jeremy Hunt MP:** I agree entirely with what Lord McNally says. Effectively, that is what the PCC is there to do. It is a kind a mediation service. Most of the time it resolves issues quite satisfactorily in those 98% of cases by getting an agreement secured between the press outlet concerned and the individual concerned, but that does not always happen. The issue as far as the PCC is concerned is that its credibility and success rest on the confidence of the public. It is a self-regulatory mechanism; it is not on a statutory basis. As a country, we have deliberately gone down that route, precisely to avoid the chilling effect that we fear statutory regulation might have on the press, but that depends on the public having confidence in the way that it works. I am sure that you will come on to talk about phone hacking, but when those issues have gone through the courts and when that process is complete, I think that people will want to reflect on whether the PCC has been as effective as it might be and on what it needs to do to restore confidence in the self-regulation of the press.

**Q483 The Chairman:** Is the confidence of the public more important, equally important or less important than the confidence of the editors?

**Jeremy Hunt MP:** I go back to the point that Mr Phillips made. I think that it is equally important. Effectively, the PCC's role is a mediation role. It is set up as a way to ensure a speedy and cheap resolution of people's complaints about the way in which the press has behaved. If it is going to be a mediator, it needs to have the confidence of both sides.

**Q484 Rehman Chishti:** My first question is for the Secretary of State. On early resolution in media cases, Sir Charles Gray and Alastair Brett have set up an early resolution and arbitration service to deal with such issues. Do we have an assessment of how well that has worked?

**Jeremy Hunt MP:** I do not have an assessment of that at the moment but, because of the issues that are before us, I think that we need to look at it. We would be very interested in this Committee's views. That will feed into some practical, tangible measures that can be taken to improve the confidence that we were talking about.

**Q485 Rehman Chishti:** A question for Lord McNally: in terms of the system where we change the presumption in favour of jury trial, although the Lord Chancellor says that jury trial will still be there, what are the exceptional circumstances and factors that would be taken into consideration in determining a jury trial?

**Lord McNally:** I know that this sounds a terribly cowardly way out, but I think that that would be a matter on which to convince the judge at the trial. I suppose that if one or other of the sides made an absolute insistence on jury trial, they would still get a jury trial.

**Q486 Rehman Chishti:** So am I right in saying that you will not be pushing for any specific factors to be taken into consideration when determining whether or not there should be a jury trial?

**Lord McNally:** Our hope, intention and guidance would be that quite exceptional arguments would have to be put to a judge to get a jury trial. One of the intentions of this whole exercise is to encourage the judiciary to be more robust—I say that with some trepidation as a non-lawyer—in their management of defamation trials.

**Q487 Rehman Chishti:** I will ask a final question, if I may. In response to the point raised earlier by Mr Phillips, you said that there is no need for specialist courts. Has consideration been given to the specialist county courts that are used for intellectual property cases? What is the difference between having a specialist court for intellectual property and a specialist court for defamation, given that it has been said that having specialist county courts for intellectual property reduces costs?

**Lord McNally:** I suspect not a lot. I do not know—I am now looking at my learned friend—whether we can move this kind of case down to county courts.

**Kenneth Clarke MP:** No, intellectual property is a highly specialised area, whereas defamation cases often involve quite a lot of hard swearing matches between witnesses and can be akin to a criminal trial. That is the argument against having a specialist court. I must admit that I am not sure whether there is an absolute bar on moving the jurisdiction to county courts, but I am not very keen on the idea of defamation actions being moved to the county courts. However, the Committee may have views on that.

On the question of removing the presumption in favour of jury trials, let me just add to what Lord McNally said—which I highly agree with—by saying that it would be interesting to get the Committee’s view on whether it is desirable or necessary to give guidance and provide more clarity to judges on the circumstances in which Parliament contemplates that a jury trial could still be required. We are open to views on that.

**Lord McNally:** Currently, defamation cases are dealt with by specialist judges in the High Court. Following the Constitutional Reform Act 2005, such matters relating to the deployment of the judiciary are the responsibility of the Lord Chief Justice.

**Kenneth Clarke MP:** That relates to which High Court judge is involved rather than to whether the case goes to the county court.

**Q488 Lord Morris of Aberavon:** If we are to have robust case management to ensure that judges can remove the chilling effect of the danger of a jury trial, following what the Lord Chancellor has just said, I suspect that you would agree that there should be rules of procedure to ensure that such decisions are taken early on. The longer a case goes on, the greater the chilling effect of the exceeding damages that can follow in a normal case in getting the case up for trial.

**Kenneth Clarke MP:** Rules of procedure are not entirely a matter for me but, yes, I agree with Lord Morris. As far as I am aware, the judiciary welcomes the whole idea of making the whole thing a little more straightforward and shortening proceedings. I do not think that the specialist judges will have any problem in trying to give effect to this desire to make the process a little less tortuous and a little less expensive for the parties.

**Lord McNally:** We are proposing new procedures, under which the kind of key issues that would be resolved would be whether a claim satisfies the new substantial

harm test where that is disputed, what the actual meaning of the words complained of is, whether that meaning is defamatory and whether the words complained of are a statement of fact or opinion. The intention is to establish at a preliminary stage the issues to be resolved, with the intention of simplifying and speeding resolution.

**Kenneth Clarke MP:** What we expect to happen is that, once the judge has given a preliminary ruling, in some cases it will be quite obvious to one or other of the parties whether there is any point in going further. That means that you will know where you are much more quickly and you will not have to go through all the rest.

**The Chairman:** Procedure and rules may or may not have been thought to be the main part of our consideration, but the evidence that we are getting points in that direction as one of a number of issues that are involved and that might usefully be amended to help to achieve the sort of objectives that you have mentioned and that, without wanting to anticipate our report, I think we would be inclined to support. We will come back to rules and procedures shortly, but I invite Baroness Hayter to move us on to another subject.

**Q489 Baroness Hayter of Kentish Town:** As an aside, let me just say as a non-lawyer that I do not think that Lord McNally and I should apologise for not using legal terms. I wonder whether I could urge you to look beyond the consolidation and codifying that you have already touched on. When we issued our request for evidence, we had a quite a lot of submissions that—to use the legal term—suggested that non-natural persons, which I would call corporations or corporate bodies, should not be able to use defamation. What is your inclination on this matter?

**Lord McNally:** I will start. The major complaint about corporations relates to the inequality of arms and to the fact that big corporations might be able to bully people. My own inclination is that corporations should not be able to sue as though they were individuals, but there is a doubt because, obviously, the reputation of corporations can be very important and can have a very specific value to them. However, there are other means by which a corporation can defend its reputation without defamation proceedings, which I think is why there is a lack of certainty. I know that in other jurisdictions, such as Australia, corporations are specifically barred from such litigation. A worrying point that I noticed in this morning's paper is that the Government of Bahrain are threatening to sue the *Independent* and Robert Fisk for defamation. That is another aspect because, if sovereign states start getting in on the act, we are in awesome territory in terms of inequality of arms. My natural inclination is to say that corporations should stay out of this. On the issue of reputation, I think that McDonald's did itself no good at all by taking on two penniless but persistent green protestors—in that respect, the inequality of arms favoured the protestors. However, the issue is out to consultation and, as on much else, we would welcome the view of the Committee. My personal inclination is that I do not like big corporations throwing their weight around. Certainly, some of the evidence that I have received—this goes back to the chilling effect—is that big pharmaceutical companies, for example, will fire off a solicitor's letter almost automatically to chill any criticism of a product. That is extremely worrying.

**Kenneth Clarke MP:** That is very clear, and we are actually consulting on all of this. Just to provide some balance, let me say that there are circumstances in which a business could be seriously damaged by someone who persistently makes defamatory attacks upon it. A big pharma trying to stop people discussing its research work is a good example from one direction; a chocolate bar company that is accused of spreading *E. coli* through its products could be ruined overnight and might well think that, in order to stop someone persistently making this attack, it is entitled

to have a go at a defamation action. There is a range of views that we are canvassing. I am not sure whether foreign Governments or states can sue. It will be interesting to see whether one can be accused of defaming France, for example. I doubt that that is likely to give rise to a successful action, but I will not anticipate the advice that is no doubt being given to the Government of Bahrain.

**Q490 The Chairman:** Would it be fair to say that, if a corporate reputation was damaged, it would show up in its share price or in some other equivalent tangible form and that that might become part of a judgment?

**Kenneth Clarke MP:** Of course, in extreme cases a defamatory tract could cause a collapse in the share price of, for example, a food company. It could be that the defamation originates from a rich and powerful competitor. You have to consider whether you would ban a corporation taking an action against one of its competitors that has persistently made allegations that are not well founded in the opinion of the company that is suffering. Some attacks that could be made against a corporation could close it down practically overnight.

**Q491 The Chairman:** The reason that I ask is that we have had some evidence suggesting that we should try to offer you advice on some tangible expression of reputational damage rather than just have an undefined concept of reputational damage. I just wondered how you might react to that evidence.

**Lord McNally:** As you know, Lord Chairman, in the Private Member's Bill that he introduced into the Lords, my colleague Anthony Lester suggested that corporations that took action would have to prove direct financial loss. We have not put that in our Bill, but we are still open to argument on that. To give one example, Nestlé has been under pretty constant criticism about the issue of powdered milk from some years ago and there is an organisation that campaigns, mainly in universities, against buying Nestlé products. There is absolutely no evidence at all that the consumption of Nescafé or KitKat or anything like that has been affected by that campaign. I think that Nestlé is too smart to do this, but if Nestlé sued the campaign group, the group could certainly make the defence that the sale of Nestlé products has not been affected by the campaign. However, as the Lord Chancellor has said, there may be cases where a total untruth about the safety of a product would definitely damage either the sale of the product or the share price, and that needs some remedy. Whether the remedy is through defamation, I am not sure.

**Q492 The Chairman:** Before I call Lord Marks, I want to make a request of the ministry that the Lord Chancellor and Lord McNally represent. It has been raised with us that stopping a corporation having the right to take action might contravene European human rights legislation. Could we have a note from the ministry on that specific point?

**Kenneth Clarke MP:** I am sure that we can let you have a note, Lord Chairman. Sometimes, the most fanciful claims are made about the application of the European Convention on Human Rights. On whether the humanity of a corporation is sufficient to enable it to raise such an action, I will take up-to-date and learned advice and submit that to the Committee.

**Q493 The Chairman:** I would not dream of asking you to comment, because I think that that would be unfair, given that the issue is very technical.

**Kenneth Clarke MP:** Certainly, the directors' human rights would have to be respected, which can be very relevant in some cases. I will take further advice on

whether it is conceivable that a corporation could have any rights under the European Convention on Human Rights. For a corporate body, my first reaction is that that is unlikely, but that is not a definitive reply. I will make sure that a proper note is submitted.

**Q494 Lord Marks of Henley-on-Thames:** I want to go back to procedure and costs. Lord Chancellor, of course you are absolutely right that the rules are a matter for the Rule Committee, but you have power to direct the Rule Committee to amend the rules for a purpose that you define. If, having had regard to all the evidence that we have heard about costs and procedure, this Committee came to the view that fairly radical procedural changes are needed, would you be prepared to direct the introduction of a new procedure for defamation actions at the same time as the Bill comes into force?

**Kenneth Clarke MP:** We are consulting on the procedure, as has been described by Lord McNally, and that involves our contemplating putting changes in place if there is general approval of them. I was paying deference to the Rule Committee, which we will certainly consult, but we are consulting on proposed changes to procedure of the kind that Lord McNally has declared. We might in the end leave it to the Rule Committee to settle the details, but that is far too way down the track at the moment.

**Q495 Lord Marks of Henley-on-Thames:** Another area that we are considering is the whole issue of what to do about the internet and take-down procedures. One suggestion that has been put to us is that there could be a quick court procedure—probably a paper procedure—to secure take-down orders that would stay in place pending any further proceedings. That might require some sort of specialist court. If it was concluded that that is a sensible way of dealing with take-down orders for the internet, might that sway you on the need for, or the desirability of, having a specialist court for defamation generally?

**Kenneth Clarke MP:** I will refer to Lord McNally any questions on take-down procedures. If the consultation produces a strong case for a specialist court because in a part of the jurisdiction a substantial number of cases are likely to arise that specifically require expertise on a narrow area, of course one will always look at whether there is a requirement to have a specialist court rather than designated members of the High Court who are accustomed to specialising in this area of law. However, we do not think that our proposals call for a specialist court at all on the generality of the law. As either Lord McNally or I have already said, the internet has changed the whole picture, so we are definitely searching for guidance on how to put the internet and modern information technology into the context of the law. It seems to me a matter of principle that people should be affected by all the important aspects of the civil law if they use modern information technology to communicate just as much as they should be if they use any other form of communication, but it is tricky. It is difficult to work that out both in the context of the law and the process for enforcing it.

**Lord McNally:** About 10 years ago, I sat on the other side of the table on the Puttnam committee on the then new Communications Bill. Our committee took the decision, on advice, not to touch the internet because it was such a wonderful gift to humanity that gave such a great opportunity for new businesses and new interchange of information, so the Communications Act steered clear of the issue. Ten years on, I was interested to read an article by Martin Kettle in the *Guardian*, which raised the point whether those who invented the internet ever thought that they

were inventing the greatest form of exchanging information on pornography and paedophilia that the world has ever seen, as well as providing a way for terrorists to exchange information about making bombs and all the rest of it. There are now concerns, including concerns about how you deal with defamatory measures on the internet. I understand that Spain has some kind of quick decision court like you have recommended. As I said at the beginning, we have started from a position of not having any silver bullets, but as a politician I start with the gut feeling that it cannot be acceptable to say that the internet is beyond the rule of law. The challenge is to find a form of law that can be delivered without killing the goose that still lays golden eggs in terms of exchanges of ideas and information. However, each issue that comes up is almost like a Rubik's cube, in that when you solve one side, there is a problem on the other side.

**Q496 Lord Marks of Henley-on-Thames:** Let me move on to early resolution procedures. We have talked about the substantial harm test. I had understood that the substantial harm test was intended—perhaps you might comment on this—to raise the bar in outlawing trivial claims by comparison with the previous common law. We have talked about earlier determination of meaning. I would be interested to know why you took out of Lord Lester's Bill—or, to put it in another way, why you did not go along with his suggestion—that, in the event of failure to meet the substantial harm test, there should be a compulsory strike-out considered at an early stage.

**Kenneth Clarke MP:** Certainly, it is intended to raise a new bar against trivial claims by making sure that people proceed only when they have suffered some significant damage. The action fails if you cannot satisfy the substantial harm test, so I do not think that we are very far away from Lord Lester's position. Again, Lord McNally may know why, if we have included some different provision, we have chosen a different way of expressing the matter.

**Q497 Lord Marks of Henley-on-Thames:** Perhaps I can help by saying that our brief says that it is satisfactory to rely on the existing procedures for strike-out and for summary judgment. The objection to that, which I think Lord Lester shared when he gave evidence to us, is that that generally comes in at a later stage and these procedures are not widely used except in very clear cases.

**Lord McNally:** The general advice that I was given is that a mandatory strike-out would not add greatly to the powers that the court already has. More important is the wider definition of substantial harm, which could and would enable resolution earlier in the proceedings.

**Kenneth Clarke MP:** The new procedure that we are contemplating is that the judge will decide at an early stage whether the claim satisfies the substantial harm test. Precisely to avoid the problems that Lords Marks has described, the judge would give a ruling pretty early on that a case does not satisfy the substantial harm test. It does not really make much difference whether the judge actually strikes out your case because, once he has made that decision, you are wasting your time making any effort to go any further with your claim. An early judgment by the judge that the claim does not satisfy the substantial harm test means that you have lost.

**Q498 The Chairman:** Lord Chancellor, that is exactly the point that we have circled around two or three times this morning. The rules and procedures have been of interest to a lot of people who have given us advice, and the suggestion is that it would be helpful not just to do the pure legal stuff but to take procedural steps to enforce early on decisions in cases that might today work their way through the legal



system and happen sometime in the future. Procedure and rules are perhaps more important in this than at least we thought when we started.

**Lord McNally:** I think that you are right, Lord Chairman. Our intention is that the normal rules as set out in the Civil Procedure Rules will apply. It seems preferable to rely on these rules rather than to create a new and unprecedented procedure for mandatory strike-out. If the court decides that the substantial harm test is not satisfied, it will be able to use its powers under the Civil Procedure Rules to strike out the claim. A mandatory strike-out would not add anything to the court's existing powers.

I have read that out because, as I say, I am not a lawyer, but that is the advice that I have been given.

**Kenneth Clarke MP:** I just assume that, under the new procedure, if the judge gives a preliminary ruling either that the case does not satisfy the substantial harm test or that the words are not capable of being defamatory, he is telling you that you have lost. As far as the claimant is concerned, it is slightly academic which process the judge uses. I imagine that if the plaintiff or his advocate persisted in trying to move to the later processes of the trial, having already had a fatal adverse ruling to his claim, by one means or another the proceedings would rapidly be brought to an end by the judge hearing the case.

**Q499 The Chairman:** Of course, going on would add to the costs.

**Kenneth Clarke MP:** Well, it would, but I am sure that the judge would stop it. The question is whether you need an express new procedure to stop it.

**Q500 Lord Marks of Henley-on-Thames:** I think that that is right. The question is at which stage you have the determination. Provided that there is an early determination on this issue, then the result follows. I accept that entirely.

**Kenneth Clarke MP:** And that is what we are proposing. There are two examples of the kind of thing on which we think that, under the new procedure, the judge will give an early ruling that tells both parties exactly where they are. There could be an equally chilling effect, as it were, on the defendant. If the defendant's main defence was going to be that the words were not capable of being defamatory and the judge gives an early ruling that they are defamatory, the defendant will be the one who goes out of the court and starts talking about how much and what sort of remedy he might offer to the plaintiff because he will actually have lost. It sounds as though this coincides with a lot of the evidence that this Committee has been receiving that the new procedure would make it much more straightforward for people to keep the costs down because they would discover quite early on whether it is really worth their while to continue litigating.

**Lord Marks of Henley-on-Thames:** I have two further questions: one on remedies and one on costs—

**Q501 Stephen Phillips:** Before Lord Marks moves on, let me just say that it seems to me to be critically important that we are given a note from the department about the amendments to the existing Civil Procedure Rules that it is contemplated ought to be made in the context of the substance of the provisions of this Bill coming into force.

**Kenneth Clarke MP:** Okay, I do not know how near we are to drafting that. Subject to the process of drafting, I think that that is a very good idea.

**Stephen Phillips:** If I may say so, this is a very good example. On the basis of the evidence that has been given this morning, if there is an early resolution, no

mandatory strike-out is required. We can probably all agree about that. But if those rules are not to be brought into force, there might well be an argument—on which I have no concluded view—that a mandatory strike-out is required.

**The Chairman:** I ask Lord Marks to keep his questions brief.

**Q502 Lord Marks of Henley-on-Thames:** I will be as brief as I can. On the question of remedies, we have heard a lot of evidence that what a lot of claimants want is not necessarily damages but vindication. Do you have a view on whether remedies should include a compulsory apology, such as is often the case in regulatory disciplinary proceedings within professional life?

**Kenneth Clarke MP:** We are inclined to say that we have the PCC and that it is not necessary to give a new power to require the publication of an apology, but it is a very serious issue and it is quite easy to argue the case both ways. We are out to consultation on the issue, and I anticipate that it will fall into one of the areas of either of my colleagues. One of the issues that we will have to determine is whether there should be a power to order a newspaper or whatever to publish an apology. The inclination on the part of the Government is no, but we are open to views.

**Q503 The Chairman:** Secretary of State, is your inclination also no?

**Jeremy Hunt MP:** My inclination is to look at the evidence. The PCC code has been strengthened so that, as part of its remedies, the PCC can insist on due prominence for apologies. I would want to look at the evidence on whether there are a large number of cases in which an apology has not been given due prominence. If I were to see such evidence, that would affect my opinion.

**Lord McNally:** Part of this is with the Press Complaints Commission, and I hope that its paymasters will realise that, the more strength and respectability they give to the Press Complaints Commission, the more they will get value for money. On whether judges should have the right to order that a newspaper give a specific apology or correction in a particular position and typeface, all the evidence that I have received is that the newspaper industry would fiercely resist that as a sinister intrusion on press freedom. As to whether this Committee would take the same view, I await the Committee's report. However, that point has certainly been raised and such a power is used in other jurisdictions. I am told by the Press Complaints Commission that the duly prominent correction hurts editors. Sometimes people think that that does not affect editors and it is water off a duck's back, but I am assured that it is not welcomed when editors have to put a correction and apology in their newspaper. My inclination at the moment is to see whether the Press Complaints Commission can beef up its act. That would be preferable to judge-imposed corrections, but I would be interested to see what other evidence the Committee receives on this.

**Q504 The Chairman:** Do you think that feeling of hurt explains why apologies and corrections are two paragraphs on page 37?

**Lord McNally:** Probably. I was mightily encouraged by the size and prominence of the *Daily Telegraph's* apology for its recent sting on Liberal Democrats parliamentarians. It took up half a page on, I think, page 5, which I hope gave them grief. But we all know that there is a certain dissatisfaction that something that has been a front-page splash is corrected, as you say, by a couple of paragraphs on page 37. I am not satisfied that that is satisfaction.

**Q505 Lord Bew:** I want to ask about the draft Bill's impact on academe, but before I do that may I just briefly tease out an implication from the earlier discussion on jury trials? Lord McNally, you said that there would have to be "quite exceptional" arguments made for a jury trial. The point made to us specifically by the editor of the *Guardian* was that in the Aitken case, the judge and the defendant were both Old Etonians. That was why he had a preference for a jury trial.

**Kenneth Clarke MP:** Were they both freemasons as well?

**Lord Bew:** Does that fit your definition of a "quite exceptional" circumstance?

**Lord McNally:** I do not think that criticism of Old Etonians is healthy for any Minister in this Government, quite frankly. Most of the Old Etonians I know are very nice people.

**The Chairman:** It says here.

**Lord McNally:** On page 22. So I would not say that. I have just sent the Lord Chancellor a minute about judicial diversity, which might address that particular problem.

**Q506 Lord Bew:** To return to the draft Bill's impact on academe, the Government has made it clear that it wishes to have a situation in which robust scientific and academic debate is not unduly frustrated. I understand why the Government has that intention, because academic publishers are naturally timorous beasts, as opposed to, say, press lords, but I want to ask how you propose to do it. Clause 5 of the draft Bill talks about the extension of qualified privilege to academic conferences. Is that the best means? Are academic conferences always so well organised and refereed that they deserve this extension of privilege? That seems to be one of the main methods that the draft Bill is proposing to defend academics from what is at this point presumed, for the sake of argument, to be an unjustified chill factor in their discussions. Is this actually the best route to focus on academic conferences as such?

**Lord McNally:** My brief says we have invited views on this issue. It is another area where putting it into law is difficult. The overwhelming evidence was that in a variety of ways, defamation law was being used to stifle proper and legitimate debate. Extending it to legitimate conferences seemed to us to be a way of helping these matters. The problem is, what if a conference is held by an organisation that perhaps you and I would think of as rather dotty? Would its proceedings be protected? That is the difficulty. One of the reasons why we are going through this, we hope, very thorough process is to test ideas that would deal with what we were told is a real problem—and I believe it to be—which is the restriction and stifling of proper and healthy scientific debate and peer review. We have had a go at that, but if there are legitimate criticisms of our solution or if there are better ways of doing this, we are open to suggestion.

**Q507 Lord Bew:** That problem of dottiness that you referred to would not refer in all likelihood to peer-reviewed academic journals. This seems to be a separate issue.

**Lord McNally:** No, but interestingly enough, I attended a session across the road at BIS with a number of editors of scientific journals who expressed that there was a chilling effect. As you say, many scientific journals do not have deep pockets. As one of them said to me, a solicitor's letter arrives and they are told that they cannot afford this and that is the end of it. So there is a real problem. We are trying to frame a law that captures a good intention without causing further problems. That is why we are going through this particular process.

**Q508 Lord Grade of Yarmouth:** I re-declare an interest as a newly minted Commissioner of the Press Complaints Commission. It has been registered elsewhere, but I declare it for the benefit of the witnesses. I have a point about the internet. There is a fundamental difference between publishing on the internet and publishing in a newspaper. If I am defamed by the *Independent*—topical newspaper of the day—I cannot get instant access to redress. I cannot ring up the editor and say, “You published this about me. I am sending you 750 words rebutting what you have said. Please publish it.” He would probably tell me to get lost. That is the likelihood. On the internet, I have all the access in the world to rebut the claim instantly. I just hit my keyboard and I can publish all over the internet and put people on notice that this is a defamatory comment. There is a fundamental difference there, isn't there? I have immediate redress.

**Lord McNally:** Yes.

**Q509 Lord Grade of Yarmouth:** Would you agree that that somehow puts the legislation in respect of defamation on the internet in a different category?

**Lord McNally:** I do not think it is a different category. Defamation is defamation and reputation is reputation. Your ability to make an instant correction may be a mitigating factor, but we cannot simply say that that means that you cannot be defamed on the internet because you have instant access to rebuttal.

**Q510 Lord Grade of Yarmouth:** But if you set about trying to sue somebody for defamation when they have published something about you on the internet and have not availed yourself of the opportunity to correct it, surely the judge—

**Kenneth Clarke MP:** You may want to do both. You technically have the opportunity of instant response, but that involves you almost instantly knowing that the statement has been made. What happens if somebody puts some extremely damaging thing about you on the internet while you are out of the country, so you do not know and it takes you a week or two to discover that this calumny is circulating, by which time an awful lot of people have started acting on the basis of it? I think Lord McNally is saying that it would mitigate the harm that you have suffered if you are able fairly promptly to correct it, but I do not think it makes the internet a totally different means of communication.

**Lord McNally:** A saying beloved of my old mentor, Jim Callaghan, is that a lie can be half way round the world before the truth has got its boots on. That is part of the enhanced danger of the internet.

**Q511 Lord Grade of Yarmouth:** I have one last point. The direction of travel on this Bill is essentially, without codifying it, trying to say that a full court trial should be a last resort. We should try to find ways to get these things settled without all the costs and resources involved in going to full trial. A point was made earlier about the PCC, but the PCC is always dependent on people making a complaint. You have to wait for people to make the complaint. Do you think it would be sensible for judges to have regard to the fact that people have not availed themselves of the opportunity to go to the PCC before going to trial, or should have the power to send people off to the PCC? “You have not been to the PCC. You might get redress there. Try that first before you come back here.”

**Kenneth Clarke MP:** It is a question of how much confidence we feel we have in the PCC nowadays. There is a wide range of views about the PCC, ranging from believing that the Press Complaints Commission is a wholly superior way of resolving all these things compared with any kind of litigation, to the other end where people

make very rude remarks about the PCC and regard it as a poodle. Wherever the truth lies on that spectrum, you have to be pretty confident that the PCC is a really effective remedy before you start requiring people to go to it before they seek redress, as the law undoubtedly entitles them to at the moment for some remedy for defamation.

**Q512 The Chairman:** Secretary of State, would you be willing to contemplate changes to the PCC in line with what the Lord Chancellor has just said as a way of providing an early, different mediation-type arrangement?

**Jeremy Hunt MP:** I am not sure that the Lord Chancellor and Lord Grade were necessarily saying anything different. We talked earlier about the PCC's essential role being mediation. Lord McNally talked earlier about the general direction of travel being to encourage mediation prior to court proceedings, because it is cheaper and quicker when it does work. I think we would all agree that for the PCC to perform that role in defamation cases, it would need to have the confidence of all sides. I think that is a very good incentive for the PCC to bring forward any measures that it may feel are necessary to make sure that it has that public confidence.

**Q513 The Chairman:** But you would not feel under any circumstances the need to effectively offer them a direction to do that?

**Jeremy Hunt MP:** We will listen to what your Committee says. There is another Committee being formed to look at super-injunctions. We will look at their recommendations if they affect the operation of the PCC. And I think we will look at what the PCC themselves come forward with. If you take all those things together, that would enable us to take a view on whether there was the confidence necessary to formally strengthen the mediation role that the PCC could have.

**Lord McNally:** There is a window of opportunity for the PCC. It is in play and I do not think it should be passive during this time when parliamentary Committees are looking at these issues. I think it would be a missed opportunity for the PCC. I have to say that I sleep a little easier in my bed at night knowing that Lord Grade is now on the PCC, but I hope that some of the comments made here might percolate back to the PCC. It should not simply be passive during this passage of examination of the law in this area.

**Q514 Sir Peter Bottomley:** We had an earlier reference to juries, and I am reminded that criminal libel cases virtually dropped out in the early decades of the 19th century, when juries refused to convict people like William Hone and others. So one needs to be slightly careful about disposing of juries too arbitrarily.

Will you be having meetings with the chief scientist and the research councils? When you get the chance to see Evidence 31 from the Vice-Chancellor of Cambridge, there is a reference to their concerns. The science areas matter a great deal. I hope you will ask them about the four levels of abuse from libel claims mentioned by Sense About Science in their submission to us on 6 June. They identified: legal proceedings being brought in place of scientific debate; the withdrawal of material before proceedings so it is no longer available to the public or to fellow scientists; the threats of legal action including non-legal letters which are not proceeded with; and the defensive publication and unnecessary self-censorship, including editorial spiking, legal reasons and other forms of self-censorship.

**Kenneth Clarke MP:** I think we are pretty clear about the need to extend privilege to reputable scientific and academic activity, as Lord McNally was emphasising a few moments ago. The only problem, it seems to me, is the one that

Tom McNally has raised: how do we define what is genuinely reputable academic and scientific work? What do you do about some flat earth society that is holding a supposed conference in some Latin American country and is being cited as a source for some defamatory attack on somebody? There are some odd bodies that hold what they regard as academic conferences and there are some odd publications that would regard themselves as academic. It would be very helpful if we could have advice on that, otherwise it will just be left to the judges, but I think we will have difficulty in being precise. I think somebody giving a paper to the Royal Society is entitled to privilege and not have some purveyor of alternative therapies come along and sue them.

**Lord McNally:** I have listened to editors of scientific journals, I have met Sense About Science and I have talked to individual academics. To my mind, the list of complaints that you read out is a real problem and one that we are genuinely trying to address.

**Q515 Sir Peter Bottomley:** If I take the various examples, Dr Peter Wilmshurst has had an action prolonged for five years for a comment he made at a conference in Canada. The Royal Society for the Protection of Birds had a case lasting for two years before the judge struck out the action at a preliminary hearing—after two years. The British Chiropractic Association’s libel case against Simon Singh went on and on. It was dropped after two years of extended and expensive legal argument before the Court of Appeal ruled that Dr Singh could use the defence of fair comment. There is the scandalous case of Dr Matthias Rath, whose Dr Rath Health Foundation and Dr Rath Research Institute went on promoting his vitamin supplements as a way of dealing with HIV/AIDS, let alone cardiovascular disease, cancer and other things for a long time. There is the Andrew Wakefield issue of autism and MMR, and his suing of Brian Deer. There is the question of David Powell and ReChem, let alone the other people aimed by at ReChem. It took a long time for a judge to say whether they could have a proper defence. I ask you to consider whether the judge could say really early on that this is not the appropriate tribunal to have this dispute, or it is not proportionate, or go away and try to sort it out and then come back explaining what you are disagreeing about.

**Kenneth Clarke MP:** That makes a very eloquent case for the Bill. I am sure that Tom and I agree that most of the examples you give are completely scandalous. It makes the case that I think we are all agreed upon that you have to protect the scientific and academic community in particular from this kind of thing.

**Lord McNally:** I have met two of the individuals you have listed there and you cannot but feel ashamed of a law that puts individuals in that kind of peril, virtually of their livelihoods and all their wealth. That is exactly why there was cross-party consensus that something must be done.

**Q516 Sir Peter Bottomley:** Does that get the judge or the court—it does not need to be a judge—to get people together and ask what the issue is actually about and whether this is the appropriate place for it?

**Kenneth Clarke MP:** That is what preliminary hearings are for. The new procedures should allow a fairly quick procedure, which will discontinue this.

**Q517 Sir Peter Bottomley:** Can I put two other quick questions to you? Take the evidence that Tom Bower gave to us. Robert Maxwell, a crook, kept him in the courts for years, let alone the fact that he cannot now publish his book on Richard Desmond, which he says is truth but the defamation threats are a worry. When does

that come to a preliminary hearing? Maybe if there were an active judge they would not dare?

**Kenneth Clarke MP:** It is not only with defamation that that can happen. I think the late Robert Maxwell died with well over 100 writs outstanding that he had issued against people. It was always reassuring that he never brought them to action. I had an interesting conversation with Robert Maxwell, when he was about to issue a writ against me, about my ability to stand the costs of the action compared with his own. Fortunately, I did not believe that he was ever going to press any action, or was in any position to do so. That is known as the gagging writ. Anything that we can do to stop powerful, rich organisations using gagging writs against people who they know cannot afford to defend themselves is to be welcomed. Anything that we can do to strengthen safeguards like that is a good idea.

**Q518 Sir Peter Bottomley:** My last example is a personal one, which I have put on the record before. A Sunday newspaper put a story on the front page about me being too close to the IRA. It ended up months later lasting a week and a half in the High Court, with George Carman losing a case and the editor not giving a single answer to a single question, because he ducked the witness box. When I issued the writ and served it, if the court had got the two of us together to sort out what it was about, the paper would have said what they actually meant and the whole thing would have been resolved at virtually no cost within days. Is there anything in your Bill that provides for that kind of thing? Could there be anything in the rules of procedure that you might get the judges to set down?

**Lord McNally:** One of the things that has come out of this hearing, and I say this genuinely, is that I am going to go back to the Department and say to my officials—the colour is probably draining from their cheeks as I say this—that we need to do some real work on this issue of clear procedure. In many ways it may well be the key to how well and effectively this attempt at codification and consolidation gets a real step change in the effectiveness of the law.

**Q519 The Chairman:** Prior to the publication of our report, I thank you for that and encourage you to do it with gusto. It falls to me to ask a few final questions in various areas. They are not all related, but there are different areas of our evidence that I would like a comment from you on before we close.

We have had advice that judges do not have the power to instruct people to make apologies and we have had advice that a judge cannot, in real terms, force somebody to apologise. On the other hand, it is fairly clear to us that apology is quite important in this area of law. Do you have a view on whether judges should have the right to do so?

**Kenneth Clarke MP:** We touched on this moment ago. It is a very live issue and we could have a very lively debate about whether the courts should be allowed to order the publication of a particular apology with particular prominence in a publication. People have strong views, but there are those who argue that in many cases that is really the remedy that the plaintiff is after, far more than money or any other remedy that you are going to offer him. On the other hand, the newspaper industry very strongly oppose a judge having the power to order them to put a particular statement in a prominent position in their newspaper, which they regard as an intrusion on their freedom.

**Q520 The Chairman:** How do you regard that?

**Kenneth Clarke MP:** Given the office that I hold, I am staying studiously neutral. It is a very live issue and it arouses strong feelings on both sides.

**Q521 The Chairman:** Can I touch tangentially on another live issue? We have talked about whether parliamentary privilege should be extended, at least to properly reviewed scientific papers—maybe or maybe not conferences, but certainly the former. Would any of you have a problem if we also explicitly included qualified parliamentary privilege to the reporting of what happened in Parliament?

**Kenneth Clarke MP:** We are looking at parliamentary privilege separately. We are suggesting that the Bill covers privilege to scientific and academic papers. Parliamentary privilege is another matter. I think at some stage we committed ourselves to a Bill on the subject, but we are treading with care. Everybody agrees—we are all parliamentarians—on the absolute nature of parliamentary privilege in our proceedings in the House. That is a vital part of our constitution. Once you get outside that, it gets more difficult, when it comes to correspondence with constituents and so on. The Speakers of both Houses and both Houses themselves have to be rather closely involved in how far we are going to go in extending or addressing parliamentary privilege. It can be argued that in modern times there is a growing habit of abusing parliamentary privilege.

**Q522 The Chairman:** I reassure you again, as I did earlier, Lord Chancellor, that we understand that this is a Defamation Bill, not a privilege Bill or anything else. On the other hand, we have had some evidence that says, notwithstanding the Government's intention to bring forward a privilege Bill at some point, we should recommend to you that reporting of what happened in both Houses might well fall under the broad scope of the Defamation Bill. It has been said that that would be helpful and would be a long way short of a privilege Bill. I was giving you the opportunity to comment on that specifically.

**Kenneth Clarke MP:** I will comment without coming to a conclusion. You have to decide what to do about the danger that somebody who wants to defame a rival or enemy could conceivably find a Peer or Member of the House of Commons prepared to use parliamentary privilege to make statements about the victim with complete privilege. Then it is open season for everybody to print it. I do not think it is for the Government, necessarily, but the growing habit of court orders being plainly defied by people making pronouncements using parliamentary privilege is something that the House authorities and Members of both Houses should consider with care. There is a relationship between the courts and Parliament and we all ought to consider it carefully. On the other hand, I put it as cautiously as I do because, like most MPs, normally I rally to the flag of parliamentary privilege with some vehemence. I want to feel free to say what the devil I like on a legitimate subject, so long as I am taking part in the proceedings of Parliament. Perhaps some guidance or some measures by either House to give a steer to Members on what is proper and what is not would be helpful. It is not easy. Subject to these hearings, it is not something that I have taken positive action about. We are looking at it.

**Q523 The Chairman:** My third question relates to the internet. Service providers have a fairly clear view that they are simply letterboxes and therefore they should not be held responsible for what goes through the system. Is it possible, in your view, using the law of the land as it is currently constructed, to do anything useful about defamation on the internet without having some element of responsibility falling to the service providers? I would be interested to hear what the Secretary of State says.



**Jeremy Hunt MP:** The service providers and search engines have exemptions as mere conduits—I think that is the phrase—under the e-commerce directive, although I have always said that that should not stop them behaving in a socially responsible way. There are things that search engines and service providers are the only people in a position to do, for example, in tackling internet piracy, and therefore they ought to behave in a socially responsible way and co-operate when people are trying to clamp down on illegal activities. I think it is a question of them understanding what their responsibilities are. What Lord Grade said about the internet is very pertinent. I do not think that the principles of what is or is not acceptable or of what is or is not defamation are different whether you are online or offline, but the remedies and the way that you deal with them very often are. Going back to what Lord Grade said earlier, one very obvious example is that it is possible for a publisher to make an instant correction online to mitigate the damage done by changing an article that has been put up, in a way that it is not possible for a newspaper publisher to do. We have to look at the internet in that context.

**Kenneth Clarke MP:** Lord McNally referred to the slightly analogous issue of child pornography a moment ago. That is a live issue. We have opted in to a proposed European directive on the sexual exploitation of children, because it is best tackled on an international basis nowadays, unfortunately. One of the things that is being contemplated is a requirement on service providers when child pornography is being distributed. In the United Kingdom we have solved that with a perfectly satisfactory voluntary agreement. We have not legislated and we are quite content to continue on that basis. The directive is likely to be worded in a way that does not interfere with our voluntary agreement, so that is fine. There are continental countries, particularly Germany, for example, where the centre of gravity of opinion is rather different. There are people with vehement views about the internet as the great new vehicle of freedom, who say that it is the people's right to enjoy the kind of privilege that only parliamentarians have enjoyed in the past, and any suggestion that you censor anything on the internet runs into a great deal of resistance. I do not know where the German Government is going to end up, but they have far more difficulty in the Bundestag than we would have here in saying that you have to have some system for stopping people disseminating this stuff, to protect the children concerned. Fortunately, so far voluntary agreements have worked, but in principle they should be subject to the rule of law, if you have a law.

**Lord McNally:** But we are seriously looking at, and would welcome ideas on, the impact on service providers and genuine chatrooms. The one that is always quoted to me is Mumsnet. I have never visited Mumsnet, but I am told that it is a perfectly respectable chatroom. Again, there is the question of the chilling effect. If the Yahoos, the Googles or the Mumsnets start getting hit by solicitors' letters and the easiest thing for them to do is to take something down, whether that is merited or not, it is worrying.

Right from the start on this, I have been trying to get the balance right between genuine complainants who want access to justice, and genuine freedom of speech, which can be impeded in a variety of ways, like the scientific and academic. We need to look at how we can enjoy the great joy of the freedom of the internet without tolerating some of its abuses. On that, I am heavily reliant on your report, although you have quite rightly given me some homework to do as well.

**Q524 The Chairman:** The last question derives from evidence we have had about costs. Let me be diplomatic and say that there is an uneasiness that defamation is in danger of becoming an issue for rich people, beyond the reach of the ordinary man

or woman in the street. I think the evidence to us suggests that we ought to recommend in the opposite direction. I hope my colleagues will forgive me if I say that I think there is a mood in the Committee to want to extend the opportunity to defend reputation to the ordinary man or woman in the street. My question is, if that was the prevailing instinct and it led us to say to you that one or two things that have been part of the law or might become part of the law ought simply to be set aside because the cost of them is disproportionate to the benefit and takes it into the rich man's area and away from the ordinary citizen, what might your general reaction be?

**Kenneth Clarke MP:** On the specifics, I will wait and see what you have in mind to propose. My instincts are exactly the same as yours, Lord Chairman. In so far as it is possible, I think access to civil justice in this country should be not too expensive and not deterrent. I also have strong views about the experience of litigation for people. As far as we can, we should move away from a feeling that must widely prevail at the moment that most of us have a mortal fear of getting involved in any kind of litigation. If we do get involved in any kind of litigation, it can take an awful lot of time and inconvenience before it is resolved, and probably a great deal of expense. You cannot avoid that entirely, but we should do what we can to mitigate and reduce it and sometimes find alternative ways of resolving disputes altogether in a quicker, cheaper way. Otherwise, sometimes litigation does not have to be the only way of resolving a dispute. But in so far as possible, it should be reasonably speedy, reasonably accessible and reasonably inexpensive.

Let's not be unreal. We have a litigious enough society as it is. It is never going to be possible for the man of ordinary means to cheerily assume that he is going to sue somebody to get himself a remedy. I am afraid that it is just life. The wealthier the man, the more inclined he is to quite readily think that he is going to seek a remedy for something. For everybody else, it is quite a serious issue before you start. It is probably a good idea for people to hesitate before they rush to law too readily. Sometimes, I think those who defame people, if they are a bit worried about the accuracy of what they are saying, have in mind whether the person they are defaming can afford to do anything about it. Without intruding any further and making any frivolous remarks about an important case, before embarking on the story about Max Mosley they probably should have considered carefully and realised that it would cost a lot to take him on, whereas if it was somebody else of ordinary means you and I would probably be advising them to put up with it and not bother. But that was a privacy case.

**The Chairman:** On behalf of my colleagues, I thank all of you very much indeed. This has been a very important part of our inquiry. I assure you that we will do the very best that we can to live up to the advice and instructions that you have given us. We will not be deflected from the fact that this is a Defamation Bill, although on the basis of evidence given to us, we may occasionally make a suggestion that you find surprising, but we would probably be willing to defend it if push came to shove. Thank you very much indeed. We are very grateful. That concludes the session.

**Baronesses Scotland of Asthal QC, Lord Falconer of Thoroton PC  
QC and Jack Straw MP**

**Oral Evidence, 20 June 2011, Q 525–562**

Evidence Session VIII

Members present

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
Rehman Chishti MP  
Dr Julian Huppert MP  
Lord Bew  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witnesses: **Baroness Scotland of Asthal QC**, [Former Attorney General], **Lord Falconer of Thoroton PC QC**, [Former Lord Chancellor and Secretary of State for Justice], and **Jack Straw MP**, [Former Lord Chancellor and Secretary of State for Justice].

**Q525 The Chairman:** First of all, thank you all very much. We recognise the distinguished nature of our panel today and the attendant demands on your time, so we are very grateful to all of you for being willing to spare the time to help us. The second thing is just to alert you to the fact that you are being broadcast, which does not fall to me to decide but you are. Before we ask some questions I thought I would just extend the courtesy, if there is anything that any of you wanted to say by way of preliminary now would be the time to say it, otherwise we will just move into questions. Okay, thank you.

One other thing that we have experienced in the past, because of the nature of the witnesses today, all of you will have things to say that would be of interest to us but, if we are to make progress, if one of you says something and the rest of you happen to agree, it is not necessary for the other two to say, “I agree”. On the other hand, if you do not agree then we definitely want to hear from you.

We have had a debate and we have had evidence on both sides of the debate about whether it is useful to try to codify some of the things that relate to defamation that are common law derivatives or have developed from court-based decisions over the years. The debate in some ways tends to separate between the lawyers who think it is fine and it does not need to be codified, and members of the public who do not understand the law the way the lawyers do, so who would maybe find codification, in at least some aspects, helpful. I think this is a question on which we would be grateful for a reaction from all three of you.

**Baroness Scotland of Asthal:** I can absolutely understand the dilemma that the Committee is faced with because one of the—

**The Chairman:** Forgive me, the acoustics in here are not very good, so it would be helpful if you could speak a little louder for us.

**Baroness Scotland of Asthal:** I very much understand the dilemma that the Committee is in. We found over a number of years that whenever you codify the law from the common law and put it into statute, unless you are absolutely clear that that is what you are doing and that you do not propose any significant change, there is quite often a furore for a year or two while everyone goes to court to see whether there was, in fact, a difference, albeit you said that there was not one. So I can understand why many will say if it's not broken, don't fix it. But I think in this case there may be some quite helpful opportunities to clarify, because much of the law now is to be found in the case law.

I think it would be very important to do whatever you could, whether it is in the preamble, in the way in which the Bill was presented through Parliament, to make it clear that where all that was being proposed was a consolidation and that the most recent law enunciated in the case law is to be maintained. If that is your position I think that can happen very well. But as we go through and talk about some of the details of this Bill I think you would have to be very conscious to ask the question what added value will the Bill bring, and be really clear about doing that.

**Jack Straw:** As I read the Bill and the consultation document, the public interest defence that was set out in the Reynolds case is added to by Clause 2. So it is a gloss on that, and I think that may be helpful. Interestingly in respect of the substitution by Clause 3 of "a defence of truth" for "justification" and by Clause 4 of "a defence of honest opinion" for "fair comment", what the drafters of this Bill are proposing is explicitly the abolition of the appropriate common law defences and the substitution by truth in one case and honest opinion in another. So that is not codification; it is seeking a significant change.

My opinion is that, frankly, I cannot see much of a difference between a defence of truth and a defence of justification. I have read the consultation a lot. It is obviously a substitution for a word and "truth" is in a sense better than "justification" but I cannot see much else.

On honest opinion, as the Lord Chief Justice, Lord Judge, brought out in, I think, the case of *British Chiropractic Association v Singh*, where he very wittily opened his judgement by talking about what the textbooks say, fair comment was not related to anything that was fair or to comment, or words to that effect. That area of the law is overcomplicated and a bit of a mess and I think, therefore, it makes sense to replace that, which is what is proposed by the new defence of honest opinion.

**Lord Falconer of Thoroton:** When I started looking at it, I came at it with the traditional common lawyer's view, which is the common law allows it to change with time. You are giving up quite a lot if you put it in a statute. I have read the consultation paper, and I have read the Bill. I think it is a very impressive Bill because it does more than codify; it makes some changes in the sorts of area that Jack has referred to. They appear to be changes for the better and the drafting of the Bill is very good. You get clear principles simply enunciated, and where you are dealing with the court determining when they will and when they will not vindicate somebody's reputation, that should be based, I believe, on clear principles readily accessible to the public.

So, although the Bill does not make significant changes, I find it a very worthwhile thing and a thing that I think will assist in the administration of the law, not just because of the sensible changes it makes but because one will always be able to refer to the statute as to what the principles are. So I am in favour of it in principle. We can talk about the details, but I think it is a good thing.

**Q526 The Chairman:** Baroness Scotland, just to clarify something you said, others have told us as well if you get into codification you have 12 or 18 months of frantic court activity until everybody is clear of what the new ones mean. Are you saying that the prospect of 12 or 18 months of clarification in the courts is a reason for not codifying, is an overwhelming reason for not codifying, or is a price worth paying for codifying?

**Baroness Scotland of Asthal:** I think it is a price worth avoiding, and you can avoid it in this way. When you go through the Bill you can make it absolutely clear what you are doing so that not just in *Pepper v Hart* terms but when it comes to interpretation you are saying to practitioners, “No, Parliament was consciously enunciating principles, which accorded with the most recent case law”. For instance, what would be poor is if you had the Reynolds defence running together with common law and people thought that the principles enunciated in that statute were in some way different or were not a substitution of that. You have to be really clear when you are doing the legislation that you are consolidating and changing in a way that people can then avoid the disputes.

Also—and the Committee will be very familiar with this—any time you do bring in significant changes in the law it is always helpful for the judiciary who might be having to implement this if the Judicial Studies Board runs training that identifies where the differences are and where the differences are not. That tends to mean you get on track much quicker. I think that 18 months is avoidable, dependent on how you manage the Bill through the legislative process.

**Q527 The Chairman:** Yes, although of course, I guess, to calm everybody down I had better say that how the Bill gets managed through the legislative process is not part of our responsibility. We just make a report to Government and stand back and watch.

I have one other preliminary quasi-philosophical question to ask the three of you, if I may. One of the phrases that has been bandied around in our 10 or 12 sessions that we have had so far has been the phrase “public interest” and we have discovered that absolutely everybody is in favour of the public interest. It is the public interest, not what interests the public, which sometimes gets a bit confused in the media. What we have not had is anybody giving us a reasonable definition of what constitutes the public interest. We see a danger in using this phrase as a sort of cloak to cover people doing almost anything they want to do. Should we have that concern and could you help us by offering some insight as to what you think is generally meant by the public interest?

**Jack Straw:** The first thing I would say, and this is more than a trite point, there is famously a fundamental difference between what is “in the public interest” and what may be “of interest to the public”. Moving into an area that is not directly within the scope of the inquiry but is related to it, which is that of privacy, the newspapers often sought to justify their invasion of individual’s privacy in practice, not on the grounds it is “in the public interest” but on the grounds that it is “of interest to the public”, which is very different.

I noted that at paragraph 13 of the consultative document there is a brief discussion about whether the Bill should better define public interest or not, and it concludes that it is very difficult to do so, so it is better to leave it as it stands. We faced the same issue in respect of the drafting of the Freedom of Information Act. Colleagues will recall that wherever there is a qualified exemption then it is ultimately a matter for the tribunal and the courts to balance the public interest in exempting the information from publication with the public interest in publishing it. We looked at

whether you could be more specific but it is frankly incredibly difficult because it boils down to a tribunal or court weighing what they perceive to be in the public interest on the basis of evidence with other considerations.

I do not have a better definition for the one that is here but others may have a better and more specific definition about issues that should be brought into consideration but, as paragraph 13 says, if you do have a list there is always danger, even if you say this is not the case, that will be seen as pretty exclusive. My instinct *faute de mieux* is to rest on the current drafting.

**Lord Falconer of Thoroton:** I think the key to it is that the resolution of policy issues, political issues, financial issues, in a way that is good for the public, depends upon public debate on those issues. Therefore it is in the public interest that such debate be promoted and not prohibited by any law, save where such law is necessary to protect an identifiable other private interest, reputation or privacy. But I think the key aspect of defining the public interest is that the publication of the material promotes public debate on issues that affect people's lives and the resolution of those issues. I think it would be worthwhile to try to formulate a definition along these lines because public interest covers such a wide range of areas and if one goes to the root of what one is trying to get at, I believe that would help the courts in determining what is in the public interest and what is not.

**Baroness Scotland of Asthal:** Not to replicate what either of the other two have said, I think this is very difficult to get a definition, for all the reasons you have identified, enumerated by Jack but also alluded to by Charlie, inasmuch as it is helpful to have a list but once you have a list it tends to become fixed in concrete and it is very difficult then, even when you put "*inter alia*", to get people to look behind that because usually they say, "Well, what does the *inter alia* encompass?" We have had a debate, as you know, about what the public interest encompasses probably for the last 50 years. So I appreciate how difficult it is to come to a definition. This Committee has heard a lot of evidence and if there were some broad agreement on the principles it might be worthwhile but, like Jack, I am just a little bit cautious about whether it is achievable and whether we could do it in a way that would not be unnecessarily limiting.

**Q528 Lord Morris of Aberavon:** We have been advised that the Bill does relatively little to change the current law, although there are some instances where it does. We all accept, following Baroness Scotland's remarks, that litigation is a possibility, if not a probability of any legislation consolidating or restating—or whatever—the common law. I burnt my fingers many years ago when I introduced, or helped introduce, the Breathalyser Bill and the criminal bar was eternally grateful—or at least grateful for a few years—that I created a cottage industry. Had I thought about it a bit more I would not have done it in that way. To avoid that, are there any points sticking out in Baroness Scotland's mind where the Bill is not sufficiently precise? Are there any changes, anything we could do to avoid such a cottage industry developing?

**Baroness Scotland of Asthal:** I think you probably have a cottage industry brewing up on substantial harm. If you think about the procedures that you have at the moment, it is relatively clear that certain words could be judicially interpreted as needing to form the basis of prospective litigation. But you could have a whole cottage industry on what substantial harm means before you even get started. So I was very attracted to the evidence I know that you had from Lord Mackay of Clashfern and I think you also had some more evidence from Carter-Ruck, who have a lot of experience of doing litigation on both sides. I was very persuaded by their evidence that the substantial harm test is one that you could perhaps do without and

there are better ways of expressing it. I know that Lord Mackay, when he gave his evidence, suggested or preferred the test about whether the words are “a serious imputation on the reputation of the claimant”, which would allow a trivial claim to be easily dismissed. But in accepting substantial harm it may be that you will be unable to throw out what appears to be a trivial claim because there would have to be a proper investigation as to what “substantial” meant. I could see a whole cottage industry growing out of that one word before anything was ever issued.

If we are looking at costs, I think costs must be a significant part of the aspirations for reform because we know at the moment litigation is out with most people’s ken because they simply do not have the money. So when we are looking at reforming it I think we have to look at the cost implication that some of these reforms will have. That which makes it difficult for the judge to do the case management job in a robust way would be best avoided. I understand why the draftsmen or women have suggested “substantial” but I think that is a bit of a hostage.

**Q529 Lord Morris of Aberavon:** If I may, I will follow the issue of costs in a moment. Are there any other potential cottage industries that worry Baroness Scotland?

**Baroness Scotland of Asthal:** I think you could look at whether we need to change justification for truth because justification is a very well established principle. I think it might be easier but does that fall in then with the conversation we were having earlier? Could we clarify that we are meaning the same thing? But if we are meaning the same thing, is it prudent to change the terminology if we are just using a different word? Clarity for the future may be one of the reasons we would want to do that. So I think there are a number of terms here that we just need to ask the question: is the terminology adding an additional clarification and help in terms of openness for people to understand or is it not? If we can retain some of that terminology it cuts away some of the potential for litigation—not that I want to deprive lawyers from earning a crust you understand. However, I think in this area moderation in all things would be a good idea.

**The Chairman:** To help Lord Morris, if after we finish other words strike you as falling into the category maybe you would just drop us a note and say, “Remember what I said about—why don’t you add these words to the list” rather than trying to go through them all now. Thank you, that would be helpful.

**Q530 Lord Morris of Aberavon:** That would be very helpful. On the issue of costs, as Baroness Scotland has raised, I am always advised—wearing another hat as Lord Falconer would know—against suing for defamation because of the costs, because of the time factor involved and you cannot do a job properly. Why are costs so enormous in this field? I have not practised common law, apart from criminal law all my life, but as a young man I had a little experience of personal injuries and the costs then were relatively modest compared with the huge amounts we hear about in defamation. Why are they so expensive and can anything be done, or maybe added to the Bill, in order to reduce costs?

**Baroness Scotland of Asthal:** I think for me it is not so much what is in the Bill. I think there is a real issue in terms of case management, in terms of the procedures that will support this litigation, early intervention. There are opportunities in terms of drafting. You could put a limit. For instance, one of the things that is really difficult is that you may have a claim but damages that someone will recover will be relatively small. So you might say that the cost is £10,000, however it is going to cost £150,000 for you to get there. Now, is there a fast track process that you could put in

place for those claims that are at the lower level, which would make it easier to determine? Reputation is such an important thing for those who have it impugned that many will do anything to save it.

**Jack Straw:** Lord Justice Jackson in his encyclopaedic report on costs of course has proposals in this area, as in others, and one immediate proposal that I tried to take forward as Lord Chancellor, but was the subject of a parliamentary ambush in the closing days of the last Parliament of a pretty unpleasant kind, was to block that. That was to end the practice by which, in defamation cases, in advance of implementing Lord Justice Jackson's report as a whole, the success fees that were set at 100% could no longer be charged.

The other thing I would say, through the Chairman, to Lord Morris is that in my brief time at the bar I never practised in this area but it seems to me that you have a situation where the bar is highly specialised, and so are the solicitors. They will inevitably charge more per hour than, say, a High Street firm is going to charge for a personal injury claim, which is pretty straightforward. Because a great deal is riding on the outcome on both sides and almost invariably the action is against the long pocket of a newspaper or media outlet, they in turn employ the best and therefore the most expensive counsel and solicitors. The taxing of these costs, as Lord Justice Jackson has brought out, has been far too indulgent, so you get an upward spiralling.

**Lord Falconer of Thoroton:** I very much agree with what both Jack and Patricia have said. As the Justice Department's document makes clear, it is a very legally complex area and it has a jury trial at the end, so it is slow on the way there with lots of expense being incurred on the legal contortions that can be gone through with specialist lawyers, and then at the end, instead of there being a driving judge, there is a jury trial that inevitably makes the thing longer. Both the solicitors and barristers involved in it are absolutely at the top of their tree, because reputation matters so much. These proposals deal with two of those issues: one, by in effect abolishing jury trial in this and, two, trying to decomplexify the process by encouraging the judges to take preliminary points and things like that. So whether that will work I am not sure.

I think in relation to the costs issue, it is the point that Jack was touching on at the end, the equality of arms issue. It used to be only very, very rich plaintiffs who could do it. It has now switched, because of conditional fee agreements, whereby in effect the risk of libel proceedings is now being taken by the newspapers and the media organisations. So they now have a much greater incentive to settle very often than the plaintiff has, because what does the plaintiff have to lose apart from the cost of his after the event insurance premium, which may not be that much money if he is quite a rich individual. I think in terms of costs the issue, which this Bill does not deal with at all, is how you restore some degree of equality in relation to it.

**Q531 Rehman Chishti:** Can I come on to a few points that are linked to costs? I think, Lord Falconer, you touched on the early resolution of cases. In this Bill at the moment you have proposals for the early resolution of cases where a determination by a judge is made on either substantial harm or looking at the statement and the contents of that at an earlier stage. Going back to you, Lord Falconer, am I right in thinking from what you have just said that you are supportive of those proposals?

**Lord Falconer of Thoroton:** Yes, I am supportive of those proposals, but one should not be under any illusion that they are making any significant change in the law. Patricia made the point about what substantial means but the law is at the moment that you can only bring a libel action if you have suffered some damage to your reputation. If you could establish you have suffered none the action would be



struck out now. Equally, the early decision that it could not bear a libellous meaning, which is one of the points that the proposal makes, could happen now as well. So, instead of fundamentally changing the law, as I understand the proposals, they are saying make judges reach conclusions about that as early as possible. That will knock out the hopeless claims, but I just wonder how many utterly hopeless libel claims are being brought at the moment.

**Baroness Scotland of Asthal:** I think things have also changed quite a bit in the recent past inasmuch as you now have pre-action protocol, you have letters and replies, you have witness statements, you have 30 minute case management hearings. So where those are aggressively and appropriately pursued the procedure can be quite tight. I think there may be a real benefit in honing those procedures, particularly where you make an assessment that the damages likely to be paid are likely to be restricted. I think there has to be a level of proportionality, and maybe the judges would be able to do this, which says, "Rule of thumb, this is how much we are going to pay", and the judges being quite robust in dealing with it. So I do not think you need to rewrite it.

**Q532 The Chairman:** Can I just chip in to clarify something that Baroness Scotland said about if the procedures were followed; I think you said aggressively or robustly? I think what we are hearing is in agreement with your earlier comment that all sorts of things exist out there that satisfy the lawyers but do not actually do much for the participants, because there does not appear to be anything in the procedures and rules about robustness. Is that an accurate summary of what you might expect us to be hearing in the real world as opposed to a theoretical world?

**Baroness Scotland of Asthal:** I think some judges are extremely good at managing cases in a way that is efficient and effective and allows everyone to know that the outcome is going to be swiftly adjudicated upon and fairly. Others are less robust and I think there is a real opportunity to devise practice and procedures that help those who are not as robust as maybe they could be to become more so. I think, to be frank, there is a real opportunity in assisting judges to case manage. We have some brilliant lawyers but many of the brilliant lawyers who have made their careers in defamation then become brilliant defamation judges. There is quite an opportunity, I think, to help them on case management, because some of the things that are intriguing and delightful could perhaps be left to one side when you are trying to come to a swift resolution.

**Q533 Rehman Chishti:** Picking up on that very point, Baroness Scotland, is it then your case that we should not have judicial discretion because that would go contrary to robustness?

**Baroness Scotland of Asthal:** No.

**Rehman Chishti:** You are not saying that?

**Baroness Scotland of Asthal:** No. I think one of the wonderful things that happened through the Judicial Studies Board is that judges absolutely accept that training can be a beneficial thing. In the past, long long ago, we all knew that judges were omnipotent and omniscient and did not need to be trained. That has changed and I think many judges now really welcome the opportunity to get training so they can do their job more efficiently and more effectively, and this may be an area that perhaps has had insufficient attention in terms of managing cases. Both Jack and probably Charlie remember, and I remember, that there were some very tight managers of cases about 20, 30 years ago but unfortunately quite often it involved

them shouting at you very hard. That is not happening so much now but I think there are very efficient and effective ways that you can enhance the management of cases.

**Jack Straw:** Sometimes a little personal example helps illuminate the issue of, in this case, cost. I have just been the subject of a completely unmeritorious claim in defamation. The House of Commons insurers are covering my costs. Simply to have this application struck out has cost the insurers £3,500.

**Q534 Rehman Chishti:** In terms of time being very short, the other point that you picked up earlier, Lord Falconer, in terms of early resolution, is with regard to jury trials. At the moment we have a presumption of jury trials. This looks at taking away that presumption. Do you still see there to be a role for jury trials? If so, what are the criteria for that jury trial and who should determine that concept if there is a jury trial? Should it be in the statute or should it be left to judicial discretion?

**Lord Falconer of Thoroton:** As I understand the Bill, it takes libel and slander out of the cases where the norm is jury trial. The current procedure is that in civil matters, although in theory a judge has the power to order a jury trial in a civil matter, I do not know of practically any case where a judge has ordered a jury trial, save in those cases that are in that exception, which includes libel and slander. Once libel and slander goes out of those exceptions then I would understand the practical result to be that the judges will not ever order jury trials in libel and slander cases, and I think that is probably a good thing. There is a residual category but I cannot really imagine that it would be used.

**Baroness Scotland of Asthal:** I think it might be used, but rarely. If you have a case that fundamentally turns not on a question of law and interpretation but one of fact and it is of great public interest and importance, I can see the judge prudently deciding that in that particular exceptional case it would be beneficial to have the jury determine the question of fact, but I agree with Charlie that it will not happen very often.

**Q535 Rehman Chishti:** Just a quick supplementary on that, briefly. You said great national importance. What would you put in that category of great national importance?

**Baroness Scotland of Asthal:** It is invidious to contemplate but you could have something that would be politically very sensitive and explosive and it was felt that it would be better to have a jury doing that rather than a single judge sitting on their own, and so that might be something where they thought they would have a jury. I would very much leave it to the judge's discretion, if the judge felt that a jury would be advantageous, and I think we can trust our judges in that regard.

**Jack Straw:** Can I offer a slightly different take on this, which is that I think that there is an argument in favour of jury trials, principally where public interest is run as a defence. If I may demur a bit from what Patricia has said, if it is an issue of fact then an experienced judge probably is as capable as a jury in sorting the wheat from the chaff about whether what is said is true or not. On the issue of public interest, I look forward to it being better defined but however well defined it is, it is going to be an abstract principle so it will come down to whether it is in the public interest or not in an instant case. There is, I think, an argument in favour of allowing jury trial there for the reason that if that aspect, obviously along with others, in that case is determined by a jury that decision will carry a greater legitimacy in the eyes of the public. In a sense it is replicating the old issue of has this damaged somebody's reputation in the eyes of the man on the Clapham omnibus and so on. While generally I am on record as wishing to see the extraordinary scope of jury trial in

criminal cases, for example, restricted to serious cases in this country, in line with other common law jurisdictions, I think on that discrete area there is a case for it.

**Q536 Lord Marks of Henley-on-Thames:** Can we move on to an area that is not in the draft Bill that is before us but was in Lord Lester's Bill and that is the issue of whether or not companies can sue? We have heard a wide variety of evidence from a position that companies should not be able to sue at all, and by companies we are using that as a shorthand for non-natural persons. Some would say that they should only be able to sue if there is a likelihood of financial loss or actual financial loss, which was the Lord Lester position; some saying only small companies should be able to sue, which is the Australian position; and others saying because companies can suffer damage in their reputation then the position should be left as it is. Where do you stand on that and what is your experience in this field?

**Jack Straw:** I have thought about this a lot. Where I come to at the moment—this is not a final view—is that I do not see the case for distinguishing between natural and non-natural persons because, although companies and corporations are indeed non-natural, they do have, in a sense, a life of their own and they are phenomenally important in the way in which our society and economy operate. I am not only talking about commercial companies but also charitable institutions and so on, universities. Yes, I think you need to measure potential damage in a monetary way, but after all that is how the courts operate in any event, but a company's reputation could be egregiously harmed by a defamatory statement. In turn, although they are non-natural persons, behind this non-natural person ultimately lies individuals and, yes, there may be large pension funds in the City but ultimately it is the individual who will suffer if the reputation of a company is unfairly damaged. As far as I know there are not that many defamation actions by companies. I know that people's experience is partly coloured by what happened in the McDonald's case, but that was pretty exceptional. So my instinct is to leave things where they are on that.

**Lord Falconer of Thoroton:** I am in favour of leaving things where they are. I support what Jack said in relation to it. I think companies have reputations. If you say that a company is a front organisation for the CIA or you say that a company deliberately exploits child labour in Brazil and that is the only way it makes money you could easily envisage a situation where the individual companies suffer substantial damage without being able to identify particular financial loss sufficient for the purposes of the new test that was being proposed. Clause 1 in the Bill has the threshold. I agree with all that Jack has said in relation to it.

**Q537 Lord Marks of Henley-on-Thames:** The arguments the other way that are generally put start with the proposition that companies do not have feelings even though they have reputations. The other argument seems to be that it is possible to limit the circumstances in which a non-natural person can sue to where they have suffered or are likely to suffer financial loss, and that is the only way that companies can suffer.

**Lord Falconer of Thoroton:** On the feelings, I understand the current position to be that a company cannot recover damages for individuals' feelings for the very reason that you have said, so the law seems to be okay in relation to that. In the rest of the area of the law, the law was always understood that you could be substantially damaged by a libel without it being possible to put your finger on pounds, shillings and pence that that may affect. I do not see why that rule should not apply to a company as long as they can satisfy the threshold test, which already exists in the common law but will be encapsulated in statute in Clause 1.

**Jack Straw:** Companies do not have feelings but it is important to remember that behind the companies are individuals who have real interests, which may be direct or indirect, and if a company's physical product, or its intellectual product through its brands, is very severely damaged and unfairly damaged that can have all sorts of adverse consequences for individuals.

**Baroness Scotland of Asthal:** And I shortly say I agree.

**Q538 The Chairman:** Do any of you know of damage to large Australian companies who are now precluded from suing as a consequence of the law change in Australia?

**Lord Falconer of Thoroton:** No, I do not and I was interested in the Australian idea. You have to have 10 employees or fewer to be able to sue. No, I do not know of any large Australian company, but I had not focused on the issue until I read this thing over the weekend. I did not know that was the law.

**Baroness Scotland of Asthal:** Also I think one of the issues is they have a very different approach in relation to damages. For instance, personal injury damages have fixed levels and it is therefore materially different because you can cap your liability. I know one of the things that people have been talking about, although not at this Committee, is whether you can do something similar to constrain costs by capping the damages and then you have a greater degree of proportionality.

When I looked at the three different models that were canvassed in the evidence before this Committee I came to the conclusion there was not, for me, sufficient strength in the argument to change, because we are not looking for change for change's sake but change that will make things less opaque, clearer and easier, and I could not see that this particular area would become easier by virtue of saying that non-natural persons cannot sue.

Coming back to Lord Morris' point, if you want another little fertile area for people to get very upset about, I can see some really interesting debates on whether under the European Convention on Human Rights a corporate person is a person or not, and that could be a wealth of gainful employment for lawyers. So, if you want another area, there is one.

**Q539 Lord Marks of Henley-on-Thames:** The answers have been fairly clear. What we have not looked at in relation to this, which is also often discussed, is the way in which allowing large corporations to sue prevents there being equality of arms in a number of cases. That is one of the other arguments that has been canvassed with us, and by a number of people it is said that large companies have other ways of protecting their interests.

**Lord Falconer of Thoroton:** I agree. I think that is a risk but the McDonald's case, which Jack referred to, shows the reverse in a way, doesn't it? The McDonald's case, I think everybody would agree, was intensely damaging for McDonald's. They looked ridiculous. They went on for months and months and months against two defendants who had no money and, therefore, there was absolutely nothing to be gained by this. There was a judgement that broadly exonerated McDonald's in a whole range of areas but the inequality of arms played strongly against the corporation in those circumstances. We have a pretty active media that will be able to characterise a corporation that is behaving in the way that McDonald's did. I am not criticising them for doing it but it did not help them at the end of the day. So I am not sure the inequality of arms argument is an argument for saying corporations should not be able to vindicate their reputations when they are wrongly traduced.

**The Chairman:** I think you have just prompted Sir Peter to make an intervention.

**Lord Falconer of Thoroton:** I hope I have.

**Q540 Sir Peter Bottomley:** One issue is whether they should be able to sue for their feelings; another might be commercial interest. I keep going back to an example I have used before, which is when Richard Doll and Bradford Hill in 1950 declared they had evidence that smoking was bad for hearts and bad for lungs and six months later they said that asbestos was bad for lungs. That was not the general view. It could not be proved beyond doubt without giving extra time for more people to come in. What was to stop a commercial company saying, "This is clearly damaging to our business. It is going behind the science that is generally accepted"? They could have shut them up in the same way a number of other research scientists have been either shut up or attacked like, for example, Dr Matthias Rath who went on about how vitamin supplements would be a good treatment for HIV and AIDS. There was potential damage with him that if a South African president happened to believe what he was saying you end up with another decade of people suffering unnecessarily.

**Jack Straw:** With respect, the climate of the times today is very different from what it was 60 years ago. I make that as a serious point. Secondly, the public interest defence, which I feel very strongly in favour of, not least and above all to protect scientific research, should operate there. If someone came along and said that—let's take the example—smoking is likely to cause lung cancer, provided they were saying that on the basis of some clear evidence, however controversial, then they would be covered. On the other hand, if what they were saying was simply plucked out of the air—

**Q541 Sir Peter Bottomley:** Would a court official say you cannot bring this action because of public interest or would you wait until you had spent £200,000 or £300,000 defending the claim?

**Jack Straw:** That is for the process. I cannot comment on that.

**Lord Falconer of Thoroton:** I strongly disagree with your contention, first of all on the feelings point. Feelings are not recoverable as a head of damage for companies at the moment. Secondly, Richard Doll was not shut up by libel proceedings. He was able, even in the climate of the 1950s, to get it across. Thirdly, if you were a corporation that did want to shut him up by using libel proceedings then you would simply have brought proceedings in the name of a senior executive of the company. I think one should not be, as it were, led away from where fairness lies as between corporations and individuals by that sort of example, because if you do have a company, scrupulously or unscrupulously, that wants to shut up the legitimate critic, even if you said corporations could not sue, I think it would be pretty easy for them to find a way to do it.

**Q542 Sir Peter Bottomley:** Suppose you take the example that our Department for Work and Pensions got pretty close to, if they did not actually get round to, signing a contract with some people who claimed that you could tell by recording someone's voice whether they are telling lies or not. It turned out that that company, and I do not want to name companies but it is there on the record from previous evidence I think, went around suing people who said that what they were doing was the work of charlatans.

**Lord Falconer of Thoroton:** Take that example. The chief executive of Speak Your Lies Weight Machine Ltd, offering the DWP money to avoid all benefits, would be a pretty severe crime if it was all based on charlatantry. If he wanted to stop a

journalist or another person saying it is all a fake he could just bring proceedings in his own name. It is as easy as pie in the law.

**Q543 Sir Peter Bottomley:** There is no way that the law or the procedures could say it is so clearly public interest that you cannot start an action if you have to respond to it.

**Lord Falconer of Thoroton:** No.

**Baroness Scotland of Asthal:** I do think that—and I know it is outside this Bill—if we were looking at procedures and trying to make them more robust so that they would be better able to kick those sorts of cases into touch that is perfectly practical. I am always looking at the practical outcomes. That is a very practical way of trying to put a feel on those sorts of issues. I am not antipathetic strongly one way or another. I just do not see this working in the way that those who are suggesting it would want it to work. I think there might be a lot of problems with it. I am not saying that is not what the Committee should do but I do think there are other ways of skinning this particular cat and you might be able to do it through the procedures that come out with the guidelines later. That is all I am saying.

**The Chairman:** Subject to timing, before we finish I will bring you back to procedures and rules.

**Q544 Lord Bew:** One of the changes of emphasis in 2011, if I put it like that, in the discussion about libel law reform is there is now more emphasis than there was, perhaps in early 2010, on the chilling effect on academe and academic discourse, and Clause 5 of the Bill advances a solution in extending qualified privilege to academic conferences. In the light of what we were saying earlier about unintentionally creating cottage industries, do you have a view about that? Is it possible that it might be wiser to go down a different route, for example extending qualified privilege to peer-reviewed journals, given the fact that it is possible, for example, that academic conferences are not necessarily always as well organised and as professional as they might be? In other words I am really asking you about the ways in which the Bill in this relatively new theme of this year tries to protect academic discourse.

**Jack Straw:** I do not doubt that concern has deepened, but one of the key factors that led me to establish the Libel Working Group in 2009 was my personal concern about the chilling effect on academic research, something that I care about and have cared about for a very long time, and there were specific examples that came to my attention. I know what my objective is, which I think is also yours, my Lord, by having some provision to cover academic research. I frankly do not feel qualified to comment on whether this particular drafting in Clause 5 or some other drafting would better meet that objective.

**Baroness Scotland of Asthal:** One thing, Lord Bew, that you are quite clearly worried about is the whole ability for people to express their honest opinion in academic settings. *Spiller v Joseph*, you will know the case in 2010, clarified a number of the difficulties with which we were struggling before and there was a lot of debate, a lot of concern. I would be very sad to see that clarification that has come from *Spiller v Joseph* in any way watered down, because I think it has sort of put the lid on a lot of the controversy. I think it is clear that an honest opinion would be preferable to the test we have at the moment but distilling the ratio decidendi of *Spiller v Joseph* I think would be a really good way forward.

**Lord Falconer of Thoroton:** I am supportive of the changes in the Bill. The wording is, “A fair and accurate report of proceedings of a scientific or academic

conference". I read that as meaning if it is a genuine scientific or academic conference where views genuinely intended to promote science or academia are exchanged then that should be protected by qualified privilege. I recognise that you can have conferences that might be described as academic but are not. I know that, for example, the Church of Scientology might bring a gathering of people who are "academics" and their only aim is to, as it were, attack legitimate psychiatry and that sort of thing. But I am moderately confident that the courts would be able to differentiate between a genuine academic conference put together by a reputable academic institution and a conference put together by an organisation like the Church of Scientology, designed to pursue a particular campaigning goal. So I am in favour of the clause; I think it is an important thing to deal with. I recognise the risks but I think the courts will deal with the risks.

**Q545 Lord Bew:** In that spirit then, you would not have any objection to Clause 5 making explicit reference to peer-reviewed journals, which it does not do at the moment?

**Lord Falconer of Thoroton:** You would have to help me as to where you would put that in. As long as it can be fitted into the structure of the Act, yes, but I have not thought enough about Clause 5 to agree immediately.

**Baroness Scotland of Asthal:** I would have thought that that sort of clarification might fit better in guidelines as opposed to the Bill, because once you include that, if you do not include a whole load of other things, they will assume that you have disregarded them. So I think the structure of the clause is probably okay but those sort of helpful indicators could probably best be placed in the guidance that would go to support the Bill.

**Q546 The Chairman:** To clarify, Lord Falconer, is there not a potential Scotland cottage industry in defining what is and is not a legitimate scientific conference? Those of us who have at some point in our lives earned our crust in the world of science would perhaps be slightly less sanguine about the validity of what passes as a scientific conference, whereas we would probably be more sanguine about peer-reviewed journals.

**Lord Falconer of Thoroton:** The issue here is the extent to which reporting of something attracts a defence in libel proceedings. Certainly I, and I get the impression round the table, want a "genuine" science conference in which a view is expressed about one form of treatment in medicine that is contrary to another one. That can be freely reported even though it might imply some degree of not trying hard enough on the other side of the argument. I do not think it would be difficult for the courts to be able to genuinely identify a scientific conference. I do not know if you are saying this, but I know from my own experience a lot of organisations that claim to be acting in the interests of science are no more than front organisations for something else. That is different from rather poor grade scientists who meet together. The poor grade scientists should get the benefit of qualified privilege, but it is those who are not genuinely scientists at all who are simply using it as a front. They are the people who should not get the protection of what is 14(a) in the schedule, and I think the court will be able to define that adequately.

**Q547 The Chairman:** Have a wild guess at how much it would cost to get a court to rule that a scientific conference was not a real one and so they could not proceed.

**Lord Falconer of Thoroton:** If it is costing £3,000 to strike out a completely hopeless claim against Jack, I would have thought 10 times that in order to determine

that a scientific conference was not a scientific conference, so at least £30,000 I would say. That is a wild guess. It all depends upon the circumstances.

**Q548 The Chairman:** A point I am teasing a little bit about is, is there not the potential for a lot of expense to be run up before you define what constitutes or does not constitute a conference?

**Lord Falconer of Thoroton:** There might be, but isn't that a price worth paying to give some protection to genuine scientific conferences?

**Q549 Rehman Chishti:** A brief follow-on from that in terms of cost and procedure and dealing with these issues specifically and early. Do you see that to be a place for specific courts, like you have the Patents County Court that deals with these issues and it is very cost effective? Do you see a role for there to be a specialist defamation court, like the specific intellectual property patents court?

**Lord Falconer of Thoroton:** No, not really. We have three or four judges who try all the libel cases in the Queen's Bench Division. It is not a separate court. They are genuinely very experienced at it. I cannot see that the expense of setting up a special court would be justified if the expertise is already there in trying them.

**Q550 Rehman Chishti:** Do you see the intellectual property patents court working satisfactorily at the moment or not?

**Lord Falconer of Thoroton:** I would not feel qualified to answer that, unfortunately.

**Jack Straw:** The Libel Working Group looked at this, because in practice you effectively have this separate court—it is at paragraph 114 of their report—and they really did not come to much of a conclusion. I think there is a much stronger case for a discrete patent court because it is very highly specialised. This is specialised but not as. There is an issue, which of course the press have been pursuing, and one of my colleagues touched on this earlier, I think Patricia, about whether you should confine those who sit on the bench, in this case to try defamation, to those who have come up that route as members of the bar. I think those who are doing it at the moment are very experienced and very imaginative but at some time, and Charlie will remember this, there is a case for saying in respect of this specialist division it might be better to bring an outsider in. But that said, I think practitioners would find it really difficult if they were faced with judges who knew much less about the subject, the law, than did they.

**Lord Falconer of Thoroton:** Jack makes a very important point in relation to this. I think unlike patent law, which is a very specialised area where it will not be in the public eye so much, there has been a great disservice done to the law by the media focusing on individual judges in relation to privacy issues, making it appear that it is one or two judges only who are following what is characterised in some parts of the media as being an idiosyncratic, rather personal campaign, whereas the truth is those judges are simply doing the law mainstream and not in any way pursuing their own idiosyncratic course. In an area like privacy or libel it may well be that, although you should have people who have experience in the field, you should spread the load over a larger number of judges so there is genuinely a sense this is the law in action rather than Mr Justice X or Mrs Justice Y.

**Q551 Sir Peter Bottomley:** I just remind myself that Mr Justice Eady was overturned less often than Lord Denning was.

**Lord Falconer of Thoroton:** That is a very good example. I quite agree.



**Jack Straw:** One of the examples that is used here against spreading the load too widely is that they quote a couple of examples where it was claimed that non-specialist judges had granted jurisdiction “in ignorance of Section 12 of the 1998 Human Rights Act”. That is quite serious.

**Q552 Sir Peter Bottomley:** Can I take one or two issues and then the Chairman can stop me if he wants. We have had Lord Lester’s Bill and we have the draft Bill. Lord Lester was going to deal with parliamentary privilege. The Bill team think that is probably best left to a Bill separate from this defamation one. Do any of you have guidance or views on that?

**Jack Straw:** I have phenomenally strong views on this, which is do not touch it with a bargepole in this Bill because all your endeavours will come to grief. Just to give you one example, which you will recall, Sir Peter. The Parliamentary Standards Bill, which set up the Parliamentary Standards Authority with huge all-party support, had a provision about parliamentary privilege in it, quite properly drafted, because there was a self-evident problem about the interaction between this place and this new body. You will recall that we had a humungous debate in the House with people on their high horses about this. I have a feeling that I lost the vote by one but even if I had won it the result of this was we had to pull that clause otherwise the whole thing would have come to grief. This Bill is not the vehicle to try and bring forward proposals on parliamentary privilege.

There were the recommendations of the 1999 Joint Committee on Parliamentary Privilege. There have been further considerations about this. It also came up over the Bribery Act, of all things. So if you want to go down this route what you need is a completely separate parliamentary privilege Bill.

**Lord Falconer of Thoroton:** I agree. I think defamation is a completely different area. This is a very worthwhile Bill and it will get derailed if it goes into parliamentary privilege.

**Q553 Lord Morris of Aberavon:** Could I return to the issue, and I know very little about it, of the judges who now try the cases? Have we developed a situation where only a few judges try defamation cases as opposed to the generality of the Queen’s Bench Division? My recollection is, I am pretty sure, that Sir Michael Davies, who used to handle the jury list, was a generalist. He came to the Welsh circuit time after time and did every case that came along. It was he who had the wonderful direction to the jury of assessing damages, whether, “First of all, do you think it is worth a holiday or, secondly, a small car or, thirdly, a detached house?” and it seemed to work over the years, but he was a generalist. My question very simply is has there been a change?

**Lord Falconer of Thoroton:** My understanding is that it used to be the most senior of the QB judges who did it. Sir Michael Davies was very senior. Following Sir Michael Davies was Sir Michael Morland who did it, he was also a very senior judge, neither of them as it happens libel specialists in their practices at the bar. Then Sir Christopher French did it for a period of time, again not a specialist. Sir David Eady and Sir Michael Tugendhat, they are senior as well. The person who supports them now is Dame Victoria Sharp and she is quite junior, so I think there has been a change. It has moved from being just a senior person to being the senior person plus people with libel experience.

**Q554 Lord Morris of Aberavon:** Has that been a good thing or a bad thing?

**Lord Falconer of Thoroton:** It is a fact. I do not know whether it has been a good thing or a bad thing. All I can say is there has been much more focus on the individuals as time has gone on and I do not know whether that is because they are libel specialists or because the media have got much more interested in these issues.

**Baroness Scotland of Asthal:** I do think, and we should acknowledge, we owe those judges who are willing to take this work on a huge debt of gratitude because they are doing this work now in the eye of what quite often can be a storm and making sure that they keep rigorously to the law. It is something I think that we as a country need to be very proud about what they attempt to do. The burden is heavy on any judge now who wishes to do this. The QB has some extraordinarily skilled judges and the opportunity to have a background and a depth of knowledge in it now is much more important, I think, than it might have been before when the spotlight was not on the judiciary in quite the way that it is at the moment.

**Q555 Sir Peter Bottomley:** I want to switch subjects, if I may, and ask a question about libel tourism and then come to my last one on early resolution, which is in a way linked. Have you seen evidence that libel tourism is a serious problem and do you think that the courts' existing powers to strike out claims or to refuse permission to serve proceedings on foreign defendants are being used adequately?

**Lord Falconer of Thoroton:** I have heard a lot of accounts by media organisations that libel tourism is a problem for them. I have read the document produced by the Justice Department that shows that statistically the amount of libel cases has not gone up over a period of time. The explanation that is being given is it is possible that actions have not been brought because the media organisations have retreated in the face of threats by foreigners. That is all I can say. I have no personal experience of it one way or the other.

**Jack Straw:** It was one of the considerations that I took into account when I set up the Libel Working Group. The evidence is not comprehensive. I think there is a problem and some of the cases that are quoted in the consultative document may be small in number but they were quite serious for those concerned. That is why I think it is worth having some provisions about it.

**Baroness Scotland of Asthal:** I am in the same sort of position as Charlie. I have not seen that this is a huge problem. I know people have been talking about it but as a classic lawyer I look for the evidence and it is very thin on the ground to identify any evidence. I think there is a real question about whether there should be a nexus between the people who want to claim here. Of course, if you were to say that in determining whether the court should exercise its jurisdiction they should look to have special regard as to whether the claimant works or lives here, that might be something that would help, but I do not see that there is a huge problem that needs to be tackled at the moment. There is not the evidence for it that I have seen, but then I have no direct personal experience to rely on.

**Q556 Sir Peter Bottomley:** Leaving that and accepting what Lord Falconer said that you cannot measure the chilling effect if it stops people writing what they want to have written, on early resolution one thing that has always surprised is that if someone feels they need to make a claim of defamation, issue a writ and serve it, why there is not a next stage the next day of having somebody get you both in and say, "What is this actually about?" Is there any reason why that cannot happen under the procedures or laws?

**Lord Falconer of Thoroton:** Nothing at all, and it would be a very sensible thing to do. Often a mistake is made that the media organisation are not remotely wedded to; they can easily put it right very quickly. As things go on, people begin to impute bad motives to each other that do not in fact exist, whereas if you could have a mediation arrangement at a very early stage in which some correction could be published or the victim understands why it has happened you would make big progress. I would strongly urge that and I would hope that in the rules that are produced one of the early resolution conditions is that trained mediators be appointed and that one of the conditions before you start libel actions is that you are compelled to go through some process of mediation.

**Q557 The Chairman:** It falls to me at these sessions to ask a few disparate questions at the end on areas that we have not touched on. You are not the first to have told us to stay well clear of privilege, for all the reasons that Mr Straw said but perhaps with two exceptions. One is whatever the common law and however old it may be, a reflection of the fact that Members of Parliament are permitted to say what they wish uninhibited by any court in the land in the House would be useful to reaffirm. The second is that it would be useful to put on the record that the media can factually report what is said in the House. Both of those would fall under some element of privilege and I would be grateful to know if your stark warning not to touch it with a bargepole included those two aspects.

**Jack Straw:** On whether to restate what is already in Article 9 of the Bill of Rights, I wish you luck, Lord Chairman, with parliamentary draftsmen because I think they will say there is no point restating it. On the second, I have less strong views.

**Q558 The Chairman:** Forgive me, there is no point in restating it because—

**Jack Straw:** Because the law has stated and been accepted by all concerned very clearly since the late 17th century.

**Q559 The Chairman:** So the recent newspaper allegation that a judge was tempted to restrict what could or could not be said on the floor of the Commons is to be ignored?

**Jack Straw:** That is the *Trafigura* case. The particular and very unusual circumstances of *Trafigura* are dealt with comprehensively in the report by Lord Neuberger on the procedure for what amounts to privacy cases. One of the things that emerged from that is that the injunction between the *Guardian* newspaper and lawyers for *Trafigura* was by the consent. Although the *Guardian* made a big stink about it, they had actually consented, both to the injunction and its terms, and both sides said that on reflection they realised that a restriction on it being mentioned in Parliament, apart from being anyway completely unenforceable, they would not have included in the first place, and it was completely unenforceable. There is a whole saga about how *Trafigura* came to be mentioned in Parliament, and it was not a breach of the sub-judice rules either, which is brought out—I happen to have it here—in this excellent review of what happened. I think it is such a specific and very unusual case that I certainly would not seek to change the law for that.

**Baroness Scotland of Asthal:** I do think there is a need maybe for us to reassert the rules that bind parliamentarians, not in this Bill but I think there are House matters, both in the Commons and in the Lords, so that Members, particularly perhaps new Members, really understand what the responsibilities of parliamentarians are and that they have a duty to discharge that responsibility very carefully because if that responsibility is not discharged carefully, if there is abuse of

parliamentary privilege, then it will not be surprising if people start demanding a change to it. So I think there is a different question. It is a question about propriety and the way in which both Houses manage themselves as opposed to necessarily including it in this Bill.

**Q560 The Chairman:** Certainly how the two Houses manage themselves is, we are all agreed, well outside the scope of this Bill but that does not mean that we are disagreeing with you.

Dr Huppert had to go and serve on another Committee and he is back so I am going to let him have the last question, but before I do I have one other that I have to ask you and then he has until 5.59pm. Thank you for coming back. I know that was difficult.

We had a very interesting time with the Lord Chancellor, the Secretary of State for Culture, Media and Sport and the Minister of State in the Department of Justice. I dared to ask them whether part of the issues around defamation might not be resolvable with a review of procedures and rules governing the management of cases, and it is a matter of record that the Lord Chancellor was unimpressed by my question. By the time we had finished, the Minister of State had told this Committee on the record that he was going back to the Department to have a review of procedures and rules because he had, during the course of the time, come to understand that they could play a much more prominent role in a beneficial sense in cutting costs, in speeding up process, in stopping issues developing into big issues when they did not have to, and so on. Given the huge expertise of you three, I would just like a very short comment. Would you encourage us to look at procedures and rules with that end in view, or do you think this is something for the lawyers and the judges and mere parliamentarians should stay out of it?

**Jack Straw:** I would encourage you.

**Lord Falconer of Thoroton:** I would encourage you as well, but I would suggest that you get evidence from the appropriate senior judge, because it is the judges who will best know where it is going wrong and they are generally very well motivated to try to improve procedures. I can see the procedures being improved in family matters, civil matters, general civil matters, criminal matters, and I think it would be of real assistance if you called a senior judge who would willingly give evidence in relation to it and see where the problems are.

**Q561 The Chairman:** The Master of the Rolls and Mr Justice Tugendhat are both due to be here early in July.

**Lord Falconer of Thoroton:** I think you will find them amenable to the idea of changes.

**Baroness Scotland of Asthal:** I think it is also important to remember that it is not just the judges who will be contributing to this, of course, because practitioners can come up with some really good ideas about how you can safely and fairly reduce costs without impinging inappropriately on the quality of the process. So I think if we are looking for procedural reform, the judges themselves in the procedural committee will usually want to take into account what practitioners in that field have to say, because they have got some very good ideas about how you can safely and productively reshape procedure so it delivers what you want but it is less cumbersome.

**The Chairman:** And they are coming on Wednesday.

**Baroness Scotland of Asthal:** Perfect.

**Q562 Dr Huppert:** My apologies to all three of you for having to nip out. Just very briefly, we have been struggling with the question of what to do about things online, which is a consultation issue. There is a balance between trying to defend reputation but equally trying to avoid the chilling effects, where we see currently that a lot of web hosts and ISPs are silenced because they do not want to get engaged. We have had discussions of the idea of takedown processes, possibly going through a court, notices of challenges. Do any of you have any words of wisdom or suggestions on how to deal with this particular Gordian knot?

**Jack Straw:** This also, of course, runs into the old debate about privacy as well and the flouting of court orders. I think the starting point has to be that the law is the law and it applies to anybody who operates within the jurisdiction. You cannot get into a situation where there is one law for those who publish something on paper or you broadcast it through a terrestrial channel and another for somebody who publishes it electronically. There are plenty of excuses offered by the IT industry and the bloggers as to why they should be special cases but, frankly, I think they are without merit.

**Baroness Scotland of Asthal:** I agree with Jack in terms of the law should be the law. I think also the thing that worries me is those who use a combination of Twitter or other opportunities to get the start of information, which then is carried in another medium and then another medium. So you will see a story starting indirectly in one form and you can then trace it until it gets to the front page of a newspaper and it says it is already in the public domain and it has been in the public domain and has been identified. I do think that we have to have a system that is transparent, that is fair and that applies to everyone and mediums are not used as a way of getting round what the law demands.

**Lord Falconer of Thoroton:** I agree with what Jack and Patricia have said about not getting special privileges to abuse people on the internet. I think the distinction that the law has been drawing between the part of the internet that is simply an electronic conduit where there should not be liability until there is something that can be done and those cases where the ISP is making decisions about when something goes up and what it is, should be expanded in the law to determine the extent to which there is liability for ISPs. It is like the way the law has dealt with a bookseller: the bookseller is not liable for a libel in a book until the bookseller knows that there is something wrong with the book and can do something about it. It is that sort of approach, I suspect, that we should be taking to the internet.

**The Chairman:** It falls to me on behalf of the Committee to thank you very much and to point out that we kept our promise that you would be gone by 6 pm, and I think you will. Thank you very much indeed. We are very indebted to you. Can I just say that if anything occurs to you afterwards that you would like to add to what you have told us or to clarify, please do not hesitate to drop us a note. That will become part of the evidence to this Committee, which we will take into account. Thank you very much indeed.

## **Raymond Buildings, Matrix Chambers and Johnsons Solicitors Written Evidence Paul Tweed, Senior Partner, Johnsons (EV 10)**

### **Clause 1: Definition of defamation; a “substantial harm” test**

I would submit that there is an inherent difficulty in attempting to provide a complete and comprehensive definition of “defamatory”. A substantial body of case law is already in existence on the definition, which I contend is more than satisfactory. A statutory definition could lead to interpretation difficulties, at least in the short term, resulting in more protracted litigation.

I would also suggest that there is a lack of clarity in the draft Bill regarding how “substantial harm” is to be defined or quantified. In particular, there is no indication on whether it will be assessed on the basis of a wholly subjective or an objective test, or whether it will be based purely on financial loss. If it is to be assessed solely on monetary terms, where does this leave a Claimant who has suffered significant distress and injury to his reputation? Again, I propose that this requirement will only lead to an increase in litigation and costs, and could potentially lead to the unsatisfactory situation were Defendants attempt to challenge every claim on a Clause 1 basis, resulting in a dramatic increase in initial costs.

### **Clause 2: Responsible publication in the public interest**

Contrary to the assertions of certain NGOs and academic groups clamouring for reform in this area, *Reynolds* does have application beyond the sphere of journalism. The defence set out in *Reynolds* extends to all forms of public speech including publications by these groups. There is a significant risk that codifying this defence will increase complexity and consequently litigation. Furthermore there is a danger of bringing opinion in under the public interest defence – defendants will potentially be protected in respect of ruinous and unjustified comments under this defence, which would not have attracted protection under the defence of fair comment.

I would submit that “public interest” has been satisfactorily defined in case law. Indeed, it has long been accepted that matters of public interest should not be defined narrowly [per Lord Denning *London Artists v Littler* (1969)].

### **Clause 3: Truth**

On balance, the re-naming of the defence “truth” appears to be a reasonable step which is a more accurate description of the defence and follows recommendations made in the Faulks Report.

I note the proposition advanced in the Consultation Paper that the existing body of case law would constitute “*a helpful but not binding guide to interpreting how the new statutory defence would be applied*”, I would submit that this proposition is unclear and could result in an increase in litigation costs.

### **Clause 4: Honest opinion**

I would submit that the previous submission of “fair comment” was misleading and thus some clarity is provided by re-naming the defence “honest opinion”. However, if a Defendant no longer has to show that he was aware of the facts on which his comment was based and will not be required to indicate explicitly/implicitly the facts on which the comment is based, I believe that this will provide the tabloids with further opportunity to speculate recklessly, rather than having to reveal the precise factual information upon which they are basing their story.

#### **Clause 5: Privilege**

There would appear to be legitimate grounds for extending privilege to cover not only UK Courts, but all national Courts worldwide.

However, recent threats by members of Parliament to undermine the protection afforded by super injunctions by disclosing information under the protection of Parliamentary privilege not only risks undermining the judicial system but also inflicting serious prejudice and possibly risk to life in certain cases where protection from the press is required. Accordingly, I submit this is a very urgent and current issue that needs to be addressed, if not in the Defamation Bill then in the Parliamentary Privilege Bill.

#### **Clause 6: Single publication rule**

More and more ISPs are deliberately locating their operations outside the jurisdictional reach of the UK Courts in order to facilitate publication with impunity. While I have some sympathy with the argument that there should be protection afforded to archive material, there nonetheless should be some form of remedy available to encourage the removal of the offending material. I would therefore propose that archive material, or any material falls outside the proposed “single publication rule” should still be actionable, but only after service of an appropriate takedown letter, affording the publisher a fair and reasonable opportunity to remove the defamatory material before alternative redress is sought.

Arguably, retaining the right to sue for multiple publications is more relevant in the internet age than ever before, with accessibility of information online greatly increasing the potential damage caused by widespread dissemination. Each time a defamatory publication is accessed online, new life is given to the defamatory imputations, which are distributed to a new audience.

ISPs are already afforded substantial protection under the electronic commerce (E.C. Directive) Regulations 2002.

#### **Clause 7: Jurisdiction – “Libel Tourism”**

I firmly believe that “*libel tourism*” is not the significant problem that is claimed. Statistical research by Sweet & Maxwell found that the number of claims involving international litigants that could correctly be classified as “*libel tourism*” is an extremely small number. I believe that this fact was highlighted during the US Congress Judicial Committee meetings when witnesses (all of whom represented the defendants/publishers) struggled to cite any examples. I firmly believe that the issue of “*libel tourism*” has been adopted by the press on both sides of the Atlantic as a

means of creating an emotive focal point to encourage changes in our libel law in order to protect their financial interests, much in the same approach as the bizarrely titled New York Libel *Terrorism Act*.

In my personal experience, the Courts go to considerable lengths to ensure that international Claimants satisfy the strict requirements of establishing that a) they have a reputation in the UK, b) that reputation has been damaged to a reasonable extent and c) that they have meaningful interests within our jurisdiction. I therefore believe that no change in the law is required.

### **Clause 8: Jury trial**

I would submit the right to a jury trial not only allows a Claimant to be judged by his fellow citizens, but also affords the ordinary man on the street one of the few remaining opportunities to express his views on the excesses of the press. This is particularly significant in circumstances where he is not entitled to legal aid to bring a defamation action and the financial hurdles facing him are being increasingly raised as a result of proposed reforms and the increasingly uncompromising stance of the media.

### **Consultation issues:**

- i) Not only do I believe that the current law as it currently stands provides adequate protection for ISPs, but on the contrary I am of the view that a more effective right of redress should be considered and available to victims of what is often unrestrained and vindictive defamatory publications by offshore and US based service providers;
- ii) I firmly support the recommendation of the Early Resolution Procedural Group (December 2010), that the Courts should determine the actual meanings of the words at an early pre-trial stage and decide whether they amounted to “fact” or “comment”;
- iii) I also believe that mediation should be encouraged as forcibly as practicable, in all defamation claims, with the additional option of a “fast track” procedure that would limit damages but facilitate an early retraction/apology and reasonable costs. I dispute the proposition that corporate libel Claimants should be treated any differently from an individual Claimant. Nor do I accept that a corporation should be required to prove financial loss, particularly in the modern age where the value of a brand can be destroyed within moments as a result via the internet, and the imposition of establishing a financial loss would be unfair and difficult in practicable terms.

### **Overarching issues:**

I would submit that the new Defamation Bill runs the risk of being disproportionate and grossly unfair to Claimants, unless parallel steps are taken to introduce legislation that would provide greater clarity in relation to breaches of privacy/confidentiality and, most importantly, the introduction of exemplary damages as a deterrent in privacy cases. It has to be remembered that once the “privacy horse has bolted”, then the damage has been done and financial compensation is often a totally inadequate and ineffective remedy, unlike in defamation actions.



I believe that it is imperative that any tightening of our libel laws in favour of the Defendant publisher should only be undertaken in conjunction with a parallel strengthening of a law of privacy, in balancing basic rights to reputation/privacy against freedom of speech/expression.

*May 2011*

## Oral Evidence, 22 June 2011. Q 563–614

Evidence Session X

Members present:

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
David Lammy MP  
Stephen Phillips MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witnesses: **Desmond Browne QC** [Raymond Buildings], **Adrienne Page QC** [Raymond Buildings], **Hugh Tomlinson QC** [Matrix Chambers] and **Paul Tweed** [Johnsons Solicitors].

**Q563 The Chairman:** I welcome all four of you. Let me start by thanking you very much indeed for being willing to spend not just your time with us here today but whatever time you have had to spend in preparation. We are extremely grateful, and we will be interested to hear what you have to say to us. As has been my habit, let me clarify that our proceedings are not being broadcast on television but there are web cameras in operation and, as you know, what you say will be on the record. We have discovered in our evidence sessions that, from time to time, it is useful to say to witnesses that, rather than taking time now while people wrack their brains or memories, we are happy to accept a note subsequent to the meeting in which they can add any thoughts that they wished they had said but did not or—this is highly unlikely, I know—in a minor way amend something that they said that, on reflection, they are not comfortable with.

The session will essentially involve us asking you questions. If someone answers and the other three all agree, a nodding of heads will save time and allow more time for questions rather than all four of you saying essentially the same thing. Where there is a disagreement, we would be interested to hear what you have to say, but if you are all saying the same thing, we can find a way to convey that. Finally by way of introduction, is there anything that any of you want to say by way of a starter before we get into the questioning?

**Desmond Browne QC:** Lord Mawhinney, I would say merely that I was a member of the working party for the Civil Justice Council's response, so I ought to declare that interest. My own views are very much reflected in the views of the working party.

**The Chairman:** Thank you. The first question will be from Lord Bew.

**Q564 Lord Bew:** Mr Tweed, the Government's intention in this Bill, which is particularly clear in Clause 5, is to protect academic discourse from undesirable chill factors of various kinds. Having acted for Oxford University Press in a fairly classic

case, what do you think of the way in which the Government attempts to deal with that problem in Clause 5 of the Bill? More generally, how do university presses tend to act in the context where they are caught up in the toils of libel law?

**Paul Tweed:** Professor Bew, I think that one of the big difficulties with attempting to codify the common law in general terms—never mind in terms of attempting to protect academics—is that it is very difficult to start distinguishing between, in this instance, protecting academics and protecting the ordinary man on the street. On the one hand, we have heard a lot about the rich and famous using or abusing our libel laws, but on the other hand some very valid points have been made that scientific research and comment are being severely prejudiced because of the so-called chilling effect. My view is that the common law as it currently stands still offers adequate general protection, in so far as is reasonable, for everybody. For instance, in the past year I have had a case in which a research scientist felt that he was being libelled and bullied by a major pharmaceutical giant—that is the other side of the coin here—and, if we go down the road of attempting to codify the common law in more detail, our emphasis could all of a sudden be prejudicial to another aspect of scientific research. My firm view is that the law as it stands does not require any amendment.

I feel that absolutely no attention has been given to the public at large at this moment in time. I may have the advantage over my colleagues in that I practise in three jurisdictions—in London, Belfast and Dublin—that have differing procedural protections and aspects. In Belfast, which is in another jurisdiction within the UK, we have never had the option to have a CFA and we have never been able to recover ATE premiums and, of course, there is no legal aid. If you put the ordinary man in the street in the same position as the academic, you have a situation in which both of them are exposed to the whims of the press. We have a situation in which that very well known expression “the public interest”, which is bandied about and is used at length in the draft Bill, is sometimes confused by the press with commercial interests.

I apologise for diversifying from your fundamental point, Professor Bew, but the difficulty is getting one Bill to cover every eventuality. In my view, that is not possible. I think that the common law, backed up by Reynolds and various other doctrines, is more than adequate for the judiciary, who in my view have done an exceptional job in trying to strike a balance despite being under intense provocation from the press. Each judge must take a view on each individual case, whether the claimant is an academic or a research scientist or a member of the public.

**Q565 Lord Bew:** From what you have said, I take it that your problem is not with the mechanism proposed in Clause 5 but fundamentally with the underlying principle. The case in which you acted for Oxford University Press was perhaps not untypical of a general problem in libel law in Northern Ireland, where—for example, to take a general type of problem—comments might be made that a strongly nationalist politician may not just have been strongly nationalist but may have had some connection with the IRA. There has been an explosion in the number of those sorts of cases in Northern Ireland since the start of the Troubles. However, there have also been other less weighty cases, for example, that have involved, famously, disputes between QCs over cream buns as well as restaurant reviews. Is it possible that, because of a genuine political problem that almost inevitably has implications for libel cases, a culture can arise in which people are much more inclined to engage in libel activity, which becomes an intense form of entrepreneurial activity? In other words, are there libel cultures, or are there not?

**Paul Tweed:** No, I do not believe that there are. You hear about the more notorious and controversial cases because those are the cases that the press believe that they have a good chance of winning. Therefore, a Max Mosley case will come to court or we will hear about another case involving a controversial character whom the press feel will either not have the courage ultimately to take the case to court or, if he does, will be undermined because of a controversy. However, I think that bringing a libel action requires immense courage and determination. The case that you cited was heard in 1987 by seven ordinary working-class Belfast people, who decided that the two leading Queen's Counsels had been defamed. They decided that after having heard the case over a two-and-a-half week period, during which they heard all the facts and all the information. In anticipation of your question, I do not believe that there are these trivial claims; there are controversial claims that get to court for the reason that I have outlined.

**Q566 The Chairman:** Lord Bew, forgive me for just a second, but Mr Tweed has been quite definitive in his view, and I ought to check whether the silence of the other three witnesses is because they agree with him or because they thought that the question was quite specific to him.

**Desmond Browne QC:** The latter, I think, combined with an element of politeness—

**Q567 The Chairman:** Incidentally, Mr Browne, do not worry overly about politeness. If I think that any of you are getting beyond the pale, I will deal with it.

**Desmond Browne QC:** I never thought that I would hear that in the mother of Parliaments.

Since Lord Bew has focused on Clause 5, let me just say a word about matters of scientific research and opinion. It seems to me that, as the proposal stands at the moment, it is both too broad and too narrow. It is too broad because it would give privilege to any fair and accurate report of the proceedings of a scientific or academic conference. Without defining "conference", there is a real risk that the privilege might be extended to proceedings that lacked any genuine scientific or academic validity. It is too narrow because it does not embrace the peer-reviewed reports in the general medical and scientific journals.

I must confess that I am scarred by the experience that I had as a young barrister when I was the legal correspondent for the *British Medical Journal*, which was sued by the dentist Mr Drummond Jackson when University of Birmingham anaesthetists published a peer-reviewed paper pointing out that his technique of intravenous anaesthesia during dentistry, which dentists could administer single-handedly, was potentially fatal. There followed an interminable libel action, which was finally settled. A year later, one of Mr Drummond Jackson's patients died under anaesthesia in his chair. Therefore, there are matters in relation to the protection of medical journals that can be said to be literally matters of life and death.

**Adrienne Page QC:** The defect in Clause 5—it is not so much that it is a defect as that it does not go far enough—is that it would not actually protect the originator of the material. So far as the general public is concerned, popular science is what tells us whether what is being peddled is safe or efficacious. There is no protection other than the common law for the Ben Goldacres and the Simon Singhs who talk about something on the "Today" programme or "You and Yours". They would not be protected by the proposed Clause 5—

**Q568 The Chairman:** Forgive me, but does that mean that you think that the clause ought to be amended so that such people are protected?

**Adrienne Page QC:** No, I am not suggesting that. What I am not clear about is to what extent Clause 5 is addressing a real problem. I do not know whether there is a problem about libels emanating from scientific conferences or abstracts. If there is such a problem, I think that the provision should also apply to the publication of peer-reviewed papers and not be confined simply to what takes place at, or emanates from, a conference.

**Desmond Browne QC:** I agree with that. When I referred to the action against the *British Medical Journal*, I ought to have added that the individual authors from the University of Birmingham's department of anaesthesia were sued as defendants as well.

**Hugh Tomlinson QC:** Let me just add two things. First, given that Mr Tweed dealt with a number of very general matters about the Bill, perhaps the Committee will return to those at some stage. I think that all of us have some very general concerns about the kind of project that is found encapsulated in the Bill. Secondly, on the specific matter, there is some common law protection for academic journals, although the precise limits of that protection are not clear.

Subject to the changes that Desmond Browne mentioned, Clause 5(7) seems to me to be a sensible and proper reform. I have some doubts as to whether it is addressing a real question—I personally have never come across a libel action relating to either of the matters mentioned in that clause in the draft Bill—but, nevertheless, it seems to me to be a proper area of protection so that people know where they stand. I see that the Libel Reform Campaign has made a strong submission about this both to this Committee and to the Ministry of Justice. Subject to those changes, the proposal seems entirely sensible.

**The Chairman:** Thank you. Please take from that that, where a specific person is asked a question on which you would also like to contribute, you should feel free to catch my eye after the original answer has been given.

**Q569 Lord Bew:** I am grateful for the clarification of views on Clause 5, and I am also very grateful for your answer in respect of those cases. One issue that we have with the Bill, which one of those cases rather brings to light, is the validity of the substantial harm test. There are issues in and around whether we should instead focus on reputational damage of one sort or another. What is your view about the new proposed substantial harm test? Are you happy with it? The obvious implication from the previous answer is that you are not. Again, other members of the panel might also want to respond.

**Paul Tweed:** It is not that I am unhappy with the substantial harm test; I just do not think that it is necessary. The common law already makes provision for substantial harm to be established. Certainly in my experience, I have not come across a situation in which someone has embarked on a libel action where there is not meaningful and substantial harm to their reputation. Obviously, I have no issues with a substantial harm test, but the issue is whether we need to codify it. The danger is that being more specific or more rigid in the definition may encourage further legal debate and actually create the problem that you are trying to solve: there will be more costs involved, there will be more controversy and it will take longer to get the cases resolved. I am a great believer in keeping matters as simple as possible. If you cannot keep them simple, at least let us have the benefit of the precedents that have been established in hearing these cases over the years, so that we all at least have a fair idea of what we are facing further down the line.

If I may diversify slightly, I think that one of the great difficulties here is that times have now changed, in that, if a headline has appeared in last Sunday's paper, by this time on a Wednesday it is all too late to deal with the matter because it has gone round the world on the internet. Although we can debate these tests and discuss mediation—which I am strongly in favour of—in many cases it will be too late because the damage has been done. We have to focus on deterrent. If we have clear law about the substantial harm test, or whatever it is, and the press know in advance what they are likely to face, that may provide at least some measure of deterrent or argument before publication takes place.

**Adrienne Page QC:** With a provision such as the substantial harm test that requires claimant lawyers to look into the matter before an action is commenced, there is a risk of abuse in terms of front-loading the costs. I am talking about not just the need to investigate whether the action might fail on the test because it has been elevated to a statutory basis; there is also the fact that, unquestionably, there are cases where costs in the situation are abused, and I think that this would provide an opportunity for that. If it was necessary, that would be a different matter, but all three of the current Jury List judges are applying a substantial harm test in accordance with the *Jameel v Dow Jones* case. Therefore, I think that it is not necessary. All that the test does is provide another box for lawyers to tick, which could in the end produce more costs. I think that, if one in effect gets rid of juries, judges will be able to be much more interventionist in striking out claims where the argument cannot be raised that, conceivably, at trial the jury may come to the view that the words bear a more serious meaning than the judge plainly thinks that they bear. My strong inclination is that it can do more harm than good and is not needed.

**Q570 Lord Grade of Yarmouth:** Chairman, could I just ask for clarification on what is meant by the front-loading of costs?

**Adrienne Page QC:** The front-loading of costs is where costs are incurred either before the action is started or certainly at the front end. Where someone with a possible libel claim goes to see a lawyer, at a later stage the lawyer must justify how the costs were spent throughout. If more investigation is to be required before the lawyer could confidently advise that an action should be commenced, that would fall into front-loading.

**Desmond Browne QC:** Let me just make a couple of points about the draftsmanship. First, it seems to me that the proposed section should refer to actual or threatened publication and that regard ought also to be had to the effect on the feelings of the claimant. Defamation is about both damage to reputation and injury to feelings. A second practical point is that, at an early stage in the action, the claimant may not know without disclosure of documents the extent of the circulation of the libel, particularly if it is on a website—there may need to be investigation of the number of hits.

Finally, and with trepidation, I want to pick up something that Lord Mackay said to this Committee. At Q301, he urged that the test should be serious and substantial harm because, he said, if the test were only substantial harm, a judge might not dismiss a case “because he would have to look into the existing reputation of the claimant”. With great respect to Lord Mackay, that exercise ought to be neither necessary nor relevant because the long-standing approach of the courts has been that evidence is inadmissible in relation to meaning and that, when considering whether words are defamatory, you do not look at the existing reputation of the claimant. I would be happy with the test of substantiality; my doubts are simply

whether it reflects the existing law, as laid down by Mr Justice Tugendhat in the Thornton case.

**Hugh Tomlinson QC:** I agree.

**The Chairman:** You have enticed two of my colleagues—Mr Phillips and Lord Marks—to chip in.

**Q571 Stephen Phillips:** I want to take Ms Page back to something that she said a moment ago in relation to strike-out. Lord Lester's Bill contained a provision for mandatory strike-out, which essentially was to have been a statutory provision that cases that did not meet the initial threshold should be struck out. The Committee has heard some evidence about that. What are your views on that? Is such a provision necessary, given the existing summary judgment regime under Part 24?

**Adrienne Page QC:** I do not think that it is necessary. Judges are becoming more interventionist and I think that they will become more interventionist. What inhibits judges at the moment—this might be an argument in favour of having something in statute—is that we operate an adversarial system, and judges tend to think, "If I am not being asked by one party or another to do something, I am not going to do it." One exception to that over the years has been where a judge has taken a view that the case is trivial and should not be cluttering up the courts because it is a product of silliness, perhaps on both sides. From time to time, judges take the initiative and strike things out. However, as I have said, I think that once juries are in effect out of the way—if that is the consequence of the Bill—one side or the other will come forward, in quite a lot of cases where they would be inhibited from doing so now, and say to the judge, "This is a proper case to strike out." If the judge is to be able to say, "I think that the meaning is this", rather than the possible range of meanings that are capable of being applied, and if the judge is to be able to receive evidence that may be wider than that seen on the face of the statements of case, I think that there will be many more strike-outs. I think that we should leave the issue to the sensitive handling of judges. I saw a facial expression there when I referred to the "sensitive handling of judges"—

**Stephen Phillips:** Not from me, I hasten to add.

**Adrienne Page QC:** Judges have that room for sensitivity because they look at all sorts of factors quite closely. Sometimes there could be cases in which it may be thought that, although a huge amount of harm may not have been caused, there is an enormous public interest in knowing where the truth lies by having the issue determined. I would leave it to the judges.

**Desmond Browne QC:** I commend the procedure in annex D of the Ministry of Justice's consultation paper. It seems to me that key to the issue that Mr Phillips has raised is early and energetic intervention by the judges. For the reason that Ms Page has just given, traditionally judges are not interventionist. The annex D provision where procedures would need to be fitted in at as early a stage as possible is obviously relevant. Cases are going for too long and too many costs are incurred before judges get their hands on them.

**Hugh Tomlinson QC:** Just to go back to the specific question that Stephen Phillips asked, it seems to me that this provision is a great improvement over the equivalent provision in the Lester Bill, which would have forced an extra layer of costs in every single case, whereas this leaves it open to the parties. I do not think that the clause is necessary, but I do not think that the clause itself causes substantial harm.

**Q572 Stephen Phillips:** I have a follow-up question for all four of you. It may be said that the existing powers in Part 2 enable judges to take these steps already, so judges can do essentially what they like with a case if they feel that it is trivial or not significant or involves no substantial harm. Is the problem really one of procedure, or is it a problem with the culture of the judiciary and the way in which libel cases are currently dealt with, particularly the fact that they are dealt with only in the High Court?

**Hugh Tomlinson QC:** It seems to me that there are two issues. One is the role of the jury, which, as Adrienne Page has already mentioned, means that traditionally judges must be rather careful as to where they go. If the mandatory requirement for a jury trial is removed, judges will be able to take a more interventionist role. There is also a question of the judicial culture in England generally, given that judges are not trained actively to manage cases. As the Jackson report has pointed out, even in areas of the law where judges are supposed actively to manage cases—and have been supposed to do so for many years—such as in commercial cases, there is no consistent practice. Time is not given to a judge for that. Active management of cases would require that judges read all the papers and understand what the case is about, but the present system does not give them time to do that. However, these are procedural matters, which do not need to be dealt with in legislation but could be dealt with in terms of the organisation of the courts.

**Q573 The Chairman:** Given the history, including what you have just said, why should we as a Committee believe that, if we say nothing about rules and procedure, all of the good things that you have enumerated will be likely to happen?

**Hugh Tomlinson QC:** I was not suggesting that you say nothing about rules and procedure. It seems to me that the difficulty with the whole Bill—if I may just go a little wider—is that, of course from time to time in the context of libel litigation, like in any litigation, there are abuses, and people bring actions that should not be brought or they bring them for improper purposes. The difficulty in setting down a set of bright-line rules to stop that happening is that they will catch a lot of cases that should properly be brought as well. If you ask me, I say that a Bill that sets out bright-line rules that force judges to strike out bad cases will generate huge additional costs and waste a lot of time. What is needed, I think, is procedural rules. This Committee can doubtless make recommendations along those lines, but I do not think that they are matters that need to be put down in bright-line statutory provisions.

**Q574 Stephen Phillips:** That raises another issue—this is essentially the same area of questioning—that I have previously raised with other witnesses. With the exception of the amendments to the law that the Bill will perhaps make, for example in the area of academic freedom, what is the point of seeking to codify the common law in this area? Is there a danger not only of increasing the costs but of entrenching in statute rules that the courts might wish in the future were not entrenched because, being so fossilised, they cannot be altered to meet changing circumstances as we progress into the 21st century?

**Hugh Tomlinson QC:** I regard that as a very serious concern. The last 15 years have seen a huge change in the law of libel, which has become much more user-friendly and much more responsive to proper concerns about freedom of expression. If you codify, you stop that development happening. That could also generate not just the problem of ossification, which you mentioned, but also litigation about what the code means, whereas at the present moment it is clear.



**The Chairman:** Mr Tweed caught my eye, as did Mr Browne. We will hear from them before we go back to Mr Phillips.

**Paul Tweed:** I think that that is an excellent question, and the answer to it is a simple yes. There is a major danger that, if we codify, we restrict the judiciary in very changing times. Even in the discussions that we are having around the Bill, my biggest difficulty is trying to maintain a relevance because of the basic point that, once something has been published, it hits Sydney and Los Angeles within a matter of minutes, so dealing with something after 24 hours is a waste of time. Once the privacy horse has bolted, the damage is done and there is inadequate remedy; once the defamation horse has bolted, we now have the same problem, unfortunately. I think that the implication of the question makes a very valid point.

**Desmond Browne QC:** The worry is that, if there is a suspicion that elements of reform may have been mixed in with the codification, that will lead to extra expense as lawyers explore whether, and to what extent, that is the case. The same point was made trenchantly by Lord Hoffmann on the Second Reading of Lord Lester's Bill. The CJC is of the view that, if one looks at the first four clauses of the Bill, they really contain very little by way of substance that would amend the law. The Bill is entitled "A Bill to Amend the law of defamation", but one has only to read the evidence of the Lord Chancellor and Lord McNally to see that, in fact, it seeks to consolidate—or, as I would prefer to say, codify—the law. That is a real danger, because it deprives the judiciary of that flexibility to which Mr Tomlinson has referred, which is the ability to develop Reynolds in the way that it was developed and expanded in Jameel and the ability to look at it again, as the Supreme Court will do when the Flood case comes before it this October.

**Q575 The Chairman:** Let me just chip in a question before Mr Phillips puts his last point. You may think that I am being mischievous—in which case I invite you to forgive me—but, from the evidence that the Committee has heard, we might be tempted to assume that the lawyers like the current law the way it is and the non-lawyer man in the street thinks that the Defamation Act does not really work as well as it ought to do. That thought—fairly or unfairly, I hasten to add—has probably been exacerbated by a whole series of privacy cases that fall outside the realms of the draft Bill. Is there a sense in which this Committee might be hearing lawyers saying, "We are doing okay, thank you very much, so don't rock the boat", or are you trying to persuade us that there is genuinely a fundamental problem that we should wrap our minds around?

**Paul Tweed:** I will try to answer that. If I may, let me give just one analogy that I think might go some way towards reassuring you in that regard, Lord Mawhinney. The largest group of claimant clients for which I act is made up of journalists, and the second-largest group is made up of lawyers. That tells you that both those groups know when a wrong has been done and when they should be entitled to a remedy. The problem is that the ordinary man in the street has been terrified by the press coverage that we have seen over the past 18 months. People who come in to see me say, "If I even contemplate a libel action, I will be pilloried even further in the press." It is not a question of lawyers trying to maintain the status quo or trying to discourage development. I am up for anything that will bring greater access to justice for the ordinary man in the street, who has no financial means of bringing a libel action at the moment. We are just not getting claims in—it is as simple as that—other than from people in the know.

**Desmond Browne QC:** I would certainly not describe the question as mischievous, but on the other hand my own feeling is that the Bill is something of a

missed opportunity. Far from wanting to preserve the existing law, I think that the Bill is something of a stop-gap measure. Indeed, the Bill was promoted by the Lord Chancellor as merely clarifying the law and putting it “in more modern language” and in statute, without seeking to change the law. My criticism is that insufficient thought has been given to the law of defamation overall. There are a number of issues that could have been addressed, including such matters as the so-called single meaning rule, which have not been addressed because insufficient time and thought have been given to the whole of the law.

**Q576 The Chairman:** In as much as this is the first time that the issue of the single meaning rule has been raised in this Committee, would you be kind enough subsequently to drop us a one-page note on what you think is the missed opportunity in this regard and what might be a useful remedy?

**Desmond Browne QC:** Yes, that is given in the CJC paper. Particularly important, in my opinion, is that regard should be had when assessing damages to other meanings that reasonable people could attach to the words.

**The Chairman:** I understand that the point is raised in the CJC submission, but given that you personally are giving evidence—if you do not think that this is too much of an imposition—would you mind providing a one-page note on that? I think that that would be welcomed by my colleagues.

Mr Phillips, you have one more question.

**Q577 Stephen Phillips:** My final question is in two parts, the first of which relates to the preamble, to which Desmond Browne has already drawn attention. Given that there have been some extremely successful codifications of the common law in various areas—one thinks, for example, of the Indian Evidence Act, which was a masterful piece of drafting, as I am sure you know—if we make it clear that the Bill seeks not only to amend the law but to codify existing rules, would that assist in reducing costs? That is the first part of my question.

The second part of my question is this: since the Committee may primarily be concerned with reducing the costs associated with libel actions, should we be much more interested in active case management and altering procedural rules than in the substance of the Bill itself?

**Desmond Browne QC:** If I may deal with the second part of the question first, the answer is yes.

On the first part of your question, the current position in relation to Clauses 3 and 4 is that they are apparently substitutes for the existing law because those clauses would, respectively, abolish the defences of justification and honest opinion. However, there is a curiosity with Clause 2, which the reader might think codifies Reynolds, in that it does not abolish Reynolds. I personally think that it is a recipe for confusion and expense if you have the statutory Clause 2 Reynolds defence running alongside the common law one. With respect, I do not understand the draftsman’s thinking on that.

**Adrienne Page QC:** On that point, and partly in answer to the Lord Chairman’s previous question, I think that Clause 2 does not actually reflect the law as it currently is. I would say that it is actually more limiting than currently because there is more objectivity built into the way that it is drafted than is necessarily the case in the common law. The danger in codifying is that you put into words something that then becomes the Bible that everyone goes to. That not only prevents incremental development and adjustment to particular situations but inevitably results in people looking for where the differences are. If the provision does not actually

reflect the existing law, a declaration that it codifies the existing law will not help matters at all, as far as I can see.

**Hugh Tomlinson QC:** In response to both questions, I would just add that I think that the reason why you get different reactions from lawyers and from non-lawyers is partly because we have to deal on a daily basis with how the law works in the interests of our clients. It is in the interests of our clients to have the law as clear and accessible as possible, but from bitter practical experience we know what happens when you bring in a new statutory provision. After the Defamation Act 1996 was brought into force, it took several years and quite a lot of litigation before people worked out exactly what it meant. For our clients, that is fantastically unhelpful because, when they ask what is going on, we need to try to explain it to them. We are therefore cautious about making changes that could make things worse rather than better.

On codification, as I answered before, if the Bill is intended to codify, it should make that clear. At the moment, the Bill is a mixture of codification and amendment, which is exactly a recipe for further litigation because of the lack of clarity.

On active case management and procedural matters, I think that those are at the heart of the difficulties that arise. At the heart of many of the notorious cases that we have all read about, which many of us think should never have proceeded, what was needed was for the judge to intervene and to get rid of those cases. At the moment, judges have been hampered by the presence of the jury and certain procedural rules, but there is absolutely no reason why they should not be given the powers to do something about those cases in the future.

**Q578 The Chairman:** Before I call Lord Marks, I seek clarification on just one point. Having been privileged to be in this place for over 30 years, casting my vote for legislation regularly—and probably too frequently—I find it hard to think of any legislation that goes through this place that does not require some degree of litigation to clarify some aspects of it. Why should we attach particular attention to an argument that says, “Be careful, Committee, because there might be 18 months of litigation to clarify the legislation”, when that is probably par for the course for any legislation that goes through this place? Those of us who cast their votes have this idealised belief that we are doing something for the medium and long-term that is good, even if it involves a certain amount of short-term turbulence to get there. What is special about defamation that it should not go through that process?

**Hugh Tomlinson QC:** There is nothing special about defamation; what is special is the aim of this legislation. As I understand it, the draft Bill aims to make things clearer, cheaper, more accessible and—to use that rather unfortunate phrase—more user-friendly. If the legislation does not achieve that purpose, that is a criticism of the way that it is set out. If the position is that, because of the mix of amendment and codification in these clauses, after two years of litigation we are actually back at square one—we simply have the same position that people understood to be the case before the legislation was brought in, but it has taken litigation to achieve that—the Bill will have entirely failed in its purpose.

**Desmond Browne QC:** I think that the answer to your question, Lord Chairman, is the issue of cost. Everyone agrees that the real chilling effect is not the substantive law but the colossal cost of libel litigation. I do not think that one should in any way be blind to the impact on cost of uncertainty in the law. That is why I would urge that, in so far as there is any proposed new or reformed law in the Bill, the case for it should be made out very clearly in order to justify the risk of the increased costs that have been referred to.

**Q579 Lord Marks of Henley-on-Thames:** Your answers in relation to substantial harm have largely proceeded on the basis that the draft Bill does no more than restate the common law. When the Lord Chancellor and the Minister of State, Lord McNally, gave evidence to us, they made it clear—indeed, this was our impression based on the evidence that we had heard—that the intention of the Bill is to “raise the bar” by introducing a higher standard and excluding more cases. If that is right, Lord Mackay’s evidence comes into play, where he called for a serious and substantial harm test. Lord Mackay also asked the Committee to consider including reference to the seriousness of the allegation, although he put that as a substitute rather than as an addition. I have two questions. First, if the Committee wishes to raise the bar, how should it do so? Secondly, as part of that process, is there a role for having guidance in the statute on the factors to which the court is to have regard in considering whether the test is met for the early resolution procedure?

**Desmond Browne QC:** I think that the expansion of the section is likely to lead to mini-trials very early on. That is my criticism of Lord Mackay’s proposal that there should be an inquest into the existing reputation of the claimant at this stage. The problem, which I do not need to outline for you, Lord Marks, is that very often in the law “substantial” is used not to mean substantial as the lay man understands it but simply “non-negligible”. That is why, it seems to me at any rate, Clause 1 is merely the codification of the Thornton position, and indeed that is how it has been promoted by both the Ministry of Justice and the Lord Chancellor.

**Hugh Tomlinson QC:** We all know that we do not want trivial cases to proceed and that the law should not be concerned with them, but the trouble is that circumstances, as you know, Lord Marks, differ infinitely and each individual case throws up particular difficulties. That is why, if you set out to provide a list of factors, you would have to make it non-exhaustive. You would need a position where the court had, as it were, discretion to let cases go forward if serious public interest issues were involved for whatever reason. Therefore, you risk having a complicated mechanism that does not actually do the job that you want it to do, which is to get rid of the trivial cases. I certainly cannot think of a drafting mechanism that would exclude the bad cases but keep the good ones in. That is the problem.

**Q580 Lord Marks of Henley-on-Thames:** I completely accept that there is a role for judicial discretion, but I just wonder whether it might be sensible to include, much as the drafting for the substitute of the Reynolds defence does, a list of factors to which the court may have regard. I do not have a concluded view, but I wonder whether that is sensible.

**Adrienne Page QC:** That may be sensible in terms of chilling claims—of course, one of the aims is not merely to knock cases out—as the developments in the law may chill claims in the same way as they chill free speech or chill defences. Although I do not think that it is necessary, I certainly think that there is potentially a role for a statement by Parliament that there must be serious and substantial harm—“serious” is a good addition—to the reputation of the claimant before a statement is actionable. If there was going to be a list of non-exhaustive factors, I suppose that, by the same token, that could be an indication to the public and to lawyers of the circumstances in which they may find themselves at a dead end with a costs bill appearing pretty peremptorily after the case has been started. That may have, as it were, a PR benefit, but I would not have thought that it was necessary, particularly because I think that the decision by Mr Justice Tugendhat in the case of Thornton has raised the bar and is now being applied by the other judges.

**The Chairman:** If on reflection any of the witnesses have any further thoughts on this question, we would be happy to hear from them if they want to drop us a note. Lord Marks has clearly bowled a particularly good ball on this occasion—as he frequently does, because this is not the first time that we have had a pause in which people have wanted to think.

**Desmond Browne QC:** I make no appeal for LBW.

**Q581 Mr Lammy:** My question is just a point of clarification. Did Desmond Browne suggest that we should not move forward with the first four clauses of the Bill? Have I understood that right?

**Desmond Browne QC:** Well, I was not quite saying that. I was simply saying that, if the Committee believes that there is a point in a pure codification and if these clauses are no more than pure codification—which seems to be what the Lord Chancellor and Lord McNally said, although you heard them whereas I have only read their comments—then it is important, as has been said earlier, that it should be made clear that it is pure codification. I have no objection to codification as such. As Mr Phillips said, codification has sometimes turned out to be very useful. However, in order to minimise the opportunity for people to try to claim that they have spotted fragments of reform amidst the codification, Parliament needs to make it very clear what the object of the legislation is. “A Bill to Amend the law of defamation” is not the most helpful of titles.

**Q582 The Chairman:** Mr Browne, I think that it might be helpful if you were to read closely the evidence given by the Lord Chancellor and the Minister of State. I think that their remarks could be interpreted as having moved across the spectrum of opinion just a little during the course of their time with us. Where they started and where they finished might not have been totally identical, and we will have to wrestle with that when we come to write our report.

**Q583 Mr Lammy:** Do the rest of the panel concur with Mr Browne’s view?

**Adrienne Page QC:** Yes.

**Hugh Tomlinson QC:** Yes.

**Paul Tweed:** Yes.

**Q584 Mr Lammy:** We have not had much discussion of Clause 4, “Honest opinion”. Do you think that the balance is right there?

**Adrienne Page QC:** My own view is no. I have two or three problems with Clause 4. One problem that makes the old “fair comment”—or “honest opinion” as we should now call it—such a difficult defence is working out what is a statement of opinion and what is a statement of fact. What Lord Nicholls said in the *Cheng* case, which crystallises the principles currently, is that the statement complained of must be recognisable as a statement of opinion. If the clause were to say, “Condition 1 is that the statement complained of is recognisable as a statement of opinion”, that would be a lot more helpful than saying that it must be a statement of opinion. A lot of things are recognisable as such if you apply common sense—I am afraid to say, but the *Simon Singh* case seems an obvious example of that—where it would be obvious that someone must be expressing an opinion, even though it may not necessarily be dressed up as, “Because of this, I therefore think that.”

I think that condition 2 goes more adversely to free speech than it needs to do. In the *Spiller* case in the Supreme Court, Lord Phillips proposed that the statement does not have to be on a matter of public interest. Why cannot one express an opinion on anything, provided that it is recognisable as an opinion and provided—this

is my third concern about this clause—that, as the Supreme Court said in that case, the general factual basis is indicated? The example that is often given—this may derive from Spiller, but I cannot now remember—is of the barrister who is said to be a disgrace. The barrister might be a disgrace because he tells lies in court or because he turns up with his wig askew. Unless you know roughly the factual subject matter, you cannot judge the seriousness of the opinion. If it is recognisable as an opinion, you can see that it is one man’s opinion.

In addition to those concerns, I might also highlight that the proposal at condition 3 in relation to an “opinion on the basis of ... a privileged statement” could be going too far, because it is difficult to know whether something is privileged. I would prefer that it was defined as “absolutely privileged”, so that you could express any opinion on something that is said in Parliament or in the courts but not just generally on anything that is protected by qualified privilege, particularly as qualified privilege gets wider and wider.

**Q585 Lord Morris of Aberavon:** I want to raise two issues. First, on the issue of clarification and codification, which we were advised is what the Bill is about, the evidence that we heard recently from Baroness Scotland made some of us sit up when she said that we would create a cottage industry of litigation if this Bill was passed because, as one of you said a few moments ago, there would be litigation on what it meant. What are the likely points of litigation—I may be asking a great deal—and what can be done in the Bill to reduce the potential of those matters? As I have told the Committee before, in my time I have created cottage industries of litigation for which the Bar has been eternally—or at least for a short time—grateful to me, but I do not want to be a party to that again if I can help it.

**Desmond Browne QC:** Particularly important is Clause 8, which would provide for a reduction in the circumstances in which there would be a trial with a jury because a great deal flows from that, particularly in relation to case management. The recent cases of Mark Lewis and of Cook v Telegraph Media Group have underlined the difficulties that a judge has in intervening to make a ruling as to the meaning of the words while the question of mode of trial has still not been decided. If the number of cases with the potential for a trial with a jury is to be dramatically reduced, the judges can start to intervene at the early stage that annex D to the Ministry of Justice’s consultation paper proposes.

**Hugh Tomlinson QC:** The more complex Clause 1 is made, the more litigation it will generate. At the moment, Clause 1 says something that I think most people agree with, which is essentially consistent with the common law position, so people would know where they stood, but the more words that are added, the more litigation Clause 1 is going to generate. Interestingly, Clause 4 was mentioned as a possible codification. It is a mixture of amendment and codification. I think it would be a particular generator of difficulty, because it changes the law of fair comment in subtle ways that are not very clear. Nobody will really know how it works and I suspect that people will want to take advantage of it, so they will have a lot of fun over Clause 4 for a period.

There have been debates on Clause 2. It is slightly different from the Lester version. I think the general view now is that Clause 2 is codificatory, so people may think it just means the same as the common law, so there will not be litigation over it, but there may be difficulties about it. Any amended version of Clause 1 or Clause 4 seem to me to be the best starting points for cottage industries.

**Paul Tweed:** I totally agree with that. If we could go back to that example of fair comment being changed to honest opinion, that change has already been made

in the recent Irish Defamation Act. I am not sure whether Lord Lester took the expression from that. When I first saw that, I thought it was a much better expression. You seem to be able to get your head round honest opinion and understand what it means, in comparison to fair comment. The cottage industry has already started on what is honest opinion. There is already extensive debate on whether a journalist genuinely held that honest belief. I do not think the codification or the change in descriptive terminology in the new Bill is going to help us. It is not going to reduce costs. There is a great risk that it will increase debate, not just in the short term but possibly in the long term, going forward. We have to look at that carefully.

I am a great believer in change and I am 100% behind anything that improves accessibility to justice, but I have not seen anything here. If we use the Irish Act as our test run, it has been in operation for a year and a half and perhaps it is still slightly premature, but there has been no magic wand appearing for that, I am afraid.

**Desmond Browne QC:** I would simply say, since Mr Tomlinson has raised Clause 4, that it seems to me that Clause 4(4)(b) could lead not so much to a cottage industry as to a stately home industry in litigation. Ms Page has already drawn attention to the fact that she thinks the words “privileged statement” should be trimmed to mean “absolutely privileged statement”. I would admit of the possibility that an honest opinion could be expressed on something that was privileged as a matter of statute—in other words, qualified privilege—because it finds a place in the Schedule to the Act. I certainly think that it should not be permitted and may not be intended that it should cover those privileged statements which are privileged at common law by reason of the community of interest between the maker of the statement and the person to whom it was made. There is an area where this Committee could make a tremendous contribution in clearing up a potential miasma.

**Q586 Lord Morris of Aberavon:** I am grateful for the comments on Clause 4. The Bar Council Law Reform Committee wanted to drop Clauses 1, 2 and 3. How far would you now go along with that view, because of the issue of fossilisation and the diminishing of judicial discretion, and adding to confusion as regards comparisons between these clauses and the common law?

**Desmond Browne QC:** As I have already said on more than one occasion, as have other witnesses, I think Parliament has to make it clear whether this is pure codification. If it is, fine; if it is not, the elements of reform need to be flagged up. I think what the Law Reform Committee of the Bar Council had in mind was the potential for extra costs in litigation, as well as expressing some scepticism about the point of pure codification. Speaking for myself, I do not believe that if the object of the exercise is to make them more clear to the man and woman in the street, anyone reading Clauses 2, 3 and 4 in particular will be assisted to a better understanding of the law.

**Q587 Lord Morris of Aberavon:** Would it help if a clever draftsman made it quite clear what is clarification and what is amendment?

**Desmond Browne QC:** Yes it would

**Q588 Lord Morris of Aberavon:** The second issue is on costs. In the impression of the man in the street, why are they so substantial in defamation? Can anything be done in the field of law, or is it principally in procedure, case management and judicial culture that one could find some avenue for reducing costs?

**Desmond Browne QC:** The costs in defamation are not, in themselves, greatly in excess of those charged in commercial litigation.

**Lord Morris of Aberavon:** That is a high bar in itself.

**Desmond Browne QC:** Indeed, it is a high bar in itself. What is important in relation to defamation is the chilling effect that those costs have. It is in those circumstances that Lord Justice Jackson's message is so pressing. He emphasises that it is not simply cost management that the court must have regard to. As the Committee probably knows, there is a pilot scheme being carried on in London in relation to cost budgeting. He makes the point that the way to control costs is through case management. That is the primary consideration.

**Paul Tweed:** I fully support case management. If I may give you an example from a court in Belfast at the moment, there are only a handful of libel actions at any one time, but the judge in charge of the list regularly reviews cases and puts what pressure he can on the parties to try to address settlement. It would be very helpful in Belfast, London or Dublin if the judge had a statutory power to enforce mediation at an early stage to get the parties together. I act for both claimants and defendants. When I am acting for newspapers, I spend my time trying to get the claimants to come to the table to negotiate and get a case resolved quickly. When I am acting for claimants, I spend my time getting the newspapers to come and talk to me. Two years ago, I wrote to most of the in-house legal departments of the main national newspapers here in London, suggesting mediation. I only got one response that could be described as positive, which was from Alastair Brett of the *Sunday Times*. The rest either did not respond to me or, at best, were totally unenthusiastic.

I am looking at this from a practical point of view. My clients, claimants and defendants, want to get the case resolved before costs mount up, but this is not the press perception. I cannot speak for all my colleagues, but strictly for myself—and I am more than happy to stand by everything I say today—I try to get cases settled early, no matter who I am acting for. Mediation is one way forward, and possibly arbitration if we had the correct procedure. It must be independent mediation. A suggestion was made at one of the earlier hearings that the PCC could step into that role. Somebody is obviously having a laugh there, but the PCC is made up largely of editors. I had to read it twice when I saw it. There are plenty of mediation bodies out there from the private sector and from the public sector who could step in and fill the role. It is the best way forward. Defamation litigation is screaming out for it, but there must be something like the California approach where there is a statutory requirement that you must mediate before you litigate.

**The Chairman:** Mr Tweed, we have on this Committee a member of the PCC, who had caught my eye and will probably want to ask you a question before I call another one.

**Q589 Lord Grade of Yarmouth:** Just as a matter of record, the PCC is not made up of editors. There are a number of lay commissioners who are entirely independent. I am very happy to take the point up with Mr Tweed, perhaps outside the meeting, to explain to him how the PCC is constituted.

**Paul Tweed:** I have the list of members here. The editor-in-chief of the *Daily Mail* is chairman of your Editorial Code Committee. I am not questioning the integrity of the good people at the PCC—don't get me wrong—but there has to be a public perception of independence. Even Ian Hislop, I think it is not stretching it too far to suggest, would—

**Lord Grade of Yarmouth:** It is a big subject outside the remit of this Committee.

**Q590 The Chairman:** Let me ask you a question arising out of this, and then I want to go back to something that Mr Browne said, for clarification. When some of the



newspaper editors were here, they were positive about the thought of mediation. They probably favoured doing it in a parallel process to the PCC rather than having it embedded in a revised PCC. They even contemplated the prospect that the newspapers might be prepared to fund such an idea. Given your comments about the PCC and the editors on it, would you want to encourage the Committee to pursue that bit of evidence further, or do you think that what you are talking about, in terms of mediation, has to be editor-light?

**Paul Tweed:** It has got to be transparent and there has to be a sense of public confidence that there is independence and impartiality. I emphasise that I am not directly criticising the PCC or the people who make it up, but they would not have an independent role in mediation. If we are to go down this route, we have to do it properly. There have to be people who have no interest in the situation. There are plenty of them, including retired judges and many other people who are available to phone up. That is not an expensive option. I cannot believe that this has not been grasped before now, and particularly on the part of the press. They have not shown the enthusiasm for this aspect that I would expect from them. I invite this to be put to them directly, because I think it is the most important aspect. If we are looking at either codifying the law or making changes, this should be given priority.

**Q591 The Chairman:** Mr Browne, my clarification question for you is, when we got on to cost reduction and you had the whole field of play in front of you, your answer was simply a reference to the Jackson report on case management. You did not mention mediation and you did not mention what lawyers might be able to do to cut the costs that they add to the bill. I was wondering why you chose one out of three.

**Desmond Browne QC:** Mediation, I promise you, was not at the back of my mind. I attended last night the launch of the Early Resolution Group and spoke in favour of it. The reason that I answered in the way that I did is that I regard early resolution, whether by the judge or by mediation, or even by arbitration, as absolutely essential. These cases need to be got under control at the earliest possible moment, and mediation and arbitration potentially have the great advantage that they can be put into effect even before the litigation starts, but of course it requires consensus. My experience has been that, more often than you might expect, the obstacle to mediation and arbitration comes not from the claimant, but from the defendant.

**Q592 Stephen Phillips:** I start with mediation if I may. I speak as a commercial practitioner. I suspect we have been more familiar with mediation than those who practise in defamation. One of the bars to successfully reaching an amicable compromise during mediation is a lack of clarity on the legal position, which means that the advisers cannot tell their clients where the litigation is likely to end up. If the Bill was to become law in its current form, what effect would that have on any mediation proposals that the Committee might make?

**Hugh Tomlinson QC:** I do not think that it would have any substantial effect at all. Whether one approves or disapproves of the codification provisions and the amendments, they are not going to radically recast the law of defamation or make the lines any brighter. Mediation is a very valuable tool to keep down costs and to get rid of cases at the earliest possible stage. The trouble is, as you will know from commercial mediation, it takes two to tango. My experience over the years is that whichever party feels that it is in a very strong position—it may be the newspaper or it may be the claimant—shows a reluctance to go into mediation, because they want capitulation. You can require people to take part in mediation. I was involved in one last week where a defendant, thinking they were on strong ground, turned up with

seven lawyers and spent the whole day making increasingly unreasonable demands. People exploit the mediation process, as you will know from experience of it. It can do certain positive things, but in the end it is not a solution to resolution by the courts.

**Q593 The Chairman:** Would it help the resolution process if the judge had access to information about how the mediation process was conducted and he or she would then be free to draw—I understand that this would have to be statutory—

**Hugh Tomlinson QC:** I think that is a very dangerous course. The point about mediation is that people can be open and state their position frankly. It is without prejudice and it can be open. If you thought that someone was going to be reading this afterwards and making judicial decisions based on it, you would go into it in a completely different spirit. I also went to the Early Resolution launch yesterday and I am one of the people on that panel, as Mr Browne is. It is a valuable tool, but everyone has to be aware that it will work only if people will co-operate. If people will not co-operate, in the end the courts have to resolve the issue.

**Q594 The Chairman:** So mediation, as discussed with us, is starting to sound more like a pipe-dream in the real world, rather than an answer to the problem?

**Hugh Tomlinson QC:** It is a partial answer to the problem. It can be very useful and I agree that the courts ought to take active steps to encourage people to engage in it. There was an action in the Court of Appeal very recently when the Court sent the parties away and said “Go and mediate”, because this was obviously a case that cried out for it. That is a perfectly proper and sensible approach and the courts should take an active view, but it will not solve every case.

**Q595 Stephen Phillips:** There is, of course, a middle way, in response to the Lord Chairman’s point, which is again the approach adopted in the commercial court—leading the way, as usual—which is to have some form of questioning on the pre-trial review, stating what has become of the mediation and why, if it has failed, it has done so, without prejudice to matters of privilege. That is something that we could propose in the context of defamation, is it not?

**Hugh Tomlinson QC:** That is a perfectly sensible way to do it and those are the kinds of procedural changes that might make a difference.

**Q596 Stephen Phillips:** Both Mr Browne and Mr Tweed mentioned arbitration. There is nothing to stop parties to a defamation case entering into an ad hoc arbitration agreement, which would be governed by the 1996 Act. Has that ever happened? If it has not happened—or even if it has—how could we assist parties to resolve their differences through those means?

**Desmond Browne QC:** It has happened for some time. For some years Mr Brett, the man behind the Early Resolution Group, had a scheme that the *Times* ran for arbitration. When used, it proved extremely successful in resolving issues, but they related to meaning. I think I did three cases as an arbitrator under that scheme. In each case, once the meaning had been determined, the case settled. I believe from Alastair Brett that that was true of other arbitrations on meaning. It will not be the “open sesame” in every case, but there will be a substantial number of cases where it will assist getting to grips with meaning at the early stage. If it can be done before litigation, well and good; if litigation starts, then one would hope that it would be done as early as possible by a judge. I should just say that the Brett scheme involved the arbitrator sitting with two lay assessors. I found that valuable. I know there are people who lament the disappearance of the jury, which for practical

reasons I favour, but at any rate the lay assessors kept the lay element in the decision process.

**Paul Tweed:** I have had no personal experience of arbitration, but I would totally endorse what Desmond has said and I would be more than happy to give it a shot, particularly in relation to meanings, because that is the area, invariably, when we send out a letter of claim, where the response comes back that this could not possibly bear this meaning, et cetera. That is a time when arbitration would be very useful, in my view.

**Q597 Lord Morris of Aberavon:** Could I have clarification of the Lord Chairman's question about the judge having knowledge of the mediation? It is not a field that I know anything about. Are mediation procedures not without prejudice, and therefore it would be impossible for that to be done?

**The Chairman:** It would be impossible to be done as the present circumstances are.

**Lord Morris of Aberavon:** It is the normal procedure of negotiation that they are without prejudice.

**The Chairman:** And the judge being statutorily made aware of the lines that were pursued by the two parties would prejudice what?

**Hugh Tomlinson QC:** The point is, as I think I said in answer, that it would mean that people would tailor the way they approached the mediation. They would bear in mind that the judge was going to know, so they would not actually be putting their true position; they would be putting a position with one eye on the judge. That is why these things are protected.

**Paul Tweed:** If the judge was able to draw an inference from either party refusing point blank to participate in mediation, which does happen, might not that be drawn to his attention—if it was a judge alone—to take into account at trial? Particularly when we hear complaints about the escalating legal costs, if the defendant refused to participate, for instance, I would have thought that that would be relevant.

**Baroness Hayter of Kentish Town:** I have two unrelated questions. One is on costs and then I would like to go further on codification. En passant, I wonder whether the former Chairman of the Bar's eyebrows went up about Mr Tomlinson's case of seven lawyers attending a hearing with their client and making unrealistic statements and I wonder whether they were acting in the best interests of their client. But my question on costs is different. All of you, I assume, are making a very nice income out of this area of defamation. What would worry you most? Which of our recommendations on costs would most injure the income of lawyers in this, and would therefore be the most successful recommendation we could make?

**Desmond Browne QC:** Forgive me for saying so, but that is a somewhat cynical question. We have come here to assist this Committee. Speaking for myself, I act for both claimants and defendants. I have tried to resist tribal loyalties. In so far as I have suggested areas in which the law could be developed more extensively, I have tried to do so dispassionately. I can assure you, Lady Hayter, that neither I nor any of the others here have come simply in order to prosecute a particular line of argument based on the preservation of our income.

**Q598 Baroness Hayter of Kentish Town:** Nor was I suggesting that. You have read all our evidence. I was wondering whether there are areas—such as it should not be heard in front of the High Court but could go to a county court—that would make an enormous difference.

**Desmond Browne QC:** I do not think that the county court would make any difference, nor indeed the system of tribunals that was proposed by Professor Mullis

and Dr Scott, which might add to the cost overall. The important thing is to get to grips with the case as soon as possible. If we are really concerned with the economic impact on individual barristers, the thing that causes greatest concern, since you have raised it, is the question of CFAs. The disappearance of CFAs will have a very adverse effect on access to justice for claimants and, indeed, for defendants. It is sometimes overlooked that defendants, too, are represented on CFAs. Simon Singh would not have got out of the difficulties that he got into in the Court of Appeal had not Ms Page been prepared to represent him on a CFA. I assure you that we do not come here simply to preserve our own incomes. You can think the worst of us if you wish.

**Baroness Hayter of Kentish Town:** That is why I was suggesting you would know best. Can I ask a question on CFAs?

**The Chairman:** Can I just chip in and say that I do not believe that that was what Baroness Hayter was suggesting, but if that interpretation was attached, can I, on behalf of the whole Committee including Baroness Hayter, make it clear that that is not in the minds of this Committee? It is not in any sense motivating our questions. We are grateful to have such experts willing to talk to us. I hope you will accept that.

**Q599 Baroness Hayter of Kentish Town:** Mr Tweed said that the CFA does not exist in Northern Ireland, which I am quite interested in, from what Mr Browne has now said. This is therefore a vehicle that Mr Tweed's clients do not have access to.

**Paul Tweed:** No, they do not. Unfortunately, that has deprived the majority of people of access to justice. It is a major difficulty. I am prepared to consider anything. What I need for my claimant clients is prevention. On a Friday afternoon, we get 10 or 20 questions from a national newspaper out of the blue. The journalist may have had a week to research his article and my client is expected to answer those questions within 24 hours for their publication deadline of 6.15 on a Saturday, or whatever it is. My problem is not a question of costs that my client is facing—that is just one aspect of it—it is getting it stopped. I am going to say something that is contrary to the whole flow here, and I am sure that all three of my colleagues will disagree with this, but ironically one of the best tools that I have in terms of prevention or to get early settlement is a threat of an expensive jury action. I have very few tools available to me for a claimant in the current climate, certainly, if I am operating in Northern Ireland as opposed to London. You will say that that is a chilling effect and that I am putting pressure on the press. The big difficulty I have in the reverse is that it is not so much the chilling effect on the press that I am worried about; it is the pneumonia that the man in the street is getting as a result of being frightened off taking a case in the first place.

One of the proposals put forward under the Southern Irish system is a fast-track application only for apology or clarification that you can put into the circuit court, which is the equivalent of the county court. It has not been utilised as much as we thought it would be. It may be early days, but again, the problem that we have is that the banner headline is there: "John Smith is accused of being a drug addict" or whatever. Once that happens, that is gone and what we are debating today is too late for the ordinary person. We have quite a few clients who are perhaps rich and famous, but they are the only ones that can go for retribution or retrospective vindication of their clients, because they can afford to do so. It is not lawyers trying to line their pockets. I would challenge anyone, outside the protection of this building or whatever, to produce a client of mine who has accused me of taking advantage of the system. But I have that frustrating scenario where I am reading the press and it is a different world.

We have to try to get access to justice for everyone, however that is done. Mediation would be my primary objective. As you were saying, a county court might provide something, but I have to ask what that will achieve down the road. To get a case heard in the county court, even, you are talking about months at best. We have an Irish case that we ran for six days, where a very wealthy corporation was the defendant and had decided for its own publicity purposes to run the case. My client only wanted a payment to charity from the outset, and she wanted the offending material that called her a racist to be taken down from their website. They just would not contemplate it. They ran the case and we fought it for six days. The judge managed the case magnificently. He did whatever he could to try to keep it under control, but he said at the end that he was absolutely appalled that this was still on their website as we were hearing the case. It was only removed after we had our award of damages and the case was over.

This is the type of scenario that we are trying to deal with and this is where we have to focus our minds. I look at the Bill and I try to ask myself how that is going to help clients in that situation. I cannot see it, unfortunately.

**Hugh Tomlinson QC:** I just want to make two points. Of course you can reduce the costs of defamation cases to almost zero by removing the ability of people to sue for defamation. A proposal was made about having a *New York Times* and Sullivan-style defence in Clause 2. That would make it impossible in practice for people to sue in defamation in most cases, as has happened in the United States. That would certainly reduce the amount that lawyers earn, but it would not serve a public purpose, in the sense that it will mean that false and damaging material is in circulation and is not corrected.

The other side of the costs matter that you have to bear in mind is that costs are run up on both sides. All of us over the years have acted for both claimants and defendants. Claimants want to spend money to vindicate their reputation; defendants want to spend money to vindicate the stance they have taken in publishing what they have published. It is not a one-way street of people earning money by suing defenceless newspapers; it is a two-way street of both sets of people trying to vindicate their rights. How you control that applies across the whole range of litigation in the English courts, as has been said already. It is a very complex question that people have tried to address over the years. It is not a defamation-specific problem at all.

**Q600 Baroness Hayter of Kentish Town:** Can I turn to an issue that is particularly for Mr Tweed and Mr Tomlinson, which is going well beyond codification? It is the issue of non-natural persons being able to use defamation. If we put aside for a moment the very small charity or corner shop accused of selling cigarettes to under-age kids, as well as other small corporates—I think there is a slight difference between Mr Tweed and Mr Tomlinson on this, but I cannot remember about the others on the panel—do you think that either malicious falsehood or a declaration of falsity could be sufficient to replace access to defamation for corporates?

**Hugh Tomlinson QC:** Malicious falsehood is a non-starter. Malicious falsehood actions effectively require positive proof of dishonesty by the publisher. Successful actions are vanishingly rare because the burden of proof is so high. I think that taking corporations entirely out of the law of defamation is potentially very problematic, because it does not matter how big the corporation is, if something is said that is seriously damaging to their business and they are left with no remedy at all, that is an unacceptable situation. I am a great believer in the remedy of a declaration of falsity. In Australia there is a provision that corporations beyond a

certain size cannot sue for libel. You might have such a provision that says you cannot sue for damages, but you can sue for declaration of falsity. I would be very uncomfortable about a law that allowed newspapers or anybody else to defame a corporation and leave them effectively with no remedy at all.

**Paul Tweed:** I would agree with Hugh, but I should like to make two additional points. If you take away the right of a corporation to sue, you will just have individual directors taking litigation in their own names. Secondly, bear in mind that the large corporations that we are talking about are also the defendant publishers. It would be very unfair to have one law for one side and a different law for the other. A major publishing corporation can have the protection of the law, so to speak, so why shouldn't a claimant corporation?

**Baroness Hayter of Kentish Town:** I am sorry I cannot remember whether either of you had commented on this in your earlier remarks.

**Adrienne Page QC:** I entirely agree and I have nothing more to add.

**Desmond Browne QC:** I would simply add that I am conscious that there have been cases where the perception has been that a big company is bullying a critic into silence. The way to deal with that is case management again, with the judge redressing the inequality of arms by limiting the costs that can be expended and recovered. Speaking for myself, I have inquired about the situation in Sydney in relation to the limit on companies suing by reference to the number of employees. That has led to anomalies, because, as one would expect, the larger the company, the greater the damage that can be done. Take a chocolate company whose products are said to be tainted by e.coli. There are issues that the previous Lord Chancellor drew to the attention of the Whittingdale Committee, which are very important. On large companies depend the employment of large numbers of individuals. If their economic prowess is damaged by defamation, that can be very damaging to the prospects of employment. Ditto, if the share price is damaged—we all know that a company cannot recover compensation for the injury to its share price—there is a detrimental effect on our pensions, as the Lord Chancellor of the previous Government pointed out.

The important thing is to concentrate on redressing the inequality of arms, where it is the case, not simply to rule out claims by companies altogether. I entirely agree about declarations of falsity. There is a place for them here, as Jonathan Heawood of PEN pointed out, and in many other areas, in particular in cases where a claimant is prevented from suing by the operation of the new single publication rule, which was a recommendation of the Whittingdale Committee, and in cases where there is a Reynolds defence, so that the claimant is prevented from recovering damages but the public do not know where the truth lies unless there is a right to a declaration of falsity. If Reynolds is based on statements that are in the public interest as a precondition, the public needs to know where the truth lies and it cannot just be left hanging in the air.

**Q601 Lord Grade of Yarmouth:** Very briefly on juries, is it a safe assumption to say that you all support Clause 8?

**Paul Tweed:** No, I am afraid I do not.

**Q602 Lord Grade of Yarmouth:** If Clause 8 goes forward, do you think there should be some guidance on the face of the Bill to guide judges in deciding whether to admit a jury?

**Adrienne Page QC:** Speaking for myself, yes, I do.

**Q603 Lord Grade of Yarmouth:** And what guidance should there be?

**Adrienne Page QC:** I have no views on what the guidance should be, I just think there should be guidance. Otherwise we are still left with the uncertainty and the risk that it will be argued that until the issues are more defined down the line, a judge could not make a decision. So we need to know what Parliament has in mind in order to give effect to it.

**Desmond Browne QC:** Can I just flesh out that answer? The Committee may find helpful the recent judgment of Mr Justice Tugendhat in the Mark Lewis case, where he saw a discretion normally being exercised in favour of trial by jury, where the defendant is the state or a public authority. Mr Tomlinson is the expert on malicious prosecution cases against the police, but that is an area where juries remain and the same policy considerations seem to me to point to that being a limited exception to the general tendency that trials should be by judge alone.

**Hugh Tomlinson QC:** Can I just add this? The position is that, if you get into an area where it is a discretionary jury trial at the moment rather than a compulsory one under Section 69, in effect, the courts have consistently said that the modern trend is against jury trials. Personal injury cases were tried by juries until the 1960s. The last one was in the early 1970s. The effect is that applying the current law, you would get very few if any jury trials even in libel cases. If the intention of Parliament is to have jury trials in some libel cases where specific issues of general interest arise, for example involving the state or the reputations of public figures, such as the Viscount Rothermere case some years ago, it would be very helpful to have specific guidance in the statute, with the usual non-exhaustive list.

**Q604 Lord Grade of Yarmouth:** Thank you. Moving on very quickly, if an established media company—I am not talking about internet; I am talking about the *Express* Group, the *Mail* Group, the BBC or somebody—has lost a case, do you think that the judge should be entitled to order and prescribe an apology?

**Desmond Browne QC:** Not an apology, because the essence of an apology is that it is sincere. Speaking for myself, I see it as objectionable to force people to make statements in which they do not believe. I remember Richard Ingrams was once asked by Mr Justice Simon Brown whether he had ever published any false statements in *Private Eye*, to his knowledge. He paused and then said, “Well, quite a few of our apologies.” That makes the point. However, having said that, I think that it would be desirable that the present machinery under Sections 8 and 9 of the 1996 Act should be extended and that the courts should have the jurisdiction to order a summary of its judgment to be published. That is different from an apology. It may have been what you had in mind and I may just be being pedantic.

**Paul Tweed:** In the past, a significant award of damages has always been the apology, if you are forced to go down that line. Juries not only form an effective deterrent, but they are also the last opportunity for the man in the street, or voters, to express their displeasure about misconduct on the part of the press. If juries are going to be put in a position where it would be at the court’s discretion in certain limited circumstances, thought should be given to the trial judge forcing the publisher or broadcaster to make a statement, maybe not in the form of an apology, but perhaps a declaration of falsity or something that would go beyond, particularly if damages are to be of a more capped nature. There has to be something to give that vindication.

**Hugh Tomlinson QC:** Can I just add that it seems to me that a major gap in the Bill is the failure to address remedies. Traditionally, as Mr Tweed said, the remedy was that you got £1 million. George Carman always used to say that you

could hold it up and say, “This is the amount of money that a British jury gave me.” That was your vindication. Damages have quite rightly gone down in recent times. One’s experience, on a professional basis, of what one’s client wants is that the money is not the issue; what is at issue is for the newspaper to correct and put it right. The courts ought to have the ability to order what I think Professor Mullis and Dr Scott have called discursive remedies. There ought to be a general ability to do that. At the moment, as Mr Browne points out, it is only, rather curiously, in the summary procedure in the 1996 Defamation Act. I cannot think of any good reason why that should not be available generally in all defamation cases.

**Q605 Lord Grade of Yarmouth:** My last question: close followers of this Committee will know that in the three minutes remaining we get round to the subject of the internet. Why should those sites that are open to anybody to post be subject to defamation rules? If the BBC defame me on [bbc.co.uk](http://bbc.co.uk), I cannot immediately go on to the BBC website and say that what they are saying is nonsense or put everybody on notice that I intend to take action if anybody repeats it, or put my side of the story. I do not get instant redress on [bbc.co.uk](http://bbc.co.uk), but on many sites I do. If you post something about me on some open site, once it is brought to my attention I can immediately get redress myself; I do not have to go through an editor or a media organisation and spend three years trying to get redress and correction. Why should they be subject to defamation?

**Desmond Browne QC:** It seems to me that the internet should not be regarded as the wild west, a land where the writ of the judiciary does not run, including in the circumstances that you have described. The problem is that on the kind of website that you have mentioned, something could be posted that was tremendously damaging. Merely having the ability to respond may not be sufficient to redress that damage. It is Mandy Rice Davies—one says something terrible about Lord Grade of Yarmouth and he posts a response within 20 minutes, but what does the reader think? “Well, he would be bound to deny it, wouldn’t he?” One needs more than simply the ability to respond. In the right sort of case, one needs the ability to make it clear, if necessary by the court, where the truth lies, so that untruths are corrected.

**Adrienne Page QC:** And to be able to stop it. If it is outside the realms of the law—

**Q606 Lord Grade of Yarmouth:** Are you talking about a take-down provision?

**Adrienne Page QC:** Either a take-down provision or an injunction, in extremis.

**Desmond Browne QC:** One of the disadvantages of the current Bill is that it does not follow through on what I think was Clause 9 in Lord Lester’s Bill, which was a provision for notice and take-down. That is important in relation to service providers in this country and outside the jurisdiction. The American courts will occasionally respond, particularly in states such as California, to orders from this jurisdiction.

**Q607 Sir Peter Bottomley:** There is not much time to put this sequentially, so I shall say one or two things and then anybody can come back on any of them. We have heard a good deal about the flexibility of judges. Last night I was reading Tom Bingham’s book, *The Rule of Law*, which says that you should not have discretion. Should this flexibility be so that judges can intervene and get closer to sorting out whether a case is one of deliberate untruth, including to do harm and at least get rid of the ones from court where the person who has done the writing was misled, made a mistake, was mistaken or was careless, or had more than one meaning, where



either a correction or an explanation would seem to resolve it, with no need for a court at all?

**Adrienne Page QC:** It is very difficult to expect a judge to be able to distinguish those cases. Claimants very often do not accept that it was an error or a mistake and insist that it was quite deliberate. When you hear the other side of the story, you hear that it was a chapter of accidents or hearsay and Chinese whispers that resulted in something being published. You would end up with the sort of intensive investigation at a preliminary stage that is not terribly helpful. What matters at the end, so far as the claimant is concerned, is that something is put right when what was published is wrong. In principle, it should not matter—although it can affect damages—whether it was done deliberately or not. In the case of a media defendant, if it was not done deliberately they are far more likely to make an offer of amends. One must remember that an awful lot of cases are now dealt with by the offer of amends procedure. When there has been an accident, an unintentional defamation or an issue on meaning, an offer of amends is quickly made and very few of them ever go to a hearing, even on the question of damages.

**Q608 Sir Peter Bottomley:** Just switching subjects, is there any reason why people should be constrained from being critical, rude, questioning and challenging to others, whether in public or private life?

**Desmond Browne QC:** No.

**Q609 Sir Peter Bottomley:** And my last point—this is fairly recent and I hope none of you are involved in it—if an American hedge fund billionaire comes to the British High Court for an order disclosing information by American corporations, is that an example of libel tourism, or is it something that we should accept as London being a world legal centre, or what?

**Desmond Browne QC:** Do you have in mind the Bacon case?

**Sir Peter Bottomley:** As it happens, I do, but I am trying to use it to illustrate. I am not trying to get into the merits of that case. I am trying to ask whether we should accept London being used for that kind of thing.

**Desmond Browne QC:** The point about the Bacon case is that it revealed that there is a recent statute in California whereby the Californian courts, if approached by the English courts following the grant of an order for disclosure—a so-called Norwich Pharmacal order—will come to our assistance. It is often thought, particularly after the passage of the Libel Terrorism Protection Bill in the States, that there is no way in which the English court can enforce its writ. Bacon is an interesting example, if the account of the law in California that Mr Justice Tugendhat gives is right, of circumstances in which the American court will come to the aid of the English court. I would not describe that as a case of libel tourism.

**Hugh Tomlinson QC:** I think that the point of that case is that, if you have a publication in England by an English publisher, then England is naturally the right place to sue. Libel tourism is about one foreigner suing another about a publication in a foreign country, using England as a convenient place. If the publication is an English one, then the natural place for an American to sue over it is in England. The fact that some of the information may be held by a US corporation is a contingency due to the domination of American companies over the internet. It has nothing to do with tourism at all.

**Q610 Sir Peter Bottomley:** I do not want to get into the merits of the Bacon case or the judgment; I just want to ask whether it would be open, either by law or by

procedure, for a British court or a British judge to say that the natural place for this kind of action is not here, but it is in some other jurisdiction.

**Hugh Tomlinson QC:** If I may say with respect, I think that you are confusing two things. One is the underlying libel action, which as I understand it was an English libel action relating to a publication in England. The second is that the gathering of information to support the English libel action is against an American corporation, just because contingently they hold the information. It could be a corporation in Kazakhstan, or anywhere else. It just happens to be the Americans.

**Q611 Sir Peter Bottomley:** Slightly adapting it, then, if you go back to the Robert Maxwell cases, where he tied people up in court actions beyond belief, is there any way that the courts can say that this is a vexatious litigant and is clearly not actually establishing whether they are a good person or a bad person, they are just using the courts over and over? Can the court stand up and say it is not having any more of this, thank you?

**Adrienne Page QC:** In Robert Maxwell's day, this was pre the Civil Procedure Rules. You could start cases and not pursue them. It was left to the parties. Now, the procedures do not allow that to happen. Cases that are not pursued get struck out. So I think that abuse would not take place now.

**Q612 The Chairman:** It always falls to me towards the end to ask one or two questions about areas that have not been explored. I wanted to ask two questions very briefly, both arising from something that Mr Tomlinson said. In the first one, I would be ever so pleased if you felt that you could say yes or no. I realise that is very hard for a politician; I wanted to find out if it is hard for a lawyer. We have had conflicting evidence about whether libel tourism is genuinely a problem. I would be grateful if you would just say that it is a problem or it is not a problem.

**Paul Tweed:** It is not a problem. The evidence has confirmed that, on the basis of statistics produced by Sweet and Maxwell.

**Hugh Tomlinson QC:** Not.

**Adrienne Page QC:** Not.

**Desmond Browne QC:** It only exists in the imagination.

**Q613 The Chairman:** My second question is one that I was thinking about asking you, and I was pleased that Mr Tomlinson made reference to the United States and the First Amendment, the consequence of which is that defending your reputation in the US is much more difficult than in other jurisdictions, including this one, because free speech is more enhanced by the First Amendment than might be the case in parallel jurisdictions. Do you think we are slightly precious about reputation and that this would be a healthier country if we were to recommend an enhancement of free expression, perhaps to the detriment around the edges—not fundamentally—of defamation?

**Hugh Tomlinson QC:** No. The very important thing that is often not understood about the United States is that it has a completely different journalistic culture, where journalists act responsibly and talk to people before they publish. In general, the quality of—

**The Chairman:** That is not quite what I think when I read the *National Enquirer*.

**Hugh Tomlinson QC:** I say that in general the American press has much higher journalistic standards. The balance between reputation and free speech that is struck in England is remarkably similar to the balance that is struck in other common

law jurisdictions, but also in European jurisdictions. In world terms, the balance in the United States is in a very strange place.

**Desmond Browne QC:** I think that one has to bear in mind that the right to reputation is a human right; the Strasbourg court and the Supreme Court have made that clear and it is an important part of Article 8 rights. They have to be balanced from case to case against the Article 10 rights of the public.

**Paul Tweed:** What we have here is that the press are looking for exclusive freedom of their speech and nobody else's.

**Q614 The Chairman:** So when you talk about having reservations about Clauses 1, 2, 3 and 4, we should understand that it is the specifics of the drafting of those clauses, not the underlying principles, that you are concerned about.

**Adrienne Page QC:** I would strike a slightly different note. There are problems with the drafting of these clauses, but I also empathise with your expression "precious", because I have had many cases where I think, "Why shouldn't one be able to say that without a libel action ensuing?" It covers all sorts of different areas. It is generally people speaking what they think. I am not able to put my finger on what change there might be other than what is most important, which is that people should be free to speak about what is in the public interest and the public interest should not be too narrowly defined.

**The Chairman:** It falls to me on behalf of my colleagues to say a very genuine and sincere thank you to all of you. Your answers not only reflect a huge amount of experience and expertise in your chosen field; they also reflect the fact that you did us the courtesy of preparing for being here as well as giving us your time this morning. We are all extremely grateful and I thank you.

**Lord Neuberger of Abbotsbury and Mr Justice Tugendhat**  
**Oral Evidence, 6 July 2011, Q 615–939**

Evidence Session IX

Members present:

Lord Mawhinney (Chairman)  
Rehman Chishti MP  
Julian Huppert MP  
David Lammy MP  
Stephen Phillips MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witnesses: **Lord Neuberger of Abbotsbury** [Master of the Rolls] and **Mr Justice Tugendhat** [High Court Judge in charge of Jury Lists].

**Q615 The Chairman:** Lord Neuberger, Sir Michael, on behalf of the Committee I thank you both very much indeed for coming. You know what we have been tasked to do. The questions that will come to you arise for the most part out of evidence that we have already received. We are conscious that there are guidelines and there are restrictions on what you might be able to say. We know that you are here in a spirit of trying to be helpful to us in sorting out whatever it is that we are trying to do, but I want you to be free, in that spirit, to say if you think that a question is not appropriate for senior serving judges to answer. We will of course respect your judgment in that regard. I should point out to you that we are being broadcast. That is not our decision, but we are being broadcast.

I shall start by asking a couple of questions. It was not our intention, but we have received quite a bit of evidence that a more effective legal system for defamation might be achieved through changes in rules and procedures rather than in writing new laws per se. I wonder whether you could share with us any views that you might have on what laws or rules and procedures you think might be impeding early resolution or increasing costs in defamation cases. I throw it wide open for you to say whatever in either of those areas, but we are under a certain amount of pressure to look seriously at rules and procedures and the Ministry of Justice has already given us some supplementary evidence in that regard.

**Lord Neuberger of Abbotsbury:** Mr Justice Tugendhat has enormous up-to-date first-hand experience of many defamation cases and sitting at first instance on those. He has been one of the three specialist judges in that field. My hands-on experience is much more limited and I think that it would be more sensible for him to answer that question, if that is all right. I suspect that I will be saying that in answer to a number of questions.

**Mr Justice Tugendhat:** It is surprising to me that early resolution is as big a concern as it is. As you are aware, the number of libel actions that are fought to trial

is extremely small. By the end of July I think there will have been three for the whole of this legal year. As I understand it, the number that are brought each year is in the order of 200 to 300. All but a minute fraction of those are resolved by the process before you get to trial.

Since Lord Woolf's reforms, the parties have been obliged to state their cases before the action in considerable detail. The cases that are started do not reflect the number of complaints. I have no idea how many complaints there are—there would be no way of finding that out—but I am sure that a very high proportion of complaints are resolved before proceedings are instituted at all. Of course there is always room for improvement, but it would be a mistake to overlook the extent to which early resolution has been promoted by Lord Woolf's reforms. To the extent that cases are not resolved before proceedings have commenced, a great many have been assisted by the offer of amends procedure that was instituted by the 1996 Act and is now being used increasingly, as I understand it.

So where is there room for improvement? I do not know. When cases get to me, they are almost by definition highly exceptional. They may be exceptional for a number of different reasons. Sometimes they are exceptional by reason of the tenacity, and possibly even unreasonableness, of one or other party. I do not see that in those cases any change is going to work unless there is a financial deterrent. Sometimes they are unusual because of the facts and the legal problems that they throw up. There is nothing wrong with some cases coming to court. That is what we are here for. There is room for more opportunities for cases to come in front of particular specialist judges. The advantage of specialist judges is that they will have more confidence in intervening. It is always very dangerous for a judge to intervene in a case without understanding the consequences of what he is about to do, because he may increase the costs. He can do that very considerably by an ill advised or unconscious error. When cases come in front of specialist judges, that helps. But I have to say that that does not really help you, I think.

**Q616 The Chairman:** We have heard a lot about the chilling effect. That may be what raises costs in cases that do not get to the court. Are there aspects of the law or procedure that might be usefully changed to reduce this chilling effect?

**Lord Neuberger of Abbotsbury:** I think one of the problems is that it would be very helpful if, in every case where there is a serious issue about the meaning of the words, a judge or a court could decide very early on whether the meaning of the words was defamatory. At the moment, as you know, there is a presumption in favour of jury trial. Part of the jury's function is to determine a meaning. Nobody knows better than people in the House of Commons or House of Lords or judges and lawyers that words can mean different things. In a case where the words could mean various things, the jury has to decide what they do mean. If there is going to be a jury trial, the judge cannot pre-empt the jury by saying early on that he thinks it is clear what the words mean. As soon as the judge thinks that the words might be held by a jury to be defamatory, even though he does not think that they are, he has to let it go to the jury.

There are strong feelings about jury trials and one can understand them. Indeed, Mr Justice Tugendhat recently gave a judgment discussing the origin of juries. But as long as you have the possibility of a jury trial in a particular case, the judge cannot decide early on that the words are not defamatory. I am sure that Mr Justice Tugendhat can deal with that more fully, but I think that that is one of the problems at the moment.

**Mr Justice Tugendhat:** That is certainly a problem. The effect of the current provisions in Section 69(1) of the Senior Courts Act, which gives a right to trial by jury, means that in defamation actions in reality you have two parallel trials. This is not something I have experienced in the Crown Court at all, where jury trials operate very effectively in my experience. In defamation cases, the parties take every possible point twice. They try to persuade the judge to decide the case on the basis that it is so clear that it cannot go to a jury. When they have succeeded on that, you very often have an urgent appeal to the Court of Appeal on the basis that the judge ought to have left it to the jury. If they fail on it, they argue the same point over again in front of the jury. So you have not trial by jury, but trial by judge followed by trial by jury. That is very costly and time-consuming, and it is very frustrating for the judge, because the judge may have a very clear view of what answer he or she would give but cannot give it because the first question that the judge has to ask himself or herself is, "Is this a question that I can answer, or is it a question that I ought to leave to the jury?"

**Q617 The Chairman:** My second question, before I invite colleagues to join in, is in a completely different area. We have had quite a bit of evidence that the internet is, to use the phrase that has been used to us, the Wild West, and there is really not much in the way of legal redress in reality, whatever is said. If we were to recommend to Government some legal accountability for internet service providers, are there any other European laws that judges would have to take into account when coming to a judgment on a legal requirement on an internet service provider? In particular, where does the e-commerce directive figure? If we wanted to put some legal accountability into the system, could that be done by recommending to Government some amendment or strengthening to the e-commerce directive, or is it an entirely different legal process? This is new territory for us. We have heard about the Wild West, with everybody sucking their teeth and saying how difficult it is. Before we make a recommendation it would be helpful, as far as you are able to help us, to have some sense of where the legal profession might be in having to come to judgments on this.

**Lord Neuberger of Abbotsbury:** There are two questions. On detailed law I cannot speak with any authority at all on this because I have not considered it. To express views on the law, as you mentioned earlier, is slightly dangerous for a judge. It seems to me that there are two questions. One is what the substantive law could contain and the second is how it would be put into effect. One way of trying to enforce it is through internet service providers having to identify the client who has put up the name. A number of service providers include in their contract a right to identify if required by a court. I do not know how effective it is.

The internet does indeed represent problems for everybody in all walks of life in terms of adapting procedures that we have all got used to, and the law is no exception to this. It would be interesting to see what other countries have done, because it is a classic area where one does something that seems sensible and the consequences are quite unexpected. Having said that, I accept that something should at the very least be considered, because it represents a problem. In cases where something is clearly defamatory or a breach of somebody's other rights, it is very easy to put something on the internet that then interferes with those rights or defames them. I would certainly encourage you to look at it, but I would not feel comfortable about coming up with a specific proposal. I do not know whether Mr Justice Tugendhat has something less woolly to say than what I have just said.

**Mr Justice Tugendhat:** I do not think I have anything more precise to say, but it is the case that people who wished to sue in defamation could, if they were unable to sue in defamation, sue under other causes of action. A great deal of the material that is published on the internet would be subject to the Data Protection Act. That is a very little-used statute for people complaining of damage to their reputation. It is much used in other fields. I think it would be necessary to look at the whole of the relevant speech legislation to understand what the impact of any reform is going to be on any particular part of it. It is true that the internet is something new and in some respects very different, but it is not quite as different as it may appear. The way people communicate on the internet, as has been remarked before, is in some respects similar to the way they communicate verbally. It is much more spontaneous and less inhibited. It is anonymous. It is like people talking in a crowd. In the past, people spoke together when they were physically close. Now they can speak together when they are physically far apart. It is not as different as all that. If you were slandered, you did not always know who you were being slandered by.

**Q618 Lord Morris of Aberavon:** As you know, we are here to scrutinise this Bill that is before us. If we approve of the Bill, generally or in part, are we doing more harm than good? Is codification the possible creator of a number of cottage industries? I have created a few in my time and lived to regret it. That is the issue that concerns me. We have heard evidence from Baroness Scotland that there is a serious danger from codification. She gave some illustrations and she probably could give more. Lord Mackay wanted to add to the substantial harm test. He did not think that it went far enough. He wanted to add serious and substantial harm. Some people wanted to dispense with Clauses 1, 2 and 3 altogether. Are we in danger of creating cottage industries, as opposed to leaving well alone and allowing the common law to develop without the inhibition of statutory restraint?

**Lord Neuberger of Abbotsbury:** I suppose you have to allow for the fact that judges may have an inbuilt prejudice in favour of the common law, but, hoping that that does not influence me, I suppose that a codifying Act can do one of two things. It can codify the law and purport to do not more than simply that, or it can codify the law with amendments. As in the example you have just given in relation to what Lord Mackay was proposing, it is clear that if this Bill goes ahead and becomes a statute, it will codify with amendments. It can be argued that that is the worst of all worlds, as it will inevitably produce a cottage industry, because if you have a statute that says that the purpose is to codify the existing law with amendments, you will have lawyers up and down the country arguing about whether Section 3(2) changes the law or whether it was intended to keep the law as it was. Therefore, codifying with amendments has severe dangers. It obviously has the advantage that you have a few pieces of paper with the law in them. But if, as I think is the case, most of the provisions of the Bill which are intended to codify the law represent areas where the law is reasonably clear, I would put up a warning light on that basis.

The other warning light, which ties in with rather well with the Lord Chairman's question a few minutes ago about the internet, is that particularly with freedom of speech and fast-changing technologies, the law has to adapt. One of the dangers—I am not sure that it is a particular danger of this Bill in its present form, but it is a danger in general—is that the common law can develop, whereas if you codify the law and say, "This is the law", then it is more difficult for the judges to develop it, because there it is in black and white and we cannot say, "Parliament may have said this in 2012, but we now think it is inappropriate". It remains the law until Parliament changes it.

Those are the two dangers of codification. If you are going to codify without amendment, some people might say that Parliament is quite busy enough passing Bills without simply restating the law as it is anyway. My answer probably betrays that I am sceptical, but it is idle to pretend that there are not advantages in codification. As I say, you have the law in a neat document for litigants in person, and so on. I do not know whether Mr Justice Tugendhat may have a different view.

**Mr Justice Tugendhat:** I agree with everything that the Master of the Rolls has said. If the clause is not absolutely clear that it is simply codifying the common law, there will undoubtedly be a great deal of litigation to establish what it does mean. The last 25 years have been very interesting times in the law relating to freedom of speech because during that period, both before and after the passing of the Human Rights Act, English lawyers have become very conscious of the impact of the European Convention. Until about 25 years ago, lawyers in this and other fields tended to focus primarily on authority and not on principle, but following the impact of the Convention, when it was understood, arguments tend to focus on principle rather than on precedent. Even if you codify the law now, you still do not avoid arguments by reference to principle from the Convention. So the degree of clarity that you can achieve is less than it would have been before the impact of the Convention was understood and the interesting arguments that the courts have had to deal with over the past 25 years will undoubtedly continue. People will wish to develop the law.

**Q619 Lord Morris of Aberavon:** I have one more question on this. I am rather attracted to the idea—Lord Neuberger gave an indication of this—of having one document which is available to everyone so that they know what it is all about. If there were a danger of cottage industries, is that going to be a short-term problem or would it be a continuing problem of seeking to find new interpretations? Let me confess. I took the breathalyser Bill through. One of my first cases assisting as an Assistant Recorder was to interpret it, which caused me a lot of anguish. Fortunately the case was not appealed against, but that I think was a matter of sheer luck. There was a huge spate of litigation then. From your reading of the proposed Bill, is there likely to be that kind of industry in the short term?

**Mr Justice Tugendhat:** I think that there is very likely to be, and this Bill does not offer a single piece of paper. If you wish to codify the law of defamation, you need a considerably longer Bill than this one. This one is from the same pattern as the 1996 Act and the 1952 Act. It addresses specific aspects of the law of defamation but does not make any attempt to codify the law of defamation as a whole. If you were going to do that, it would be a very different document.

**The Chairman:** For clarity, from the Committee's point of view, I do not think that any of us around the table wants to write a defamation law that encompasses the whole subject. That is not what we have been called together to do. Perhaps it is helpful if I make that clear. On the other hand, the Committee does not feel totally bound to deal only with the issues that the Government have raised with us. If, out of the evidence that we receive, there are one or two other recommendations that we feel it would be helpful to make, we will feel free to make them. But the Committee absolutely shares your view, Sir Michael. We are not going to try to start from scratch.

**Q620 Dr Huppert:** Before I start, I should declare that Lord Neuberger's brother Michael is well known to me. I have worked with him in Cambridge. I have three related questions. Perhaps I can put them all and then come back to the issue of what to do online and how that has changed. One question is to do with the e-commerce directive and whether the current protection for ISPs as mere conduits is



clear enough. The ISPs have expressed concerns—Sir Michael may have experience of such cases. The second one relates to the evidence that we have heard on how the internet could be dealt with through a procedure where a court order could require someone to take something down or there could be notices of dissent, as it were. Could there be a workable court procedure to deal with that swiftly? My third question relates to the comment about conversations taking place online. Do you think that there is an argument for saying that some of the things that happen online should be more akin to slander rather than libel? Should the two be conflated now that we have changed the distinction between the written and the spoken word in the way that we operate?

**Mr Justice Tugendhat:** I do not think that there is an easy way of establishing a procedure for taking material down. The ISPs naturally—this is no criticism of them—want complete immunity and the people who consider themselves defamed want an effective remedy. I do not see any way to shortcut this. If you take things down immediately, the criticism that is made of ISPs already is that they do not put up a fight and true things are not stated, whereas if you go through the current procedure, you have all the implications associated with the ordinary law. I do not see how it would work.

It is important to say something very fundamental about how judges actually work. We are there to resolve disputes; we are not there to act in an administrative capacity or one that involves us taking initiatives without hearing both sides. As soon as you hear both sides, we are where we are today. It would be a huge change to give us a responsibility for doing something on a summary basis without giving both sides the opportunity to be heard. I am sorry, but I have now forgotten the other two parts of your question.

**Q621 Dr Huppert:** I think that you have covered two of the three to some extent, although I believe that there are some interim application courts and other processes and injunctions a bit akin to the take-down court process. My third question was about libel and slander, and whether, as written text is being used more as a conversation piece in the form of chatrooms and all sorts of things, there is a case for saying that something would count as slander or whether the concept of libel and slander should be more conflated.

**Mr Justice Tugendhat:** In practice now there is not a great deal of difference. Since the law was changed to provide that it was no longer necessary to prove actual damage, merely that damage was likely, the reality is that there is not a great deal of difference. Theoretically, there is no justification for any difference at all, but I think that that was recognised 200 years ago.

**Q622 Lord Grade of Yarmouth:** I have two quick questions. One is on the presence of juries in these situations. The Bill seeks to remove the presumption in favour of jury trial. Am I right in thinking that you would support that move?

**Mr Justice Tugendhat:** If I was asked that question 10 years ago, I would have said that I favoured trial by jury. In many cases, as a judge, I think that a jury is an enormous benefit. There is inevitably criticism of the judiciary for being unrepresentative of the community, too old, too male and all these things that we are aware of. A decision made by a jury is never impugned on the basis that they are too old, too white or whatever. Sitting, for example, in the Crown Court hearing prosecutions for serious sexual offences, I cannot imagine myself giving the judgment, not because I would reach a different verdict from the jury—I have not had

an experience when I would have done—but because my decision would have lacked the legitimacy of the decision of the jury.

I do not want to give the impression that I am in any way against juries—I am very much in favour of them—but the problem is that they produce an unmanageable situation. In the Crown Court, that does not happen. People ask for trial by jury and, although there are applications to the judge, they are few and far between, they are dealt with quickly and they do not interfere with the progress of the trial. In civil proceedings, the intervention of applications to withdraw points from the jury has got to the stage now where, in my limited experience—there are not many jury trials in libel actions—these actions have become almost untriable. They are very frustrating, because, in libel actions, as the Master of the Rolls has said, very often if not always the most important issue is meaning. If you can decide that, you can usually decide it very early and it determines the way the action goes. If the meaning is one thing or another, it is not necessary to explore all sorts of other avenues, which become irrelevant. If you want to control costs, you have to get rid of juries, I am afraid.

The only other way of controlling costs is something that nobody is proposing—I am not proposing it either; I just mention it to illustrate where you would have to go if you really wanted to get rid of costs—which is to adopt the civil law model, dispense with disclosure of documents and dispense with cross-examination. If you do that, as they do on the continent, you can have several defamation trials tried by the same court in one day at a fraction of the price and you will reduce the damages.

**Lord Neuberger of Abbotsbury:** I would like to make three points about jury trials in addition to what Sir Michael has said, with which I agree. The first is that in principle one of the main reasons for a jury is to, as it were, stand between an individual and the state. That is why it is so important to maintain jury trials in the criminal context. Almost all libel and defamation actions do not involve the state or an emanation of the state. It could be said, therefore, that that is one reason for not having jury trials or limiting jury trials possibly to cases where the state is involved only in defamation. There is an advantage for the parties in having a judge rather than a jury, which is that a jury simply say defame or no defame and how much the damages will be. From the judge—while there is the disadvantage of the perception, which is not entirely unjustified, by any means, of the judge being a middle-class, white, public school man—you get reasons, so the loser will know why he or she has lost. With a jury, all that you know is that you have lost or won and what the damages are.

My third point relates to the submission that you have had from the Civil Justice Council, which I chair. A committee was formed of various different interest groups—I will puff the response, if I may. It is interesting that, from the different groups, there is scepticism about jury trials.

The final point that Mr Justice Tugendhat made impinges on all civil litigation. Our civil litigation system is very good and digs deep, but it is very expensive compared with the continental legal system. Michael, entirely rightly, made the point about costs because of disclosure—the amount of documents and effort that go into disclosure and discovery, particularly with e-mails and so on now, is enormous and therefore the expense is enormous. Similarly, cross-examination adds considerably to the cost and length of the trial. That is a point across the whole of civil justice and it is a question that we will have to face, but it is not peculiar to defamation.

**Q623 The Chairman:** If we got a radical rush of blood to the head and recommended something more akin to the European system, where the system did not dig as deeply—and I note your comment that at some point we are all going to have to address this issue—would such a recommendation to the Government assist

the process of encouraging people to address the issue or would it create so many raised heckles that it would put back the prospect of consideration?

**Lord Neuberger of Abbotsbury:** I am hesitating about what it is appropriate for me to say. If you are going to deal with it, I respectfully suggest that the furthest you go is to say that it is well worth looking at.

**The Chairman:** We have discussed this and I am pleased that you feel free, because we want you to feel free, to draw the lines on what you wish to say and what you do not wish to say. We take that absolutely in the spirit in which you have said it.

**Lord Neuberger of Abbotsbury:** I very much appreciate that, thank you. Similarly, we do our best within the confines to assist you.

**Q624 Lord Grade of Yarmouth:** A last point on this area: do you think that a decision on whether to admit a jury should be left entirely to the discretion of the judge or do you think that there should be some guidance in the Bill for the circumstances that you would have to take into consideration?

**Mr Justice Tugendhat:** It depends on the view that you take, as a Committee, and Parliament as a whole, on whether you want to change the guidelines that we the judges have laid down for ourselves on this matter. The position at the moment is that, if you do not put any guidelines in the Act, we will carry on doing what we have always done, which is to look at existing guidelines and apply them or possibly develop them in new circumstances. But as things stand, unless there is a case involving an arm of the state, for practical purposes you are likely to see the end of juries in defamation actions—that should be very clearly understood. There are cases in which an arm of the state is involved. There are defamation actions against the police—one is going on at the moment—and there are defamation actions occasionally against other public authorities, but they are not very common.

**Q625 Lord Grade of Yarmouth:** May I be allowed one more quick question, Lord Chairman? Do you think that it would be helpful for judges in defamation cases to have powers to order corrections or apologies?

**Mr Justice Tugendhat:** This is a deeply cultural thing. It has been discussed in the past. I subscribe to a French weekly magazine, *Le Point*, and I am struck to see, quite regularly, considerable sections of this publication containing statements that the courts have ordered to be put in, occasionally even on the front cover. When I have an opportunity of talking to journalists about this, I am given to understand that they would rather pay almost anything in damages than be compelled to make a statement in terms dictated by a court. I do not think that it is for a judge to comment on this. If we were given the power, we would use it and the corresponding benefit would be that the damages would be much lower. No doubt there would be other benefits, too, but I do not think that it is for me to say whether this should be done or not.

**Q626 Lord Marks of Henley-on-Thames:** I come back to the so-called chilling effect of the costs of defamation proceedings and the issues of early resolution mentioned by Sir Michael in the context of how many cases settle. The problem for barristers and courts and judges is that we only get to see the cases that are brought. We have heard a great deal of evidence about the chilling effect on free speech of threats of defamation actions which prevent publication, and the chilling effect on litigation by genuine claimants who are frightened off by the thought of the costs. In that context, one thing we have been considering is how to increase accessibility of the procedure, and codification perhaps comes into that. I do not know whether you

would consider the early resolution procedure proposed in the consultation document as going far enough. I also wonder whether you might think that there is a role for a court-led mediation and early neutral evaluations service rather similar to the FDR procedure that obtains in matrimonial proceedings, in which the court, but with a different judge, says, “If I were trying this case, my inclination would be to go this way”. That is completely private for future purposes if the case goes on, but it says, “You have offered this, you have offered that, so what about an apology, what about a declaration of falsity?” to see if there is a way through at a very early stage. That might assist parties to come to court if they felt they wanted to.

**Lord Neuberger of Abbotsbury:** The idea of early neutral evaluation has always appealed to me. The idea of an early steer from a judge has always appealed to me. It has been available in some courts, but not much taken up. It is the sort of thing, if one is going to take that route, for which there is much to be said for some sort of pilot rather than introducing it directly and mandatorily across the board. I suppose that if it is an option that one can introduce, then one can do it in stages. But my experience, for instance, in introducing some of the Jackson reforms—the less headline-catching ones; the more workmanlike ones such as costs management in defamation cases—is that the sensible thing to do is to institute a pilot in one or two courts. That will tell you whether the system can actually work and, even if it does work, it will probably reveal problems that you did not know were going to arise, so that you can then tweak it. Before you have it across the country, you have a system that is tried and you have put right the start-up problems. I see no problem in offering this, but you then have to address the question of whether it is going to be compulsory and whether there are cost consequences if one side wants it and the other side does not. In principle, I find it quite attractive, although I have to say that where it has been available at times in the commercial court, where different considerations might apply, it has been taken up very little. I do not know whether Sir Michael has experience of this.

**Mr Justice Tugendhat:** I do not see how it could work in practice because of the resources available. There is very little defamation litigation compared with other forms of litigation. Non-specialist judges are very much to be appreciated and encouraged, provided that you have specialist counsel or solicitors on both sides doing the advocacy. But if you do not have specialists on both sides, you have to have a specialist judge. The way that Queen’s Bench judges are deployed means that the judge in charge of the jury list, as it is called, is in London and available most of the time. There is generally one other specialist judge available, but not always. Where would you get your numbers from? I do not see how it would work. We already have a problem with cases where something has to be decided that the trial judge is not to know about, so you need two judges for the same case. The flexibility available to me as the judge in charge of listing is tiny. If I had to make judges available for early neutral evaluation, they would be immediately written off as the trial judge. I do not see how it would work in practice with the resources that we have available.

**Q627 Lord Marks of Henley-on-Thames:** Can I follow up on that? I entirely take the point that Lord Neuberger makes about piloting, except because of the small number of cases I suspect that one would need a provisional approach rather than a geographical pilot. Since there are not many cases, you could do it for a limited time as a trial in all defamation cases. In response to your point about the limited number of judges, that is entirely accurate, but there are a significant number of senior silks who sit as deputy judges. I should have thought that they could take the early neutral

evaluation mediation-type role for dispute resolution very successfully, and the harm done by then ruling them out from the subsequent trial would be minimal. Of course they would be conflicted from acting, but there would be people on both sides anyway by the time it got there. I wonder whether that might make this a proposition worth taking forward.

**Mr Justice Tugendhat.** Certainly. Again, though, I have to say that we already have concerns about our budgets. I cannot call on deputies when I want them. The budget is exhausted before the end of the year and deputies have to be paid. There are serious resource implications.

**Q628 Rehman Chishti:** Can I clarify three points? The first is with regard to jury trials. Would I be right in saying that you would support the general principle to move away from the presumption of a jury trial in this particular area except in exceptional circumstances? In those exceptional circumstances, you say that in your view the best way forward would be through common law, allowing judges to develop those exceptional circumstances. Is that right?

**Mr Justice Tugendhat.** I am not saying that it is the best way forward. I am saying that if you want to lay down criteria that are different from the ones that we are applying, you must do so, and if you are content with what we are doing, then do not. I am not saying that I prefer one course or the other.

**Q629 Rehman Chishti:** In your opinion, are the current measures that you are applying working?

**Mr Justice Tugendhat.** Yes. Until very recently, the understanding was that if somebody wanted trial by jury, they would get it. More recently, in the last few years, judges have been more attentive to whether the procedural steps have been taken; they very often have not, for one reason or another. Due to the administrative and case management advantages, judges have been more ready to seize the opportunity of saying, “Ah, well, you have not actually done what is necessary to get your statutory right to a jury, therefore I am going to exercise my discretion against trial by jury”.

**Lord Neuberger of Abbotsbury.** A broader answer to your question is that, first, the decision on whether there should be more, less, no or always trial by jury in defamation cases is ultimately a policy decision for Parliament, not for the judges. Subject to that, the two primary disadvantages of a jury are, first—to pick up the point about the chilling effect—that if you get to trial it would be more expensive, longer and more complicated, and, secondly, that the possibility that there may be a jury is enough to prevent many cases from being solved by the judge early on and he or she deciding what the words mean. On the other hand, if you are strongly wedded to the principle of a jury and believe that it is very important and that things like cost and early resolution are less important, that is your policy decision.

**Q630 Rehman Chishti:** With regard to specialist judges and the issue of the cost and the jury, people often talk about the specialist Patents County Court looking at intellectual property cases, which reduces costs. Do you think that that can be looked at for defamation, if one is looking at the cost in terms of efficiency, making it more accessible and dealing with it at an early stage? Do we need to explore that avenue further so that, rather than going to the High Court, you can have specialist defamation county courts?

**Lord Neuberger of Abbotsbury.** Without treading on too delicate ground, a great deal depends on who the defamation county court judge would be. At the

moment we are very fortunate in having an outstandingly good Patents County Court judge and as a result the work is flowing in. The procedures are the same, so I am not sure how much it saves, but you could possibly combine it with a more attenuated procedure. Again, setting up a new county court has cost implications and the Courts Service is under considerable pressure, as Sir Michael has already said and as is well known. There may be other, more technical implications that Sir Michael can speak about.

**Mr Justice Tugendhat:** We have two very experienced specialist circuit judges, but, like all circuit judges, they are assigned to particular geographical areas. Their deployment includes all sorts of other duties, such as trying criminal actions, so they are not always available. In principle, I would be very much in favour of some defamation actions being tried in the county court. Even now, we refer some. A considerable number of defamation actions are between neighbours or relate to personal, family, work and other relationships; sometimes they are tied in with claims for harassment and other matters that are dealt with in the county court. There would be everything to be said for such cases being tried in the county court, but you do not have specialist counsel in those cases. Very often you do not have counsel or solicitors at all—you have litigants in person—and it is impossible to impose on a county court judge who has no experience of this area of the law the task of resolving such disputes.

**Q631 Rehman Chishti:** The Lord Chairman has very kindly allowed me one final question. If I may transgress, we have heard evidence on the issue of apologies that one national newspaper puts all the apologies on one page and some leave their location to the editor's discretion. What would be the right way forward?

**Mr Justice Tugendhat:** I do not think that I can express a preference.

**Q632 Baroness Hayter of Kentish Town:** My confession is that I was for many years a magistrate. If I get fed up with my local corner shop and throw a brick through the window, I am very quickly in front of the magistrates. If I write in the *Camden New Journal*, my local rag, that he is selling cigarettes to underage people, I am suddenly in front of a High Court judge. What makes this element of our life a High Court issue? Is it the very few cases? Is it the degree of specialism? Is it the tenacity or sometimes the unreasonableness of the party that sends it to the highest level? As a lay member, I have also dealt with very complicated pension and insolvency issues, so I am quite interested to know whether it is the nature of this bit of law that sends it that way or whether there is something else about it.

**Mr Justice Tugendhat:** The reason is that freedom of speech has always been fundamental to our tradition. It is a principle that has been fought for and developed over many centuries. It is unlike other litigation. All litigation involves the whole of the community, in one sense: we all are concerned that the victim of a personal injury should be compensated. However, freedom of speech cases are different, because every freedom of speech case involves not just the parties but the listeners, the people who receive the information. It is so controversial and attracts so much attention—far too much attention, I fear—because everybody feels concerned when one person is silenced. Other themes of litigation involve balancing matters of one principle or another—the public interest and private interest—but every case involving freedom of expression involves such a balance. I could give a long lecture on it, but this is not the occasion.

**Baroness Hayter of Kentish Town:** It is really interesting and we have not had it put to us as nicely as that. Thank you.

**Lord Neuberger of Abbotsbury:** There is an historical reason and a technical reason. Historically, civil law—non-criminal, non-family law—has developed in one way with its own courts, while criminal law has developed another way with its own courts. You are quite right to identify cases of greater seriousness that may be heard by the magistrates in the criminal field compared with a relatively trivial case that gets to the High Court. It is an entirely fair point. You have also identified another aspect. The civil, non-criminal law is a good deal more technical and difficult than much of the criminal law, and defamation is a prime example. *Halsbury's Laws of England* runs to about 85 volumes but only four or five cover crime; the rest, except the three that cover family, cover civil. Civil law is more complicated, on the whole, although of course crime throws up a lot of problems in itself. It is a very interesting point, I must say.

**Q633 Stephen Phillips:** I wanted to pick up on a number of points arising out of your evidence and the points that have been put to you, beginning with Sir Michael, if I may. You said at the beginning of your evidence, in answer to the Lord Chairman's first question, that the number of libel actions fought to trial is relatively small. I think that you also said that therefore the cases that reach you are highly exceptional. As a result of that, you were able to say to the Committee—probably correctly—that the reforms that Lord Woolf introduced in terms of civil procedure have to some extent been successful in ensuring that cases were resolved amicably and without trial where that was necessary. There is an alternative construction and I wonder whether you are able to express a view on whether you have seen a flavour of this: because of the costs associated with libel actions and the uncertainties associated with trial by jury, cases are resolved between the parties amicably but in a way that neither thinks reflects the merits of the case itself, because they are so concerned about the costs and the uncertainties. I wonder whether you see anything of that in your practice as the judge in charge of the jury list, or whether that is outside your experience.

**Mr Justice Tugendhat:** You are certainly right that cases are settled in circumstances where sometimes, as I am aware, neither side is at all convinced that justice has been done. But that is true right across civil litigation. Drawing on my experience as a practitioner and as an adviser to newspapers in particular, I can say that in many instances defamation actions arise out of statements that the maker of the statement did not have at the forefront of their mind. They would be writing or publishing an article or programme on a particular subject and the complainant turns out to be somebody whom they did not expect to complain. The source of the complaint is often either a simple error or not something on which the publisher wants to make a stand in principle. As long as there are procedures for getting this solved at an early stage before the costs mount up, people are ready to sort it out. That is where most of the early settlements come—where the newspaper, or whoever it is, recognises that either they never really meant to say it or, even if they did, they got it wrong.

**Q634 Stephen Phillips:** If I may say so, that is an extremely important answer, which we will have to come back to and look at again. It has seemed to me since the outset of this Committee, and it increasingly seems to a number of my colleagues, that the principal problems with which we have to grapple are procedural rather than substantive and that, rather than focusing on attempting to codify the law, perhaps the Ministry of Justice would be better advised to direct its attention to reforming the procedure associated with defamation cases. Do you agree with that? Is that really what the focus of this Committee's inquiry into the Bill should be about?

**Mr Justice Tugendhat:** Certainly, procedure determines costs.

**Q635 Stephen Phillips:** Does it follow from that that, if our principal concern is cost and access to justice, it is procedure that we should be thinking about?

**Mr Justice Tugendhat:** I think so but, as I have said, the only way of making really big impacts on costs is to change forms of procedure that nobody, as far as I am aware, has proposed changes be made to. One of the attractions of the common law of defamation to litigants—to both sides, depending on the case—is that, as Lord Neuberger said, there is an in-depth way of establishing the truth or falsehood of an allegation. People are very attached to that. Claimants are very attached to it because all they want is the truth; defendants sometimes want to prove the truth of what they have said, but very often they do not. Often they are more concerned to establish that it is in the public interest that they should have said it, whether it is true or not. So claimants and defendants have different agendas. But very often defendants do want to prove the truth. As long as a judicial investigation of the truth is something that we are to offer and that people want, we are going to have a very costly procedure.

**Q636 Stephen Phillips:** As a result of Lord Marks's questions on early neutral evaluation, one of the things that we might perhaps consider recommending to the Government—incidentally, I agree, as a commercial practitioner, that ENE has not been particularly well taken up in the commercial court, notwithstanding the fact that it has existed for over a decade now—is that the right to take a defamation action to court should be conditioned on compulsory mediation, where the parties try to resolve their differences prior to that. It may be that it raises a broader question of whether access to civil justice should be conditioned on compulsory mediation. That is outside the scope of our inquiry, but I wonder whether Lord Neuberger has any views on that.

**Lord Neuberger of Abbotsbury:** Compulsory mediation is a very big and hot topic. It is undoubtedly the case that in some common law jurisdictions—in parts of the United States and parts of Australia—mediation is virtually compulsory, as you probably know.

**Stephen Phillips:** You probably saw my question to the Justice Secretary.

**Lord Neuberger of Abbotsbury:** Exactly so. However, so far in this country it seems that we have set our face against it. The first problem is whether it is right, when litigation is already expensive, to require people to indulge in a further preliminary round of mediation. It costs money. Even if the people appear in person and do not have their lawyers—which is not very satisfactory—it still costs because you have to pay for the mediator. If their lawyers turn up—you may have more experience of this than I do—there is a danger of it turning into a bit of a trial, or, at any rate, a fairly expensive exercise. There is a danger of the big or rich party using it as a weapon to make the smaller or weaker party even weaker. The big party says, “Let's have a mediation; I'm going to sit there and be completely unreasonable and you're going to have to spend money and turn up and it won't get you anywhere”. These sorts of arguments are very negative.

I strongly support the idea of encouraging mediation—and strongly encouraging it in many cases. Indeed, I am putting some new procedures in place in the Court of Appeal to encourage people to mediate in areas such as personal injury appeals. I am a fan of mediation, but I think that one has to be a bit careful about it. If you have some sort of compulsory early neutral evaluation, or anything that involves the courts or judges, the other factor that you have to bear in mind is that it is going



to be more work for the judiciary and courts. We are often told, for example, that our legal aid is much more expensive per head than Europe's. That is true, but it is because our lawyers do more in actions than European lawyers; the judges do more in Europe, because they are investigatory. If you start pushing the work more to judges, which you can consider, the Courts Service will have to get more money. It may reduce the legal aid budget, but it will put more pressure on the courts. It is obviously an interesting and important area, but it is not specific for defamation—it has much wider implications.

**Q637 Mr Lammy:** You mentioned big parties. We have had contrasting views on the right of corporations to bring libel claims. Do you have views on the workability of the substantial financial damage test proposed by Lord Lester?

**Mr Justice Tugendhat:** I would like to say this. One of the distinctive features of defamation is that it is more about the future than the past. Most tort litigation is about seeking compensation for something that has already happened—personal injury, for example. People bring libel actions because they believe that, unless they do, they will be treated very differently in the future. You cannot form a view about the importance of a libel action by looking at what damage has already been caused. There may be none. Take, for example, a corporation that is accused of conducting its relationship with its employees unlawfully or improperly in terms of discrimination. The corporation will be quite unable to establish any existing damage, but who wants to work for a company that is known to be sexist or racist? The answer is that the accusation is bound to have an impact on the future of the company. Similarly, if a company is accused of exploiting child labour in underdeveloped countries, which is a common example, proof of actual damage has nothing to do with it. The issue is to establish that the corporation does not behave like this, or indeed that it does, speaking from the point of view of the publisher. I do not see actual damage as being the issue at all.

**Q638 Lord Bew:** We have talked a lot about the possibly fraught implications of codification. One area of the Bill that explicitly announces itself as an amendment is Clause 5, dealing with attempts to extend qualified privilege in a number of areas, particularly in the area of academic freedom, which may have suffered an undue chill factor in recent years. I wonder if you have a view on Clause 5 and on the mechanisms proposed to deal with the problem.

**Mr Justice Tugendhat:** I do not want to go into the specifics, but the underlying principle of privilege is public interest. “Privilege” is an outdated and misleading word. If there is to be a public interest in publishing material that is or may be false—that is what we are talking about—there has to be a public interest justification. Each example given in the existing statutes and in the Bill has a different public interest justification. There is a real risk of injustice if the definition of the occasion is too vague. You have had evidence on this before and I do not want to repeat it, but what would count, for example, as a scientific conference? There have to be some objective criteria because, if there are none in the Bill, we will be asked to put them in in some form or another, but it is going to be very difficult to do that.

**Lord Neuberger of Abbotsbury:** You will have Lord Morris's cottage industry.

**Q639 The Chairman:** It falls to me to ask the last question, as we appreciate that you have pressing demands on your time and we agreed to finish by 10 o'clock. Sir Anthony Clarke gave evidence to the Commons Culture, Media and Sport Committee in 2009. He was questioned about Articles 8 and 10 of the Human Rights Act, and

particularly the importance of Section 12. This came to mind when you, Sir Michael, used the phrase “freedom of expression” on quite a number of occasions. In areas that may go beyond defamation, I suspect that it will not come as a huge surprise to you that you could probably find people at both ends of the corridor in this building who feel that—notwithstanding the fact that we have to balance Articles 8 and 10, that we are part of the Convention and all the rest of it—perhaps the courts have not given quite as much expression to the application of Section 12 as Parliament might have had in mind when bringing it forward. Does Parliament need to restate Section 12 in a new Bill to give better protection for the freedom of expression that Sir Michael referred to? Of course, I am talking primarily in the context of this legislation.

**Lord Neuberger of Abbotsbury:** For my part, I am very chary of expressing a view on this. The short answer, even if it is slightly trite, is that if Parliament comes to the conclusion that the judges have either misinterpreted or misapplied Section 12, or the section is not doing its job—in the sense that the judges have got it right but it is not doing the job intended by Parliament—it is for Parliament to decide what to do about it and, in particular, whether to change the law by amending Section 12 or repealing it and re-enacting it in a different form. But we then trespass into the area of policy. As a judge, I would be very chary about that. However, Sir Michael may be braver than me.

**Mr Justice Tugendhat:** My recollection is that Section 12 was much debated before it went into the Human Rights Bill and nobody knew whether it would work. It is true that in one sense it has not worked. The reason why it has not worked to the extent that it has not is that there is a tension between it and the earlier provisions of the Act. It is impossible to enact the European Convention and then include a provision that seeks to give a different emphasis to the different Convention rights from what would be given otherwise. This was foreseen at the time by many people and I do not think that it is any surprise to lawyers interested in this field of the law that Section 12 has not achieved what its promoters would have wished, but how could it?

**The Chairman:** It falls to me on behalf of the Committee to offer a very sincere thank you. We appreciate the time that you have given us both before and during our conversation. Perhaps it goes without saying, but let me say it anyway. We will pay particular attention to the answers and advice that you have given in such gracious terms and I am pleased that we did not stray too often into areas that might have caused you embarrassment. This concludes this aspect of the Committee’s activities. Thank you.

**Sir Charles Gray, Sir Stephen Sedley and Lord Woolf of Barnes**  
**Oral Evidence, 6 July 2011, 640–667**

Witnesses: **Sir Charles Gray** [Chair of Early Resolution Procedure Group], **Sir Stephen Sedley** [Former Lord Justice of Appeal] and **Lord Woolf of Barnes** [Former Lord Chief Justice].

**Q640 The Chairman:** I take this opportunity to welcome all three of you and to thank you very much indeed for coming. I express the Committee's appreciation. I want to start with a general question, if I may. All three of you have had a chance to read the draft Bill, the broader document that the Government issued and the evidence that we have been receiving and all three of you are extremely experienced. I was wondering whether, in turn, starting with Lord Woolf, you would like to offer one piece of advice to the Committee that says, "This is really where I hope you will do something, and in this particular direction". We can and will ask questions, but with experienced people sometimes it is helpful to sit back and say that you have the whole panoply in front of you; direct us in a way that would be indicative of where you think we ought to go.

**Lord Woolf of Barnes:** I apologise for starting off with a note of dissent. I do not purport to be extremely experienced in this area. My practice meant that I was very general when I was a barrister. As a judge, the occasions on which I had to give a decision in defamation proceedings were very rare, but I am very interested in what the Committee is doing and, if I may say so, I congratulate the Committee on taking on this task and I wish you very well with it.

I would like to respond to your question, because I think it is very important. I would ask you to focus on the fact that our defamation proceedings, to an extent, have the problems that they have now due to two factors. The first, and in my view the more important one, is the fact that jury trials are so much part of the proceedings. Turning to a field where I do purport to have expertise—civil procedure—it is very difficult to reform the procedures in court if you have a jury. A lot of our rules of evidence and a lot of the procedures are designed specially to take into account the fact that juries obviously need help if they are going to perform their most important role of determining the factual issues in these cases. It is an extraordinarily difficult task that we give them to do.

So far as the criminal law is concerned, I am totally committed to jury trials. In civil proceedings I am against them unless they serve some special purpose. They can do so in reflecting the relationship between public bodies and members of the public, or some other area like that. Every now and again, they can correct what the experts are doing, if I may say so, and introduce a dose of realism and fresh air. I do not think they do that in defamation proceedings. On the contrary, I think they have the opposite effect.

Management of civil proceedings, which is so important, is much more difficult if you have a jury. Certainty, which the parties need, is much more difficult to achieve if you have a jury. Our civil proceedings work on the basis that good lawyers, or advice that is available to you from other sources, can very often anticipate the outcome. Once you inject a jury into the situation, that certainty is reduced. We can do our best and we can make the law as certain as possible, but that is the consequence. That is just a personal position.

Of course, that pushes up the costs of the proceedings. Although the courts have helped more recently, when I was growing up in the law it was a Biblical command that judges did not tie the hands of the jury, for example in the award of damages. The damages in defamation have, on the whole, been disproportionate to the harm caused. We do not have penal damages as such, but in defamation in practice we do have damages. I do not think that that is a healthy aspect. That is my answer to your specific question, but I would go further. I think that you would find most of the problems that we have in defamation proceedings disappearing if there was trial by judge.

**Sir Charles Gray:** I agree with almost everything that Lord Woolf has said. I have been against juries for some time now because they add enormously to the cost and introduce an element of uncertainty. It is not a sensible way to determine the sort of conflicts that arise in defamation actions, in my opinion. That is my view as far as Section 8 of the Act is concerned. Your question embraced a number of other provisions in the Act. Without going through them individually, it appears to me that there is a degree of tinkering about some of the provisions. Sometimes it is best to leave things as they are, and perhaps even to allow judges to develop the law on a piecemeal basis. I have already sat on a committee that has gone through all the sections in some detail and I am dubious whether there are powerful arguments for introducing into our law a great number of the provisions that we see in the Bill.

**Sir Stephen Sedley:** Perhaps I should, like Lord Woolf, explain the capacity in which I am here. I am invited, I think, because I am chairing the advisory committee that has been assembled to oversee the alternative libel project, which Nuffield is funding for English PEN and Index on Censorship. Their report, which they hope to have before you in interim form by the end of the summer and in final form by the end of the year or early next year, will be their responsibility. As you have seen from the names of the people on my committee, I have the good fortune to have a committee that almost matches this one in its expertise and breadth of knowledge. However, there are things that the committee has no view on but on which perhaps I may nevertheless say something.

I practised at the Bar for 28 years and did a certain amount of libel work for defendants and for claimants. I tried no libel actions as a Queen's Bench judge for six years, but I have sat on a good many libel appeals in my 11 years on the Court of Appeal, which ended when I retired earlier this year.

As to your introductory question, Lord Chairman, I would have thought that one of the overriding concerns of this Committee needs to be the reduction of the distorting effect of cost on the achievement of justice on either side in libel proceedings. The problem that arises from that is that it is possible to produce a cure that is worse than the disease if all it does is make libel cheap to commit. Somehow, there needs to be some kind of balancing mechanism that brings justice within the reach of the small as well as the large litigant, but does not simply make it a bargain for a media outlet to commit a libel, knowing that the increase in its circulation will pay for the damages. If I have to pick on an issue, that would be my big issue.

**Q641 Stephen Phillips:** I am not a libel practitioner, but I know a little about it just as a lawyer. Lord Diplock once said that there were two ways to perform a contract: either perform your obligations or pay damages. A number of witnesses have agreed with the Committee that there is a right to commit libel in English law subject to the subsequent payment of damages. One issue that we might consider is whether the remedy of an injunction, which we understand to have been granted only once in a libel case, would be appropriate. I wonder whether you, even though not a libel

practitioner, and those who have more experience of libel, would support the introduction of such a remedy into English law.

**Sir Stephen Sedley:** Sir Charles Gray probably has more hands-on experience than I do on this, but the problem about an injunction is that, once the stable door is open, the horse has bolted and that is frequently the first time that the victim of the libel knows that there has been one. It is too late to grant an injunction at that point, except against repetition. If the potential victim gets wind of what is coming, he or she may be able to obtain an injunction. I see no reason in principle why that should not happen. The law set its face against that: historically, wherever there was going to be a defence of justification, it let the media run the libel, or the alleged libel, and sort it all out in court—by when it is largely too late, from the claimant's point of view.

**Sir Charles Gray:** The answer is that an injunction is available in defamation cases and always has been. From the claimant's point of view, the problem is that where the defendant says that he is going to justify, as Sir Stephen Sedley has just said, that is usually the end of any entitlement to an injunction. It is very easy for a defendant to assert a defence of justification and the judge will be bound to refuse any injunctive relief, which in many cases will be what the claimant is interested in obtaining above all. It is really as simple as that, I fear.

**Q642 Stephen Phillips:** Does it follow that you do not think that justification should be a bar to a pre-publication injunction?

**Sir Charles Gray:** No, I think it should. Perhaps the extent to which a libel may be justified ought to be examined in rather greater detail at the earlier, interlocutory stage, but I definitely think that freedom of the press is a very important constitutional principle and this is one of the ways in which one safeguards it.

**Lord Woolf of Barnes:** I endorse what has just been said. I remember when it was sometimes possible to get an injunction subsequent to justification, and it was extremely contentious and created great difficulties. So far as an injunction may be wanted against repetition, once the case is over in the sense that the judge has decided that the statements were defamatory, injunctions can and should be granted if they are wanted by the claimant, but they do not have any effect on the damages.

**Sir Stephen Sedley:** I am less sanguine than the other two witnesses about this, because it means that the law is already very close to creating the right to commit a libel as long as you are prepared to pay the price for it if it goes against you. I do not like this idea. It is one thing to say with regard to a contract that you have two ways of performing it—either do what you agreed to do or pay for not doing it—but I do not think libel is like that. A reputation, once destroyed, is very difficult to restore and we need to be more cautious. The previous witnesses were asked about Section 12 of the Human Rights Act. Sir Michael Tugendhat made the important point that Section 12 is intended to try to stop judicial intervention at an early stage of what may well be a serious libel. The risk it takes is that it itself may be in violation of the Convention. You have to read Section 12 and Section 13 in the light of Section 3 of the Act. That may be one reason why it does not seem to be having the prophylactic effect that its movers intended it to have.

**Q643 The Chairman:** In that case, what might this Committee recommend to Government to restore what Parliament probably intended when it put in Section 12, even though we are now being educated on why that was never likely to be as effective as Parliament wanted it to be?

**Lord Woolf of Barnes:** I am afraid that the European Convention on Human Rights is there. Unless you want the very unsatisfactory situation of two systems of law, one of which applies to the citizen when he is before the courts in the Strand and a different one when he appears in Strasbourg, I am afraid that what our law at present requires the courts to do, which is take into account the European Convention on Human Rights, has to be read in the way that the European courts interpret that Convention. It is very difficult. Parliament took on an almost impossible task.

**Sir Charles Gray:** The problem goes back to the Convention itself. Article 8, the privacy right, and Article 10, the freedom of expression right, are, according to my understanding of Convention law, to be given equal status. Parliament, in its wisdom, enacted Section 12(4), which says that the courts should have particular regard to the right to freedom of expression, but how can one reconcile that with Convention law, which says that the two rights are equal, and often in conflict, as we all know?

**Q644 Lord Bew:** Sir Charles, may I ask you a question in your role as chairman of the Early Resolution Procedure Group? I have been reading with interest Mr Brett's very vigorous speech at your launch. The argument is that the Bill should be scrapped and there should be a U-turn—the Bill is described as “piecemeal codification” of the existing law. What if someone was to say that the Bill was more than that because it contains not just codification, but amendments, in the area of academic freedom, for example? Could a person not believe in the wisdom of much of what you say about early resolution and say that that should be combined with the positive elements in the Bill, rather than saying that it should be scrapped completely? I understand that you are also proposing a radical simplification of the existing law of libel, but what sort of answer would you give to someone who was reluctant to advocate a complete U-turn?

**Sir Charles Gray:** I understand entirely the thrust of your question. The early resolution policy is aimed at solving what seems to be the principal problem with defamation as it stands at the moment, namely that you do not get the decision on what the article or publication meant—what its natural and ordinary meaning was—until trial. That means that everybody is in the dark as to what, in the end, is going to be a viable defence. Sometimes defendants have used that to their advantage. The early resolution system is an arbitration system, really, and it proposes that one has an opportunity to have determined by a panel of experts—because that is what they all are, silks with considerable experience of defamation law—a decision on the question of what the article or publication means. Once you have that, everything else, in a sense, falls into place. The defendant knows what he has to prove and is not going to waste time setting up a specious defence. The claimant knows that he has either achieved what he wanted, in terms of getting the meaning for which he was contending established at an early stage, or perhaps has failed, in which case he might decide that the game was not worth the candle. To come back to your question, in no way is the early resolution approach intended to challenge what is in the Act. What is in the Act is good, bad or whatever, but that will remain. We are trying to simplify and obtain a solution to the ongoing problems that exist in this branch of the law.

**Q645 The Chairman:** Can I just clarify something, Sir Charles? The Master of the Rolls said that determining what the words mean, and determining that early, would be very helpful, but there was a difficulty because the judge might not know whether it was the judge who was to determine the meaning, or whether it would be left to a

jury. Is it a concomitant of the early resolution procedure that it would be helpful if what could go to a jury, if anything, should be specified, so that people would know in advance that a large proportion of the cases could not go to a jury and therefore would be settled by a judge, and that would facilitate an early determination of what the words mean, which I think you are telling us is quite important to your early resolution? Is that a reasonable summary of what you are saying to us?

**Sir Charles Gray:** My view would be that we ought to go the whole hog and get the meaning determined. One is assuming, rightly or wrongly, that Clause 8 of the Bill—perhaps only that clause, I do not know—is likely to be enacted. In other words, we are going to dispense with juries determining the vast majority of defamation actions. If that is happening, and if you have somebody who may not be a judge—by definition this is arbitration—and that person is going to be well qualified by his experience to decide what the words mean, why not have that determined as a binding fact, whatever else happens later on in the action, under the early resolution procedure, or maybe by the judge if the law were to be amended to permit that to happen?

**Q646 The Chairman:** Let me pick up your phrase that the vast majority of cases would not go to a jury. Does the law not need to make it clear what would be the small minority of cases that could go to a jury, so that the early resolution determination of the meaning of words can take place in the vast majority of cases that would be settled by a judge? Unless you define what might be allowed to go to a jury, do you not still leave open the point that the Master of the Rolls was making?

**Sir Charles Gray:** Yes, but if I may say so I think that most litigants would much prefer that there were not a jury. I think I include most defendants in that.

**Q647 The Chairman:** Forgive me, but you are arguing the case about whether there should be juries. We understand that. What I am trying to get my head around is, assuming that some element of jury remains for some element of cases, does it not follow from your position that people would need certainty about which ones were the vast majority of cases that were not going to go to a jury, where the judge would then be free to move to a determination of meaning of words in an early resolution?

**Sir Charles Gray:** If I follow your question correctly, and I hope I do, it depends a little which route you are going down. If you are going down the early resolution route, both sides have agreed that the meaning issue should be determined at the outset, and that that determination will be binding. The jury will not enter into the equation at all under the early resolution system.

**Sir Stephen Sedley:** If I may add, it seems to me that your questions highlight one of the big issues for the Bar Council, which is whether you should take juries right out of the system lock, stock and barrel now. It does not matter whether it is at the meaning stage or at any other stage. If there remains at any stage an uncertainty about whether this may end up being tried by a jury, a great deal of the potential for early resolution goes, because there is an unresolved threat still hanging over the case. Having read the papers and started very much as a partisan of juries, I now think that if you are going to take juries out of most cases there is no good reason for not taking them out of all cases.

**Q648 The Chairman:** Except, for example—I simply quote and I make no comment—the Editor of the *Guardian* sat where Sir Charles is sitting and told us that, left to him, he would have preferred to have had a jury in the Jonathan Aitken case.

**Sir Stephen Sedley:** He might have been mistaken—we will never know—because he turned out to be right.

**Q649 Baroness Hayter of Kentish Town:** I have one question of clarification for Sir Charles. I think that you said that this would be determined under the proposals by a panel of experts. When I read your material, I rather liked the fact that it said “with or without” the help of two lay assessors. Is this correct, or do you think it would only be experts?

**Sir Charles Gray:** The proposal is that there would be two lay assessors, but if the parties agreed that that was not necessary or appropriate in a particular case for any reason, there would not be assessors. But you are absolutely right and I am sorry that I did not remember that detail of it. Certainly, lay assessors are provided for.

**Q650 Baroness Hayter of Kentish Town:** My actual question to all three of you is a difficult one. It is about the reporting of court cases, where the opening prosecution may make extraordinary allegations against the defendant, which are later found to be unproven, but by that stage the newspapers have covered the openers and not the rest. Or, indeed, a barrister for the defendant could also put extraordinary accusations to a witness, which are then reported. Clearly, this is very difficult because it is reporting of a court case, but is there any way to handle that effective defamation that can happen either to a defendant or to a witness in a case?

**Lord Woolf of Barnes:** This is very much a situation of balance between the two rights, in particular the right of the media to report court cases. I emphasise of course that you are talking not about a permanent restriction but about a temporary one so that when the reporting takes place, if what has been alleged by the opener has not been established, that will be clear if there is responsible journalism. A power could be given to the judge, in appropriate cases, to defer the publication of certain matters given in evidence that would be particularly painful and inappropriate. They could be published later, but experience tells us, of course, that any interference with the publication of court proceedings, as occurs with the so-called super-injunctions, is very unattractive, certainly to the media and probably to a great majority of the public.

**Sir Charles Gray:** It is a dilemma, because the report has to be fair and accurate, but if you have a very high prosecution opening, which I think is the proposition that you are putting, you can report that fairly and accurately as of that day’s newspaper or whatever it may be. I think you are wondering whether there is a mechanism by which one can ensure fairness and accuracy over the whole trial. The answer to that must be no, you cannot. You cannot direct a newspaper to remedy an unfairness and inaccuracy by reference to what happened later. As you say, they usually report the first day and not the rest.

**Q651 Lord Morris of Aberavon:** I would like to follow up what Sir Charles said earlier—if I took it down correctly—that it is sometimes best to leave things as they are. We are charged with pre-legislative scrutiny and we have heard evidence that the very fact of codifying, or putting in statute, is likely to lead to litigation. Baroness Scotland was rather strong on this, and others have said that we should delete Clause 1, 2 or 3. Lord Mackay suggested that he did not like the term “substantial harm” standing alone as a definition; he wanted “serious and substantial harm”. What are your views generally as regards what the Bill proposes? Would it be best to leave the common law the flexibility that it has to develop? Are we possibly doing more harm than good?



**Sir Charles Gray:** I fear that the latter may be true, although one obviously hopes not. If one starts with substantial harm, is there any real argument for that change? I am not quite sure what substantial harm would be, if it is not what has to be established under the existing common law. I would take the same view, with great respect, in relation to almost all—although not all—of the other provisions. It is necessary to broaden qualified privilege in the way that subsection (5) does, but about most of the other things I am rather doubtful and sceptical.

**Sir Stephen Sedley:** It may be that, nevertheless, there is a good case for codifying what is otherwise complex and arcane law. It was done with the sale of goods many years ago, very beneficially. The Human Rights Act is another good example—simple draftsmanship makes it possible for an individual to pick it up, read it and understand it. But there is one respect in which it seems to me, as to others, that this is an opportunity not to codify but to repeal part of the law. That is Clause 2(3), which reproduces the *Al-Fagih* doctrine, under which any controversy—as long as it is reported as a controversy—is protected from the law of libel. *Al-Fagih* itself was an example of what can happen. Somebody, who is quite possibly somewhat unhinged—I am not saying in that case, but in the generality of cases—launches a completely defamatory and unjustified attack on a public figure. The public figure responds with dignity and possibly only monosyllabically, saying that this is simply nonsense. You have got a controversy, and to give the protection of the law of libel to any newspaper that publishes all the accusations, however wild and foolish, seems to me to be unwise. It is a course that the law should not have taken and this is an opportunity, as the Bar Council has I think submitted to you, to put a stop to that and to make it clear that, if there is to be a defence, it has to be the defence of responsible journalism and publication and not that of merely reproducing someone else's accusations.

**Lord Woolf of Barnes:** When you come to consider codification, I cannot see that in relation to defamation there is any difference from any other area of the law. Some people will say that codification has got great virtues. It has, but we are a jurisdiction that has, on the whole, approached codification with caution because it tends to stop the natural development of the law. Perhaps in defamation you want a degree of flexibility so that the law can develop. Of course, you can amend codification as you can amend any other legislation. But we are dealing with a situation where methods of communication are developing with great rapidity. The law has to keep up with that.

**Q652 Lord Morris of Aberavon:** On the one hand, I see the advantage of having a great deal of the law of defamation on one piece of paper, which would be accessible and available to the ordinary man. On the other hand, on the evidence we have heard, one fears the development of a cottage industry as regards some of the clauses. Would you think that one outweighs the other? Is there a greater danger of litigation, certainly in the short term, as opposed to the advantages of having a very—hopefully—clear statement for the man in the street?

**Sir Charles Gray:** I think that is a danger. Take the example of Section 4, which is headed “Honest Opinion” but to defamation lawyers in the old days would have been called fair comment. That is making a number of perhaps minor changes, but they are changes to the existing law, particularly subsection (4). I can see a small cottage industry building up, arguing about quite what is intended by the changes that are being made. That will add yet more to the expense, which is the fundamental problem in this area of law anyway.

**Q653 The Chairman:** Sir Charles, if I may clarify, is that not an argument for never doing anything? I have been privileged to vote for legislation in this building for over 30 years, at both ends. Those of us who understand what we are doing all know that, whatever we put in legislation, somebody will go to a court to clarify it. Every time legislation emerges out of this place, there is, to use Lord Morris's phrase, a cottage industry clarifying what Parliament meant, which runs for a year, 18 months or two years. That is the necessary price to pay for legislation. Is it not difficult to make the argument that, because an element of clarification will need to take place in the courts, that is a reason for not really doing very much of anything?

**Sir Charles Gray:** I respectfully see the force of what you said, Lord Chairman. The difficulty I would have with some of the provisions in the Bill is that it is not entirely clear what is sought to be changed—and sometimes one doubts if anything is being changed. The other point that I would make is in relation to the single publication rule in Section 6. As I understand it, that is directed at libel tourism, which has been the subject of a great deal of publicity. But I think it is fair to say that libel tourism, if you analyse what has happened in the cases, such as they are—and there are not very many of them—is not a problem at all.

**Q654 Lord Marks of Henley-on-Thames:** I would like to come to the question of reducing the chilling effect both on free speech, where publishers are put off publishing by threats of litigation often made by large corporations, and on claimants who are simply too frightened of the costs to bring claims. That seems to me to lead to questions of minimising the costs, partly by early resolution, in a wider context than just determining the meaning. Looking at that, do you think that early resolution could be partly, or at least as an option, court-led, much as it is in matrimonial proceedings with the financial dispute resolution appointment? The judge taking part would not be the trial judge and would obviously be debarred from further involvement. He would give an early evaluation and then encourage or broker a settlement. How would that tie in with extrajudicial attempts to broker settlements through mediation in the more conventional sense, whether there is a role for both or just for one?

**Lord Woolf of Barnes:** I have to disclose an interest here in that I am now a mediator; it is my third career. There is no doubt that there is tremendous scope for this in all litigation and it is very productive in defamation proceedings. But I do not think we need to change the law and I would be cautious about encouraging it, because the variety of methods of mediation now are unlimited and still developing. They are usually very creative. I do not see why the law needs to specify one particular method in preference to another. In family proceedings there are special considerations because, with families being involved, it is extremely likely that, if there is no mediation, there will be very adversarial processes. However, I do not believe that that is true in defamation, and I have played a part in producing settlements in defamation proceedings as I have in other types of proceedings. I therefore welcome the reasoning behind Lord Marks's question, but perhaps it is not necessary to have a special procedure put in for defamation. Certainly it would not be necessary if you were to do away with juries. In the commercial court, judges are now very creative about encouraging and facilitating the parties to mediate. A great many cases are settled very quickly as a result of that. The presence of a jury makes it so much more difficult.

**Sir Stephen Sedley:** Lord Marks has put his finger on the central concern of PEN and Index on Censorship, and indeed of all the small publishers and individual writers whose interests they are concerned with. As Lord Woolf has said, there is more than one way of approaching a libel dispute short of full-blown litigation.

Arbitration is most closely analogous to litigation; in fact it is private litigation. Below that there is mediation. First, however, someone has to pay the mediator. There will be some people who are glad to contribute to the cost of mediation in order to find a middle ground between two disputing parties, but there will be others who will say that they have been libelled, that it is a bare-faced lie and that they do not see why they should have to pay to get it taken off the record. People like that may well have a good, litigable issue but are absolutely terrified of the cost implications of going to court.

For that reason, my committee is interested, as a further alternative in some cases and possibly in a good many, in early neutral evaluation. This has been practised by the Technology and Construction Court with what I am told is universal success. First, it comes for free because it is done by the judge, who is already there and paid for. The judge will look at the papers, make an appraisal of them, hear the parties very briefly, perhaps for half an hour or an hour each, and then put on two sides of A4 paper his current view on how the litigation is likely to wind up. That judge is thereafter disqualified from adjudicating if the case does go to trial, but experience from a number of states in America is that it nearly always works because the parties have got what they need—not so much the oracle but a welcome prognostication based on an educated appraisal of where the litigation is likely to go. We are therefore extremely interested in the option of early neutral evaluation as a relatively cost-free and effective way of disposing of litigation. It deals at one blow with all the initial questions of meaning, privilege and so forth. That again does not require legislation—

**Lord Woolf of Barnes:** That is the point that I was going to make; it does not require legislation. It could happen now.

**Sir Stephen Sedley:** It can all be done voluntarily or by rule.

**Q655 The Chairman:** We have been told that this would be ideal or extremely helpful for a variety of things, and of course it does not require legislation, but then of course it does not happen. I personally would like, for clarification, another sentence or two out of you on what it does require if it does not require legislation. It does require someone actually to make it happen on the street. What does it require? What could we do to help to move the process forward?

**Sir Stephen Sedley:** I have no doubt that an enabling clause in the legislation would be of great value. It would give the rules committees a steer on what they would be expected to achieve by rule. I am not saying that there is any reason why there should not be some legislative provision but, as I think Lord Woolf would say as well, there is no need for Parliament to spell out the detail. For example, one would want there to be a power to impose a costs penalty on the party that had turned its back either on early neutral evaluation as a procedure or on the result of it. If, having rejected an early neutral evaluation, the party then goes to trial and gets exactly the result the judge predicted, it should pay indemnity costs. Indeed, it may very well be that legal advisers ought to indemnify their clients for those costs.

**Q656 Lord Marks of Henley-on-Thames:** I was not suggesting the need for legislation as such. In our session with the Lord Chancellor, we reminded ourselves of the power that he has to direct rule changes to a purpose. The rules committees are then bound to implement them.

I was interested in what Sir Stephen was saying. The question about family proceedings was directed to early neutral evaluation coupled with the possibility of the judge who conducts the evaluation also acting as a quasi-mediator and

encouraging settlement on the strength of it. That judge would then have the power to look at the without-prejudice positions of both parties, which would be one reason for the future disqualification. But a further question arises, and I am interested in the way you took it forward; it is whether the same judge could then decide the interlocutory issues of meaning and privilege which would determine the future course of the case if the settlement failed.

**Sir Charles Gray:** Could I answer that? I see no reason at all, provided that Clause 8 has been enacted—in other words, you do not normally have a jury—why the judge who is going to handle should not decide the issue of meaning right at the beginning. That would be a binding ruling on his part and would be easily made because no evidence is admissible on it. He could then carry out the judging of the case as far as is necessary, although I would think that most cases would settle once meaning has been determined, as one party or the other is going to be unhappy with the outcome. I see no problem with that.

**Q657 Lord Marks of Henley-on-Thames:** But he would not be the early neutral evaluation mediation judge of necessity, would he?

**Sir Charles Gray:** He could be.

**Sir Stephen Sedley:** You could roll the procedures up. Again, this is why I think Lord Woolf would argue for flexibility, because it may be possible to get the whole lot under one umbrella.

**Sir Charles Gray:** Perhaps it should be meaning first and then early neutral evaluation of all the remaining issues at that stage.

**Lord Woolf of Barnes:** If the parties consented, the judge who carried out this process could be the judge at the trial, in my view. Things can be done. We know, because we have changed our civil procedure substantially. Things do happen now. What was much more difficult to achieve than the legislation needed for the changes that we have now was a cultural change. I am afraid that the incentive for cultural change has to do with fear of costs if you do not take advantage of sensible ways of doing things. You have to accept that if you start imposing penalties of costs, you will then have satellite litigation over the question of costs. That can be as expensive as the additional expense caused by somebody being unco-operative.

**Q658 Stephen Phillips:** I think it comes to this—and I just want to check that I am neatly encapsulating your advice to the Committee, which I think is threefold. First, the vestigial right to a jury in defamation cases should disappear. Secondly, the Government need to focus on procedure rather than substantive law. Thirdly, there are perhaps some provisions of this Bill where the law needs to be kick-started—for example, in relation to academic freedoms—where the Committee could usefully say, “That is a decent proposal and we recommend that”. If the Committee is really concerned about access to justice and cost—I certainly am—the two things that need addressing are jury trial and procedure. Is that a fair encapsulation of your advice to the Committee?

**Lord Woolf of Barnes:** As far as I am concerned, very fair.

**Stephen Phillips:** I am very grateful.

**Q659 Lord Grade of Yarmouth:** I am really interested in the idea raised by Sir Stephen of cheap libel proceedings being a way of buying circulation, if I can characterise it in that way. I have been on both sides of these arguments over the years, and what media organisations really resist are public apologies and general statements that they got it wrong. This is much more painful to them than writing out

a cheque, usually, in the culture of the media. Do you think that there would be any benefit in the courts having the power at the end of a trial to order corrections or apologies?

**Sir Stephen Sedley:** I can see no reason at all why the court should not have an injunctive power to direct publication—not necessarily an apology, as you cannot put regret into the mouth of somebody who has no regrets, but at least a correction, saying that what was published was false and that this is why it was false. That would certainly be a practical solution. The problem of making libel cheap at the price is huge. If the overriding objective of this Committee—and everybody here, I think—is achieved, of stopping libel costing so much to litigate about, you have the risk of a cost-benefit calculation being made: “We know this is not true, or we know this may well not be true, but it will do things for the circulation that make it worthwhile because it is not going to cost us that much to commit it”. It seems to me that there is a case for thinking outside the box and thinking about regulation as an alternative to litigation. For example, if the Press Complaints Commission were put on a statutory basis and were in a position to make sure by the means of regulatory fines that reckless or knowing libels did not pay, that might very well be in the public advantage. Such a body may also be in a position to deal with questions of invasion of privacy and unethical conduct of the kind that is all over the front pages today. That is a long-term, different proposition from what this Bill proposes. I argued the case for this in the Blackstone Lecture that I gave at Oxford in 2006 and I would be happy to make the relevant passages available if they were of any interest.

**Sir Charles Gray:** In answer to Lord Grade, I think that there is an objection in principle to ordering any publication to publish anything, whether it is an apology or anything else. It should be done by them if they see fit to do it and, if they do not, they should not be ordered to, even if it means them having to pay a very much larger sum in damages.

**Q660 Lord Grade of Yarmouth:** Those last few words constitute the nub of it. Is there currently anything that inhibits the court from taking those two factors into account? They have refused to apologise, they are not going to apologise—therefore, damages will be increased.

**Sir Charles Gray:** No, I think it is taken into account every day.

**Q661 Mr Lammy:** On that last point, Sir Charles, why do you say that? Is integrity not a fundamental of our society? We raise our children to apologise or state the truth when they do something wrong. Do we not want to live in a society where, if a paper makes a false statement, it maybe does not apologise but gives due prominence to the correction?

**Sir Charles Gray:** The way that you put it is very attractive, but in the end does one want a system of justice that enables judges to tell newspapers what they are going to put into the next day’s edition? I take your point that in an ideal world it would be better to educate newspapers and their editors in a way that sometimes is necessary, but I have a gut feeling that it is wrong to be in a position of ordering a newspaper or any other publication to publish what it does not want to publish.

**Q662 Mr Lammy:** Could you not say that judges, as well as the press, are the custodians of free and correct speech in that sense?

**Sir Charles Gray:** I am not sure that I saw my role as being quite that. One tries to get the right result, with or without a jury, but it is just an objection of principle

to the notion that judges or indeed anyone else could tell newspapers what ought and ought not to be published.

**Q663 Mr Lammy:** We have not raised the issue of the internet with you. Clearly, the world that we are entering has potentially far more libel in it because of the new technology and the advanced pace of change. I have seen this through my responsibility for intellectual property and copyright in another life. Should we be concerned about cost escalation because of the internet? Does this really need to be gripped?

**Lord Woolf of Barnes:** The internet is an example of where the world has changed and the law probably has not yet changed sufficiently, and it is going to be very difficult to achieve the change you need because of the global nature of what has happened. One advantage of the conventional methods of communication is that there is always somebody in the jurisdiction who is responsible and whom you can identify and look to for redress. In the electronic age, that is much more difficult to do.

**Sir Stephen Sedley:** I suspect that some kind of international convention is needed. At present it is difficult to enforce English libel judgments in the United States because it is believed, largely wrongly, that we subvert free speech in a way that the First Amendment forbids in the United States. It is very difficult to achieve reciprocity and, of course, many of the problems arise in the United States and arrive here from there. It is probably a matter for international negotiation because it is certainly not something that we can legislate on unilaterally.

**Q664 Rehman Chishti:** Can I explore the idea about early resolution in terms of cost savings? We have talked about the jury system being contrary to that. What about the idea, which has been pushed by some, of having specialist courts? We looked at the specialist Patents County Court, which deals with things at an earlier stage rather than taking them all the way to the High Court. Is that something you would favour or not?

**Lord Woolf of Barnes:** My belief is that, wherever possible, we should provide specialist types of proceedings for work that justifies that type of process. Sir Stephen mentioned the Technology and Construction Court. That is a typical example. In defamation we now have specialist judges who, on the whole, deal with it. That is an informal way of doing what you have referred to. The great advantage of dealing with defamation in this way is that there was a time—some may regret that the position has changed—when Sir Charles, when he was at the Bar, may have worried about where his next brief was coming from because there were very few defamation cases. It has become a much more popular form of litigation among certain sections of the public, so the need for specialist judges and advocates has increased. Our courts system at present is well capable of dealing with that. As I say, the Technology and Construction Court is a very good example. It was a backwater that was not serving the public. The old official referees list that some of us may remember was, I am afraid, very ineffective and did not work well. The Technology and Construction Court has been transformed. This can be done in a flexible way and does not, I think, require special legislation.

**Sir Charles Gray:** I was going to deal with part of your question, which is whether it is a good idea to have some defamation work farmed out, if I can use that expression, to county courts. There used to be a problem with that because the county courts did not always have the facilities to enable a jury to be physically accommodated in the court. That would go, of course, if Section 8 were enacted. Personally, I think it would be a good thing if one were to see more defamation

actions dealt with more cheaply and perhaps rather more quickly in the county courts. There may be a problem finding judges with the experience and expertise to deal with defamation, but that is a short-term problem.

**Q665 Rehman Chishti:** I should like to transgress into something slightly different and direct a question to Sir Charles Gray. In your work on early neutral evaluation resolution, taking into account the pre-action protocol in defamation cases, which states that all avenues should be explored before coming to court, how well is that working now?

**Sir Charles Gray:** I have not been in practice for a while and one does not come across it very much on the Bench, but the short answer, I think, is not much. However, I may be wrong about that.

**Lord Woolf of Barnes:** I am afraid that I cannot give you an answer. Sir Charles has given you more recent information than I can.

**Sir Stephen Sedley:** The purpose of the pre-action protocol is to enable the parties to shape up to each other. The problem is what happens then. That is why this Committee is here.

**Q666 The Chairman:** It falls to me to ask the last two questions, neither of which is particularly complicated. Would each of you recommend to this Committee that we should recommend to Government that internet service providers should have some legal accountability for what they put on the internet?

**Lord Woolf of Barnes:** I would be in favour of that.

**Sir Stephen Sedley:** Yes, very much so.

**Sir Charles Gray:** Yes, I think so.

**Q667 The Chairman:** Thank you. My second question relates to a comment that I understand was made recently, which was that legal practitioners up and down the country have launched an outcry against this Bill. I am not sure that that is an accurate summary of the evidence that has come to this Committee and I would be grateful if you could tell me whether you think that this Bill has produced an outcry. If so, could you direct us to where we could lay our hands on some evidence of it?

**Lord Woolf of Barnes:** I am afraid that I share the Lord Chairman's reservations.

**Sir Stephen Sedley:** I am not aware of an outcry of any general kind. It might be that if it is going to reduce the opportunities for profitable litigation, a handful of practitioners will be jumping up and down about it, but they would be unwise to make themselves too prominent. For myself, I do not see how it can be so, because, as Sir Charles Gray has said, this Bill largely tells us what we already know.

**Sir Charles Gray:** I do not think that I can add to that. I agree with every word that Sir Stephen has said.

**The Chairman:** In that case, it falls to me to thank you most sincerely not just for the time that you have given us and for sharing your experience but for the time that you have put in on preparing for the meeting. We also appreciate that. Thank you.

**Ian Hislop, Private Eye**

**Oral Evidence, 11 July 2011, Q 668–729**

Evidence Session IIX

Members present:

Lord Mawhinney (Chairman)  
Rehman Chishti MP  
Chris Evans MP  
Dr Julian Huppert MP  
Stephen Phillips MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames  
Lord Morris of Aberavon

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Witness: **Ian Hislop**, Editor, Private Eye

**Q668 The Chairman:** I should say a couple of things by way of preliminary remarks. First, thank you very much for being willing to come to talk to us. We are very grateful. Whatever the questions, what we are really interested in is picking your brains from your experience as someone who has worked in this field for a number of years on both sides of the fence, if the briefing is correct. The second thing is that we are going to be broadcast and, I think, televised, and I want you to be aware of that. Thirdly, rumour has it that the Lords may have another vote fairly soon. We have just had one. When that happens, I will adjourn the meeting and those of us who have to do so will go and vote. As soon as the Chairman and at least one other Peer is back, we can recommence. I apologise to you for that but that is one aspect of life that we do not control.

First, I am going to ask a couple of scene-setter questions, if I may. The first is a very general question. You have had a chance to read the draft Bill. What do you think of it? Is it radical enough? It is too radical? Is it just saying in different words what is already there? How do you see it?

**Ian Hislop:** I think that on the whole it is good. It is saying in clearer words a lot of things that existed before. I would have liked it to have been more radical, obviously. I would have liked it to focus more on what we mean by “damage” and “reputation” and on whether what is written is sufficiently serious and, in some cases, devastating to merit the reaction to it. There are obviously specific things that I do not agree with but on the whole it seems to me good and positive.

**Q669 The Chairman:** May I ask a question that I asked of previous witnesses, who broadly took your line on the generality of the Bill? Given the American First Amendment on free speech and so on, do you sense that perhaps in this country we are a little bit precious about reputation? Should we be less concerned about reputation than we are?

**Ian Hislop:** I think so. It is quite an old-fashioned idea. The Americans have a defence that you need to prove malice, which means that there is relatively little in the field of libel there. I have to say that less and less libel work is going on at the moment since most of it has migrated into privacy, which, as I have told this Committee before, I do not think is very helpful. In the old days, we had “Publish and be damned”. Now, we have “You don’t publish at all, thank you,” and that is the end of the story. If we are talking about libel as a way of rich people dealing with their



reputations, I would say that a lot of people who would have taken libel actions now take privacy orders and therefore nothing gets printed.

**Q670 The Chairman:** Do you think that there is an element of overlap between privacy and defamation? This Bill is about defamation and you know that the Government has announced that it may have other plans to deal with privacy and super-injunctions, which do not fall to us, but in your mind is there a sense of overlap between privacy and defamation, and, if so, to what extent do you think we ought to be interested?

**Ian Hislop:** No. I think that one is replacing the other and that is not necessarily helpfully. I realise that this is not a great week for journalists to be talking about privacy. The basic problem for all of us in terms of regulating what the press does is that you have three groups of people who might be in charge: journalists themselves, which I do not think people are very thrilled by at the moment; MPs, which, after the expenses scandal, they are not that thrilled by; and then judges, which in the privacy debate they proved they were not that happy about either. So none of us is in a great position to start pontificating, although that is what I will be doing when you ask—

**Q671 The Chairman:** I hope that you will, otherwise we are going to be kicking our heels for a while. Perhaps I may ask you a specific question and then I will invite my colleagues to join in. We have had a noticeable amount of evidence that suggests that judges should have the power to order newspaper editors to apologise if they have been found guilty of defamation and, perhaps going further, that those apologies should be displayed in a way that bears some noticeable resemblance to the location and size of the original defamation. What do you think about judges having the power to order you to apologise?

**Ian Hislop:** I think that it is a terrible idea. I do not think that you should be made to say something that you do not believe. Newspapers go into a process of settlement and part of that is an apology. That is what happens at the moment and, in a sense, it becomes part of the negotiated agreement. The apology, the size of the apology, the prominence of the apology and the amount of money paid up are all part of a negotiated settlement about, supposedly, reputation. Ordering people to apologise is slightly ludicrous. It makes for insincerity.

**Q672 Rehman Chishti:** Coming on to the point about early resolution, jury trials and costs, the first point that I would like to touch on and get your view on is: what would you like to see in any new early resolution procedure? We have seen a number of proposals put forward by Sir Charles Gray talking about voluntary arbitration and mandatory arbitration, which he says is the right way forward.

**Ian Hislop:** The problem occurs not when the two parties want to agree to arbitrate, because then they do and they settle. If both parties want to settle, the matter gets settled. The problem arises when one does and one does not. I thought that the suggestion about mandatory arbitration, in which someone says, "You have got to sort this out," was quite interesting. That seemed to me good. What would be helpful would be an early resolution on meaning. If someone says, "This piece you have written means X," and we, as the defendant, say, "It doesn't mean nearly that," the defendant is always going to say that if we write a piece it more or less means that they are the most heinous person in the whole country and the damage done is incredible. It is obviously inflated. That is what the complainant does, and then you, as the defendant, have to defend any number of meanings up to the highest

meaning. If you could establish early on what the piece meant, what was actually being complained of and what the damage was, it would concertina the whole legal process.

**Q673 Rehman Chishti:** Linking to that, in terms of looking at the early determination of meaning and the presumption of jury trial, which is there at the moment, am I right that you are saying that that presumption being reversed and having trial by judge would be the right way forward?

**Ian Hislop:** No. I am happy for the judge to make the initial point, but certainly in the libel trials that we have been involved in I would have been very unhappy to see a judge on their own. One has only to think of cases involving people such as Robert Maxwell, Jonathan Aitken or Jeffrey Archer. Pretty often the judges have summed up the wrong way and the public, in the persona of the jury, have been examining matters of fact, truthfulness and trustworthiness and have come to what I thought was the right decision. So, no, I do not want a presumption against juries. I think that in many cases that is the better way of doing things. In my experience, there is not much evidence that jury trials take longer than judge-led trials.

**Q674 Rehman Chishti:** Perhaps I may just clarify that last point. Some have come to the position where you are sitting at the moment and have said, "Well, actually we prefer the presumption of trials without a jury. A jury trial would have to be the exception." You would say that it would be wrong to have the jury trial presumption to start with and not the other way round.

**Ian Hislop:** Yes. Quite often both parties agree that they will not have a jury. In some extremely complex cases and in some fraud cases, both sides think, "We're going to be here for ever and I'd rather have a single judge." However, I would not say that a jury should be presumed against. I would not like that.

**Q675 The Chairman:** Just before I call Lord Marks, can I ask you a question for clarification? We have had quite a bit of evidence that splits the difference. It says that normal defamation cases should be done by a judge but, if a public official or a public body is involved, the presumption should be that there will be a jury. That would mean that the three cases that you cited would all have been done by jury, but the evidence we are getting suggests that maybe 90% of the cases should be done just by a judge with juries being reserved for that special category. Could you live with that?

**Ian Hislop:** Just about, provided that there was agreement rather than someone being overruled. So in, say, the Jonathan Aitken case or one of the other cases when we said that we would like a jury, we would be allowed to say, "The jury is the bottom line for us because it is the word of a single person. It is not an accounting procedure; it is about character," rather than the defendant saying, "We want a jury trial. That's all there is." So you would need some element of consent.

**Q676 Lord Marks of Henley-on-Thames:** We have heard a great deal of evidence about the chilling effect on free speech by the threat of defamation actions. We have also been asked to consider the whole question of companies' right to sue, on which the evidence has gone two ways, with a lot of people saying that companies should not be able to sue at all or should be able to sue only under certain conditions. Lawyers in particular, who only see the cases that come to court, say that companies can suffer badly from defamation commercially and should be allowed to sue. I

wonder whether you have any views on the effect of the right of companies to sue as regards the chilling effect on free speech.

**Ian Hislop:** On the whole, they do have a chilling effect because they have so much money. Libel is so expensive now and most recipients of libel actions, apart from perhaps News International and one or two others, really do not have a great deal of money, and a lot less money than a large multinational corporation. So companies' ability to bully through their lawyers is quite significant. I think we saw that in the *Trafigura* case and there are lots of other corporate cases where, if Carter-Ruck sends you a letter, you think, "I'm going to be £100,000 down by the time this is sorted." Why would you continue with it? I think that some evidence was offered earlier on but it is years since one of the local papers even fought a libel action, which either suggests that everything they have ever written is untrue or that they just do not want to do it. So the chilling effect is fairly clear. I assumed that the way forward was as it was with local councils, the fire brigade and the police. *Private Eye* used to get a lot of libel actions from individuals paid by those bodies to sue on their behalf. We do not get them any more because they are not allowed to do that.

**Q677 Lord Marks of Henley-on-Thames:** Can I follow that up by asking what sort of proportion of libel cases where there is probably a meritorious defence you think is deterred by the effect of large resources and by that threat? I do not want a mathematical answer; I just want some sort of impression.

**Ian Hislop:** I would have to say that I am guessing from other people and other newspapers. My direct experience is that our cases come largely from individuals. I would suggest that the cases where we report on the failings of the libel system or whatever in those columns are ones where some corporations bully their way out of criticism. That occurred particularly in the medical case where the doctor involved said, "This particular procedure doesn't work," and the company said, "Actually, we produce the equipment and therefore that is a libel upon us." I thought that that was pretty indefensible, and there are similar cases. I cannot quantify them because I am afraid I do not know how many there are. Certainly, journalists say, "If you write about that company, you get a letter."

**Q678 Dr Huppert:** I have two brief questions. First, you talked about corporations as being large multinationals. Non-natural persons include small companies, charities and so forth, which obviously do not necessarily have vast reserves of funding, whereas some private individuals do have large amounts of money. Do you think that a line should be drawn somewhere? The Australian model is, I think, that companies with up to 10 people cannot take libel action. Do you think that that is worthwhile? Should we say, "No non-natural person at all," however meritorious the organisation may be?

**Ian Hislop:** Yes. You mean that if a charity or an amateur association wanted to sue—

**Dr Huppert:** Or a corner shop or whatever it might be.

**Ian Hislop:** I think that you might have to take scale into consideration. That is a reasonable point.

**Q679 Dr Huppert:** Can I ask you about another issue which I think follows on from what you were just saying and is to do with scientific issues? We have heard the suggestion in other debates that one should give greater protection for scientifically peer-reviewed studies, with them having a privilege. Is that something that you would support, and would you widen it or have guards on it?

**Ian Hislop:** If you are thinking about the Simon Singh case or any of those other cases, it seems to me quite obvious that the way that that sort of science progresses is by people being robust and even rude about each other's work. That seems to me healthy and to be no business of the libel courts. I think that one of the judges said at one point, "This is for the lab, not the court." I think that that case was proved eventually but it involved unbelievable costs and the person involved risked his house, his children's education and everything else as far as I could see in order to prove his point. With any luck, you will have got the point that those sorts of criticisms must be allowed.

**Q680 The Chairman:** Should we deduce from that answer that you think that too many trivial cases are brought?

**Ian Hislop:** A lot of trivial cases are brought but I notice that you have attempted to determine what is trivial. I thought that that was pretty much covered. If someone says that something is defamatory, it is meant to be serious and to lower the person in the eyes of right-thinking people, so saying that you were late for a meeting or that you have an odd haircut does not really qualify. I think that there are trivial cases and people do bring them.

**Q681 Lord Morris of Aberavon:** On this issue of trivial cases, from your experience would you want the bar raised regarding what kind of case can be brought? Does the test on the face of the Bill of "substantial harm" meet what you would want, or should it be added to or perhaps strengthened?

**Ian Hislop:** "Substantial harm" seems to be quite a good phrase. I said earlier that I thought damage and falsity should be proved. You have to say, "This is a very serious allegation and it is absolutely untrue," rather than, "My reputation has been ruined by this being said," which is slightly different.

**Q682 Lord Morris of Aberavon:** Would that get rid of the kind of trivial cases that you have to muster your lawyers to deal with?

**Ian Hislop:** The problem is that then the other side says that it is not trivial and then the judge has to decide.

**Q683 Lord Morris of Aberavon:** The question is whether the aim is to get serious cases only. Lord Mackay has said that the test should be "serious" and "substantial", which would strengthen it. Would you want it strengthened or are you content—not with the minutiae of it but with this kind of test, which might raise the bar so far as you are concerned?

**Ian Hislop:** I would like the bar raised. If it did that, then, yes, I would like that, because otherwise the test is a waste of money in particular and a waste of everyone's time.

**Q684 The Chairman:** But does not raising the bar for you, Mr Hislop, constitute a chilling effect for individuals who do not have *Private Eye's* fighting fund?

**Ian Hislop:** I am trying to think of individuals who do not have that much money. No, I do not think that it is terribly chilling. One sense of "trivial" is that it is a trivial accusation and the other sense is that only three copies of the publication in question are sold in England. That test is also used by judges, but that is another question. It is saying, "There was no damage to your reputation in this country because no one read it, and it barely got published."

**Q685 Baroness Hayter of Kentish Town:** Having been through this a number of times, it may be that your lawyer is better able to answer this question. Are there things not in the Bill, such as procedure rules, which could make things move faster? What are the lessons that you would want to draw?

**Ian Hislop:** I think that the courts should speed things up during these procedures. Our last marathon case was a confidentiality case against the head of the Law Society last year. That is probably a case that you do not want to go into in terms of costs, as it was hugely expensive, but it had a successful result. The other I am thinking of is the case of *Pressdram v Condliffe*, where the judge kept saying throughout, “Why are we spending all this time doing this? Why is so much money being wasted?” The judge was Mr Justice Gray and he was flabbergasted by the amount of money wasted during the court procedure. That was not because a jury would be too thick to understand it; it was that the mechanics of arguing over legal points that took for ever. By the end, you were talking colossal amounts of money. They definitely need to speed things up internally. It is all about cost.

**Q686 Baroness Hayter of Kentish Town:** That is once the matter has got to court, but what about before? Are there things that you think could be done before that?

**Ian Hislop:** I certainly think that the point about meaning would mean that no one could rack up costs straightaway, saying, “We’ve got to defend every possible meaning,” and the other side could say, “Well, we’re going to attack you on every possible meaning.” That whacks up the costs. The last time I came here, I talked about no win, no fees, but a lot of that has been covered elsewhere. However, the costs are still ridiculous.

**Q687 The Chairman:** Why do you think that defamation costs are so much higher than costs in every other type—or certainly in the majority of other types—of litigation?

**Ian Hislop:** I think that it is because the proceedings are protracted. They go on for far too long and everyone contests everything, partly through fear on both sides that it will never end. It is also because lawyers charge a very large amount of money.

**Q688 Lord Bew:** I should like to turn to the Reynolds defence. We have heard varying evidence from members of the press before this Committee, some saying that it is common sense and others saying that it is deeply internalised in the practice and the language of their newspapers. First, I should like to ask you how in recent years the Reynolds defence has affected the life of *Private Eye*.

**Ian Hislop:** Not really at all. It is no bad thing to get Reynolds codified into a new statement but in the end you are still defining what you mean by public interest. On the whole, I think that the judiciary tends to define public interest in favour of the claimant rather than the defendant. On the whole, I do not think that it comes down on our side very often. Secondly, there are problems with judging a case on the behaviour of the journalists rather than what is actually printed. I would prefer to see the debate saying, “You have said this. How damaging is that? Is it true?” rather than, “Did you ring up twice or three times? How often did you put this to him? Did you take enough care?” It does not seem to me that that is the issue that the court should be deciding. I am absolutely against prior notification, which I think is disastrous and quite obviously so. This, as I am sure you all know, is the process whereby, before you print a story, you ring up the person involved, they issue an injunction and the story disappears. That is it. It does not work.

**Q689 The Chairman:** Is that not true in privacy cases, or is it equally true in defamation cases?

**Ian Hislop:** It means that you turn a defamation case into a privacy case and then it does not even matter whether it is true or not. The story does not come out. There is no time then for any defence, Reynolds or other—it is just gone. In the Napier case, after six months there is still no print story. They appeal; you go to the appeal court and you still cannot print the story. You are nine months or a year down the line and £250,000 in before you can print the story virtually as you wanted to print it in the first place.

**Q690 Lord Bew:** If the key thing is the definition of public interest, and you are not happy with the type of definition that judges tend to give, would you care to offer us a definition of public interest?

**Ian Hislop:** Yes. It is more or less anything that I think should be printed. I see that that is a problem. I have written in my notes, “Some form of wording or guidance between all the interested parties on your side, our side and the judge’s side.” I think that Articles 8 and 10 in privacy case law have been hopelessly weighted the wrong way, and that has spilled over into everything else. Once you say “privacy”, everyone throws up their hands and public interest goes out the window. Again, I realise that this is not a great week to be saying this but, when this particular hoo-ha goes away, there will still be a need for a press that is interested in pursuing stories that are in the public interest.

**Q691 Lord Grade of Yarmouth:** Have you ever sued anyone for libel yourself?

**Ian Hislop:** No.

**Lord Grade of Yarmouth:** Have you ever been tempted?

**Ian Hislop:** No. I was tempted to sue Robert Maxwell, who said that I was a known practising homosexual who picked up boys on Hampstead Heath, which was factually inaccurate—it was Wandsworth Common. Sorry. I am being childish.

**The Chairman:** The minutes will so record.

**Ian Hislop:** No, I am in no position to sue other people for libel.

**Q692 Lord Grade of Yarmouth:** To come back to the issue of jury trials, you said in an earlier exchange that you thought it unlikely that there was much difference between the costs involved in running a trial simply with a judge or with a jury.

**Ian Hislop:** Not in my experience.

**Lord Grade of Yarmouth:** Yet, in a later exchange you talked about the endless case you had with Condliffe.

**Ian Hislop:** That was nothing to do with the jury. There was not even a jury in that case.

**Lord Grade of Yarmouth:** I am sorry but we ought to get this correct. You said that there were endless points where the judge dismissed the jury to discuss legal points.

**Ian Hislop:** No. That is a general point, not about Condliffe. With a legal argument, it does not matter whether the jury is there or not. It takes an hour for the two sides to argue a legal point. If there is a jury, the judge sends them out. That does not add to the time. You would have the legal argument anyway in front of the judge.

**Q693 Lord Grade of Yarmouth:** We have had a considerable weight of evidence from the legal profession at different levels suggesting that, if you remove the jury

from a defamation trial, it enables the judge to direct the traffic much more swiftly and to bring the thing to a much quicker conclusion. The presence of a jury inhibits the judge from settling points early on in the case. There has been quite a weight of evidence suggesting that.

**Ian Hislop:** Yes—

**Lord Grade of Yarmouth:** That will cost you.

**Ian Hislop:** In our cases, that just was not true. Certainly, the majority of the costs are racked up before you go to trial, so it is not a question of whether a jury is or is not there. The trial itself may in some cases and with some evidence be cheaper but you pay the solicitors' costs and you pay the brief. You are actually just paying refreshers by then—a wonderful word for what barristers demand for being there on the day. The huge weight of work in accumulating evidence is done before you even get to trial, so in my experience that is not true. In the Condliffe case, which was the last very long case that we fought, the costs involved were entirely due to the fact that we had to fight that case and then we had to fight it again, and there was no chance of resolution there. The complainant, who was a lawyer himself, just extended the process as far as it would go right down to the final verdict.

**Q694 Lord Grade of Yarmouth:** In Lord Lester's draft Bill, which preceded the Government's Bill, he offered one solution, which was to give the courts the power of strike-out if certain tests were not met. At the moment, the Government's Bill has taken against the idea of the strike-out, and there is a sort of mandatory early resolution formula. Would you be in favour of an early strike-out provision for judges?

**Ian Hislop:** That is the equivalent of what used to be called vexatious litigation, where people really did waste the courts' time. I thought that a strike-out provision was a good idea, but if the judge says very early, "This is such a waste of time that you must settle it now," that is one step below that.

**Lord Grade of Yarmouth:** I think that there is quite a big gap between the two. I do not think that one is the equivalent of the other.

**Ian Hislop:** I would be for the former, obviously—for strike-out. I think that you should be able to argue, "This is a ridiculous claim. Can you get rid of it?"

**Q695 Lord Morris of Aberavon:** On costs, I take your point that, once the trial has started, there is not all that much difference whether a jury is there or not. There may be some difference, but in your experience does the fact that a jury is going to be there or might be there inflate the costs by way of preparation? Perhaps you have to meet a wider range of contingencies because of the presence of a jury and that may be where the increase in costs occurs. Am I wrong in that?

**Ian Hislop:** No, that is perfectly possible, but, again, I am worried about the idea of removing the jury in every case from the process on the grounds that they may get it wrong or may not understand what you are doing. I do not want to repeat myself but in a number of those major cases they pretty much did understand what was going on and they made their judgment in a way that was quite different. Again, there is a presumption at the start of any libel case that someone has a reputation, and juries do not necessarily feel that. It depends who it is.

**Q696 Stephen Phillips:** Can I take you back to the point about the presence of juries inflating the costs or not? Like Lord Morris, I quite understand that, once you are at the doors of the court, the trial is going to cost what it is going to cost. However, the evidence from at least some judges is that, because there is the possibility of a jury trial, or perhaps there will definitely be a jury trial in due course,

there is a reluctance on the part of judges in the early stages of the case—in the first 12 months that it runs or something like that—to remove a point from the jury which the jury might find in favour of one party or the other. As a result, the trial is much more complex and therefore much more expensive, whereas if the case was going to be tried by a judge, the judge might have taken that point out at an earlier stage. So we have a conflict between, on the one hand, saying that juries are a good thing because they are the last bastion that stands against the establishment and people like us, and at the same time saying that they seem to inflate the costs.

**Ian Hislop:** I suppose you are asking whether a judge would take out points, having convinced himself of their merit in a way that a jury might not. That would be my worry. I am obviously keen for the process to be less expensive but I think there are cases where the judge would decide that something was not relevant and the jury might think that it was. That would worry me.

**Q697 Stephen Phillips:** Could I follow that up with a question about the culture of the judiciary? Do you think that there is a reluctance among the existing judiciary—obviously you have a number of years of experience, although things may have shifted; I do not know—to grapple with these cases at an early stage in order to try to move the parties towards an amicable settlement and/or to reduce the costs? If there is such a culture, what could be done about it?

**Ian Hislop:** I think that there is inertia at the opening stage, and this Bill addresses quite a lot of that. I have talked about early meaning and the process of speeding up the trial once you get going. Journalists and their lawyers think that, as soon as the writ arrives, there will be months of work before they get into court and then it will take even longer. Everyone has a two-year framework for the reparation of what may be two sentences. One allegation is made and suddenly you are looking at an extraordinarily long process.

**Q698 Stephen Phillips:** With the Lord Chairman's indulgence, I will ask this question in two parts. The first concerns compulsory mediation in whatever form. It is not arbitration, so no final decision is made, but it is a case of getting the parties together with someone who is going to bang heads together at a very early stage in the case. Is that something which would be helpful and which this Committee might recommend to the Government?

**Ian Hislop:** Yes. I think that that is a good idea. Whereas I said absolutely no to mandatory apologies, I think that mandatory mediation is certainly a route that you could go down. Quite often, there are cases where one side wants to settle but the other does not.

**Q699 Stephen Phillips:** I have a follow-on question from that. We talked earlier, and you gave evidence, about the chilling effect, particularly of fighting big corporations or anyone with a lot more money than *Private Eye* has. Do you think that compulsory mediation, because you cannot force the parties to settle—

**Ian Hislop:** No. You can only force them to talk and then they can go away.

**Q700 Stephen Phillips:** But would that in fact be detrimental in that the big party—the one with the big money—would use it to push up the costs and then refuse to settle, so that you would have yet another stage? If so, how could we grapple with that?

**Ian Hislop:** You would obviously have to put a cap on it. You would say, "You have a certain amount of time and you can't run up giant costs during that time." The



clock could have to start ticking after you had done that. I am sure that that could be built in, but it is a good point. That is absolutely what the bullying party would do.

**Q701 Stephen Phillips:** Do you have any experience of bullying parties going into arbitration and mediation?

**Ian Hislop:** I am afraid that we have not done a lot of mediation. The party who does not want to settle is usually me.

**Stephen Phillips:** You sound exactly like the sort of client that I like.

**The Chairman:** Skating over that plug, we come to Lord Grade.

**Q702 Lord Grade of Yarmouth:** Picking up the point on that last exchange, I should be interested in your views on mediation. Obviously it is a good thing if you can get people together, but it seems to me that the problem with mediation is that there is no sanction, so any big corporation could use tactics to delay and rack up more costs. There has to be some kind of sanction at the end of the process and I wonder whether one sanction might be that, assuming the case goes to court, the judge can say, "Get a report that says that the mediation failed because the people were clearly paying lip service to it and therefore the damages are more punitive."

**Ian Hislop:** It would be better not to do that with the damages, which nowadays are not a major expense, but, rather, to cap the costs. I think that the taxing masters are very good at spotting where costs have been whacked up and I am sure they could take into account whether you failed at an early stage of arbitration. As someone who is constantly applying for costs to be looked at again and brought down, I would like to see that. It would probably be helpful.

**Q703 Lord Grade of Yarmouth:** In your experience, which is considerable, as we have been hearing, where should the burden of proof lie?

**Ian Hislop:** At the moment, it lies entirely with the defendant. Someone comes into court and says, "This isn't true. You prove that it is." No one here or anywhere else is going to accept the opposite of that—where the burden of proof is that you write something about me and I have to prove that it is not correct. I do not think you are going to buy that, which is a shame, but I can see that that is not going to happen. But, again, the balance has shifted too far the other way. If someone comes into court, the presumption should not be that they are inevitably going to be telling the truth and that they have a clear reputation which has been damaged because they say that it has been. It should be acceptable to question all those things. I think that, to some extent, they should have to prove that their reputation has been damaged.

**Q704 Lord Grade of Yarmouth:** But what prohibits that at present?

**Ian Hislop:** The burden of proof is entirely on the defendant's side, so they do not have to do any of that.

**Q705 Chris Evans:** I am interested in looking at the internet. Let us take, as an example, Robert Maxwell still being alive today, God help us. You accused Robert Maxwell of trying to buy a peerage. If that were put on to the internet now, it would be harder to track it down than if you published it in *Private Eye*. Do you think that, in that case, you are under a different legal jurisdiction as a publisher of a printed magazine than you are as someone putting things on the internet? Do you think that that is fair and how would you address that?

**Ian Hislop:** Again, I do not have a huge amount of experience of this because *Private Eye* is first and foremost a print publication. The advantage of print publication in this country is that you are tested. I do not expect people to look at *Private Eye* and say, "This isn't true." I expect them to think that it is true and, if it is not, then there is a cost to be paid. It is a case of "Publish and be damned". On the internet, that is not true at the moment, so it seems to me that, rather than totally abandoning a set of standards for the internet, your problem and everyone else's problem is in getting the same standards to apply to both. I know that there are questions about who you go for on the internet, but the idea of it being fine to publish anything on the internet strikes me as ridiculous and unsustainable. One has only to think of the case of former pupils going on to a website and saying, "My teacher's a paedophile," and naming them. Is that freedom of the press or is it just libel? It strikes me as the latter. So there must be a model similar to that in publishing, where you do not sue the newsagent or the lorry that distributes the print but you do sue the person who is responsible for publishing it—the publisher, in whatever sense, or the person who wrote it. Again, we do not do a lot of that, so I do not really know what I am talking about.

**Q706 Chris Evans:** Do you feel at a disadvantage because you are running a magazine in that you cannot say certain things, whereas probably another satirist can say whatever they like on the internet? That seems to be the huge tension at the heart of this Bill. Whatever law is brought in, you could be disadvantaged by being a publisher, whereas with the internet people can say whatever they like.

**Ian Hislop:** I genuinely consider that to be an advantage. I consider it an advantage that when the hard copy of *Private Eye* reaches the streets, people pay for it and pick it up, and that has—this sounds very odd—an authority or a certain dignity, or perhaps not. But at least what we print is subject to some sort of legal test and verification that it is not total nonsense. So, no, I do not feel at a disadvantage.

**Q707 Chris Evans:** Even if, for example, someone set up a [www.privateeye.co.uk](http://www.privateeye.co.uk) website or whatever and started publishing untruths? Would you still feel that that was fine?

**Ian Hislop:** Well, not if they are passing themselves off as us.

**Chris Evans:** But you cannot then catch them.

**Ian Hislop:** Oh yes we can.

**Q708 Dr Huppert:** May I follow up on that? Your comment about booksellers was interesting. We have had some evidence from the Booksellers Association that individual booksellers are sued on a relatively regular basis for what is printed in hard copy.

**Ian Hislop:** Only by the worst of the claimants. That is Goldsmith/Maxwell territory. They are going not for the person who committed the libel but for the person who sold the book or the newspaper.

**Q709 Dr Huppert:** I thought that it was interesting to make that point in terms of an analogy with things that are online. Mr Evans has raised a very important point but perhaps I may press you on the distinction between articles being published online by, for example, BBC News or the *Huffington Post*, and more informal things, such as commentary, lighter pieces, discussions on Mumsnet and that sort of thing. One of those is clearly more akin to publishing things in *Private Eye*. There is a regard for BBC News—I will not try to guess which one is held in higher regard—and they

should be following the same rules. I hope you would agree with that. The question is what one does about informal, more anonymous postings. Does one say, just as with any other libel case, that one should target the person who wrote it or does one say that they should target something else, as they cannot target the person who wrote it? We have been struggling with this question for a while and perhaps you have some thoughts on it.

**Ian Hislop:** Again, I have very little first-hand knowledge of this. The people who seem to do it successfully are the corporations, who just go straight for the server. The server then takes it down irrespective of whether it is true or false.

**Q710 Dr Huppert:** Do you think that that should not be allowed?

**Ian Hislop:** There obviously should be some measure as to whether it should happen, rather than someone saying, “Because you say so, I take it down.” I am not really qualified to talk about this. What you call “informal comment” seems to me pretty public publishing in a lot of cases. I find it difficult. People say that it is just like people talking down the pub, but it isn’t really, is it? It is putting it in words online so that as many people as possible can read it. If you wanted to say this down the pub, then you would. There has to be a definition of what you mean by “informal”.

**Q711 Dr Huppert:** There is a spectrum. It is very clear that there is a publisher for *Private Eye* but it is not entirely clear who is the publisher of a comment on a Mumsnet thread or whether they should exercise the same amount of care that the publisher of *Private Eye* or BBC News should take.

**Ian Hislop:** Again, I do not really know. My instinct is that in a number of these cases—the teacher one and a few others—if you are essentially libelling innocent people and saying, “Well, it’s just casual, isn’t it?” that does not seem to me something about which you can just say, “It doesn’t matter.” But I really do not know, because we do not do that.

**Q712 The Chairman:** You have told us that you have not had a lot of experience in this area, so can I appeal to your instinct, to which you have made reference? Do you think that internet service providers should be held accountable for what appears on sites?

**Ian Hislop:** Provided that there is some sort of testing process before it just has to go.

**The Chairman:** I did not ask you whether it should go or not. At the moment, they are arguing vigorously that they are just a postman, a milkman or whatever. My question is really quite simple. Instinctively, do you think that they should be held accountable in some form to be determined because it is on their patch?

**Ian Hislop:** I can only equate it with the model that I know, which is essentially distribution as opposed to publication, and it feels to me that they are distributors. Targeting them is too late for the injustice—if it is an injustice—that has been committed. But I really would not pose as knowing what I am talking about in this area.

**Q713 The Chairman:** Let me take you to a follow-on from that. If you look at the net, you can divide it into two bits. One bit is that which is sourced or identifiable, so if there is a defamation or potential defamation you know who to go for. But a lot of it is unsourced and unidentified. Do you think that we should recommend to the Government that those two categories be addressed or handled in the same way?

**Ian Hislop:** One lot are admitting who they are and then saying it, while the other lot are not doing so. I do not know how you address finding out who they are. If we print a piece in *Private Eye*, thousands of sites, threads and comments immediately say, "Hislop is in the pay of the CIA. He's a known fascist. He's working for the Zionists," or, "He's secretly on a jihad." You name it, they will say it. It is nonsense and it is garbage, but there is a vast amount of it out there. I do nothing about it because I think, "So what?" I do not think that most people look at it and think, "That must be true."

**Q714 The Chairman:** That is a very helpful comment because it indirectly answers my question. You treat what is unidentified and unsourced in a different way from that which is identified and sourced.

**Ian Hislop:** Some of these people put their names on it.

**The Chairman:** Let us assume that we do not know who thinks that you are on a jihad, just for the purposes of this conversation. You treat the two differently, but my question was: do you think that we should recommend to the Government that they, in legislation, should find different ways of addressing the problem, though those ways could conceivably be different?

**Ian Hislop:** So you create a sort of respectable bit of the internet and a less respectable bit. I really do not know how you do that. I instinctively feel that the question of informality on comments and threads is not enough. You have to have a better definition of being allowed casually to do those sorts of things. In the private sphere, we accept that you can say what you like.

**Q715 Lord Grade of Yarmouth:** I have a very quick point arising from that exchange. Listening to that, it occurred to me that it might be possible, if a case got to court or was in the early resolution procedure, for the courts to take account not of the damage that the statement was likely to cause but of the damage judged against the penetration or distribution. If [bbc.co.uk](http://bbc.co.uk) says it, it is one thing; if it is a rant on Twitter, it is another.

**Ian Hislop:** Yes, or if it is on an obscure website where maybe 20 people have read it, you obviously do not want to be looking at a £20,000 fine and the full majesty of the law. Yes, I can see that. But if you have proportionality in the print sphere, then you should have it in the blogosphere. That seems to be sensible.

**Q716 The Chairman:** Way back at the very beginning, you said that there were a number of things about this Bill that you did not like and that you would get around to it. Can I invite you to get around to it?

**Ian Hislop:** I think that I got round to most of it, didn't I?

**The Chairman:** Only you can tell us.

**Ian Hislop:** There are costs, early meaning deliberations, speeding up the courts when the cases get there and some sort of more balanced definition of "public interest" that does not always allow the judiciary to find against the press, which I think on the whole they tend to. I mentioned jury trials. There is a thing about archiving online, which is about the only thing that I do know about. *Private Eye* has been going for 50 years. If we put our archive up online and someone 30 years later says, "I'm going to sue now," when the statute of limitation has run out, I hope that the Bill would consider that to be too late; I hope that it would not be possible to come back and sue again just because something had been put on an archive. That is a very small point. There is also presumption of reputation, certainly as a starting point in, say, the Aitken case, the Maxwell case or even the Napier case—he was

President of the Law Society and a fairly significant figure. There is an initial presumption that everything they say, in terms of their own reputation and the damage to it, should be taken at face value. I would like to see that challenged early—you asked about that in terms of balance. Mandatory apologies, no. As for restrictions on corporations, I think that that is a good idea.

**Q717 Lord Morris of Aberavon:** Mr Hislop, I think that you indicated earlier that you are in favour of mediation.

*Ian Hislop:* Yes, I think that it is a good idea.

**Lord Morris of Aberavon:** Have you any experience of mediation?

*Ian Hislop:* No. I indicated that it was a very good idea for other people.

**Lord Morris of Aberavon:** I see. I have got the message. Mediation obviously needs the consent of both parties.

*Ian Hislop:* It does, yes.

**Lord Morris of Aberavon:** Compulsory mediation is obviously a contradiction in terms.

*Ian Hislop:* It is difficult, unless some sanction is involved, as Lord Grade suggested, so that you do not get your costs unless you take this bit of it seriously. That might be quite a good idea.

**Lord Morris of Aberavon:** The opportunity to mediate, yes.

**Q718 Lord Marks of Henley-on-Thames:** There is just one point that I would like to canvass with you, which is the honest opinion defence. You talked about the public interest in relation to the Reynolds defence and we have had some evidence about whether public interest should be a condition of running the honest opinion defence. My first question about that is whether you take a view one way or the other on it.

**The Chairman:** Excuse me. I apologise but there is a Division in the House of Lords. I have explained why we need to adjourn for just a few minutes, while we go down and do our duty, after which we will resume. Thank you and our apologies.

*Sitting suspended for a Division in the House of Lords.*

**Q719 The Chairman:** Apologies for the disruption. I should just make it clear to my colleagues that, when this session with Mr Hislop finishes, that finishes our meeting for today. Lord Marks, you were in the middle of a question.

**Lord Marks of Henley-on-Thames:** Mr Hislop, if you remember, my first question was whether a defence of honest opinion should be contingent on public interest being engaged. My second question, in relation to that, is whether, if you are going to rely on the defence of honest opinion, there should be some indication of the factual basis for the opinion. We have had some evidence on that. In other words, you should not just be able to say, “X, Y or Z is a lousy doctor and that’s my honest opinion.” You should have to say, “X, Y or Z is a lousy doctor because he messed up three operations,” or something of that sort.

*Ian Hislop:* That would be fair comment, as I understood the old definition.

**Q720 Lord Marks of Henley-on-Thames:** “Fair comment” is now to be called “honest opinion”, so yes.

*Ian Hislop:* I suppose that if “honest opinion” includes having thought about the evidence for having this opinion not exhaustively but so that you could genuinely hold that opinion, that is all right, if that is what it means. I preferred “fair comment”,

because I thought that it meant that it was fair to say what you said on the basis of what you had. I am not sure whether “honest opinion”—

**Lord Marks of Henley-on-Thames:** So you approve of the idea that there should be a basis for—

**Ian Hislop:** Yes. I am all for that being a defence and I do not think that it necessarily has to include public interest. I think that we should be allowed to have an honest opinion and to make fair comment about things that are not necessarily in the public interest.

**Q721 Dr Huppert:** During the break we reflected on some of the things that you said. We have had discussions of the idea of using declarations of falsity as an alternative route to standard libel, particularly with corporations that are not allowed access to libel, but also with other people. Rather than trying to get damages, they would be able to get a simple court-led statement saying, “This thing is false.”

**Ian Hislop:** I think that that is dangerous.

**Dr Huppert:** That is what I was going to ask. We have just talked about the Reynolds defence. You said that you were not that comfortable about having to depend on what process you as a journalist went through but would rather rely simply on whether something was true or false, which would seem to fit with liking the idea of declarations. Perhaps you could help with that.

**Ian Hislop:** I was trying to say that it should not be based entirely on the behaviour of the journalist and whether they have overcome these 10 behavioural hurdles in their pursuit of the story. The question should be whether the story as they have presented it is unjustifiable—they have not presented any evidence to justify it—and therefore unsustainable. This is not what courts do, on the whole. They do not say, “This story is untrue,” partly because that makes them a hostage to fortune a year later when potentially the rest of the evidence comes out. The court did not declare, “Robert Maxwell is not stealing his pension fund because you have not proved that.” The court said to us in that case, “You have not proved this.” If they had said, “This story is not true,” they would have looked ridiculous in the passage of time. Also, they do not have that evidence. What they have to decide is whether you have shown enough to make it reasonable for you to have made that allegation. I think that declarations are tricky.

This is why you have public inquiries. That is their role. The court cannot ask, “Is chiropractice a scam? Is it nonsense? Is there no evidence at all for it?” That is not for the court to say at the end of, say, the Singh trial; all that it can say is that, on the basis of what he knows and the trials he has covered, he is allowed to say that he believes that that is what it is. Do you not think that that is a better end than having a court ruling on matters of truth and falsity?

**Q722 Dr Huppert:** I absolutely accept what you are saying, but my challenge is partly that if any people or organisations—corporations, say—are not allowed to take action in libel, some alternative remedy needs to be available to them. One suggestion that we have been exploring is the idea of declarations of falsity—“Yes, you’re right, that wasn’t true. Next.” You are not comfortable with that, but is there anything else? Clearly one can unjustly defame the reputation of a large corporation. Just because it is powerful does not mean that one cannot be unreasonable towards it.

**Ian Hislop:** I suppose that you are not defending the individual—the chief executive or whoever. You think that if someone says, “This incinerator company

caused death on a wide scale,” there should be legal redress for it to say, “There is no evidence for that.”

**Q723 Dr Huppert:** Our legal advice is that there has to be some sort of process. The question is: what is a proportionate one? Many of us think that libel actions are not the best way.

**Ian Hislop:** I think that declaration of falsehood is too much. The declaration might be, “There is no evidence to suggest this,” or, “This has not been proved,” but has the court got the mechanics to say that nothing happened? Has it investigated? It sounds like a magisterial thing. Has it gone out to the Skeleton Coast and checked whether Trafigura has been flushing out the inside of those tanks? Would it have said, “There is no evidence”? I do not know. I think that it is difficult.

**Q724 The Chairman:** I come to what I think are maybe the last two questions. They are not related. You started off by saying that you could have lived with something a bit more radical than what the Government have produced. We have been told that the issue in defamation is not the damages but the costs—you have used that phrase this afternoon. Would it help to keep defamation in the range of the common man or woman if we recommended to Government that costs could not be more than a certain percentage of damages?

**Ian Hislop:** It sounds like a terrific idea.

**The Chairman:** Why?

**Ian Hislop:** Because they would be smaller than they are now, when they are unlimited.

**The Chairman:** But help me with slightly more reasoning than just bottom-line reasoning.

**Ian Hislop:** If a defendant said, “My reputation has been appallingly traduced, as you have suggested that I have done A, B and C,” and at the end of the trial they are awarded £10,000 in damages, you might think, “Well, £10,000, their reputation has been traduced that much in the opinion of the court.” If behind that there is £300,000 to be paid in costs, you are looking at an imbalance between the total cost of this action, the total cost of their reputation and the amount that you see as the headline figure on damages. That seems to me unfair. If you made some equation between damages and costs, that would balance it.

**Q725 The Chairman:** Do you think that if there were some legal limitation on damages—I realise that this is seriously radical when it comes to lawyers, judges and so on, but we as a Committee are trying to keep defamation within the range of individuals—that would be likely to encourage the legal profession to focus on the priorities and not to do the contingent activity that might turn out to be useful but only in one case in a thousand?

**Ian Hislop:** Yes. If you want to make libel not merely a rich man’s tool, the cheaper it is in overall costs, the better. You may remember the case of the two girls who were accused by a store of shoplifting. They felt that their reputations were traduced, but they said, “Libel is not for us. We are not going to take issue with this.” The case was much quoted at the time—you had the rich man who had the ability to take a case on what appeared to be less evidence that he was a thief but you also had the girls who were saying that they were called thieves but were not. If, as I take it, you want libel to be useful for more than just very rich people and corporations, you have to keep the costs down.

**Q726 The Chairman:** This is my final question and I will tiptoe into it for reasons that will become obvious very quickly. You should not necessarily feel equally constrained if you do not want to. We have had evidence that the Press Complaints Commission, which I know you do not wholly subscribe or belong to—

**Ian Hislop:** I do not belong to it

**The Chairman:** We have heard that the Press Complaints Commission could maybe play a more active role in the handling of defamation cases. We have even heard some suggestion that, if we were going to have early resolution, it should have some role in that. On the other hand, we have had evidence that said in effect, “Anybody but the PCC”. I am genuinely not trying to sideways suck you into contemporary comment, but I would be interested to know where you would see, if at all, a Press Complaints Commission involved in early resolution.

**Ian Hislop:** It would be the logical place to do it, but the record of the PCC recently—well, for quite a long time—is that it has been ineffective, toothless and often wrong. The PCC are the people who censured the *Guardian* for running the phone-hacking story, so you can see why some of us feel that their judgment has not been awfully hot in the past few years. I do not belong because it is a supposedly self-regulatory body that had a very strong tabloid and News International influence for many years. Therefore, I felt that to go before it and to offer myself to its judgment was not something that I wanted to do. We run a column every week called “Street of Shame”. I would rather comment about them. So that was my position. I know that the Prime Minister has rather jumped the gun in saying that it is all over, but I think that there would have to be a fairly major rethink about who is on the PCC and what it does if you want to use it as a regulatory body.

**Q727 The Chairman:** But you would not by definition rule that out if there was to be an appropriate structural or similar amendment to the present PCC.

**Ian Hislop:** No. We go back to the first thing that I said to this Committee. We have a problem in that someone has to regulate this, but who are the public going to want to do it at the moment? Self-regulation by journalists is probably not thrilling people at the moment. What about regulation by MPs, who would not have released the details of their expenses? Or there is regulation by judges. A month ago, there was a widespread opinion that they had risked absurdity by their views on privacy. We have a slight problem in that all the normal avenues for regulation are not looking hugely trustworthy at the moment. I think that you have to come up with a balance of those, which will allow regulation without it being seen as MPs getting their own back—they are furious about what happened to them, so the press will do what they say—judges getting inside the system, as it were, before the press, or journalists just serving themselves. That is why I think that, if you are going to come up with a regulatory body, it has to be very different from what the PCC has been before.

**Q728 The Chairman:** It falls to me on behalf of the Committee to say a very big thank you. It is a very sincere thank you not just for the time that you have given us today but for the time that you have put in in preparation, which was obvious. I want you to know that that is appreciated as much as your being here and answering our questions. If, after you leave us, anything occurs to you that you wish you had said or, more likely, that you wish you had not said—

**Ian Hislop:** Did we go into libel tourism?

**The Chairman:** No, we did not. Tell us about libel tourism.

**Ian Hislop:** I am sorry—I am sure that everyone has had enough of my voice—but that struck me as an issue that was worth raising. I hope that the



Committee will do something about it. It comes under the trivial—the sight of watching people whose entire careers or lives are based in the Middle East, Russia or wherever using London as a way of shutting up their opponents. Certain charities have been targeted, as has medical opinion. Writers of perfectly good academic books about the funding of terrorism or whatever have been targeted by the people they are writing about on the grounds, “We would never get this through in our own jurisdiction, so let’s try London.” It is amazingly embarrassing to have the American Federal Court saying, “Don’t worry about the UK; they’re all mad.”

**Q729 The Chairman:** On the other hand, the evidence to this Committee has fairly strongly been—I do not want to over-egg it—that, yes, although there is the odd case of libel tourism here and there, it really is not a problem. It is not a problem on a par with the other issues that we are having to address. You want to dissent from that view.

**Ian Hislop:** I suppose because we have written about it a lot but have not been subject to it. All the cases of libel tourism seem to be about things that are very important, as opposed to a lot of the libel that turns up, which is about things that are not. These are always about corruption, terrorism, bad practice. You do not get trivial libel tourism, generally speaking. The cases that we have covered have tended to be about things that you would get exercised about. There may be fewer cases and you may think that it does not happen very often, but I think that it happens often enough for it to be worth considering.

**The Chairman:** Thank you. That was a very helpful addendum. I appreciate it very much. If anything occurs to you, you are absolutely free to write to us, and whatever you write to us will be on the record, just as much as this has been. Thank you very much indeed. It is much appreciated. I say to my colleagues that that concludes our meeting today.

**Edward Garnier QC MP, Solicitor General**  
**Oral Evidence Session, 18 July 2011, Q 730–748**

Evidence Session III X

Members present:

Lord Mawhinney (Chairman)  
Sir Peter Bottomley MP  
Chris Evans MP  
David Lammy MP  
Stephen Phillips MP  
Lord Bew  
Lord Grade of Yarmouth  
Baroness Hayter of Kentish Town  
Lord Marks of Henley-on-Thames

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*Witness:* **Edward Garnier QC MP**, Solicitor-General

**Q730 The Chairman:** Solicitor-General, we are extremely pleased to have you with us and we thank you for coming. As you know, we have agreed with your office that we will take only half an hour of your time. However, there are a few questions on which we would like to pick your brains, if we may. First, I alert you to the fact that we are being broadcast. Secondly, I alert you to the fact that we may have to adjourn briefly if there is a vote in the Lords. Thirdly, I ask you whether there is anything that as a senior government Law Officer you would particularly like to say to us before we start.

**Edward Garnier:** No, I do not think so, other than to say that I am delighted to be here—at least, I think I am—and to remind you of the obvious, which is that this is a Ministry of Justice Bill and not an Attorney-General’s Office Bill.

**Q731 The Chairman:** Thank you for that. We are aware of it. Indeed, it is quite a good introduction to my first question, which you are perfectly entitled to say falls to the Ministry of Justice rather than to the Law Officers, although, given your historic professional background and the role that you play, we think that you might have a view, which we would be interested to hear. One of the big surprises to us of our inquiry has been that nobody mentioned rules and procedures when we started, but they have now assumed fairly significant importance in our thinking and in the evidence that we have taken. Would you have a view or a concern if we were to recommend, and the Government were to accept, that defamation could be handled more effectively and more quickly simply by persuading the courts to adopt different rules and procedures, some of which may exist in theory but do not appear to us to be very operational?

**Edward Garnier:** I do not think that I would have a problem with that. You would just have to ask yourself, “What is the question that you are trying to answer?” If you are trying to change the substantive law, probably you need to do that through legislation. If you are simply trying to change the procedure, you would look to the rules committees that are relevant to this aspect of law and apply your minds to that.

**Q732 The Chairman:** Given that we have been asked to reflect on a draft Bill and issues that were too tricky for the Government to put in a draft Bill, you would have no problem if part of our recommendations was focused on giving advice to the Government on rules and procedures.

**Edward Garnier:** No. You and your colleagues must decide what you think it is appropriate to make recommendations about. If you want to make recommendations about the substantive law, no doubt you will do it in relation to the draft Bill. If you want to make recommendations about how defamation actions or complaints are handled by the courts and that leads you to make recommendations outside the Bill, no doubt you will do so and address yourself to what you consider to be the deficiencies in the current procedures.

**Q733 The Chairman:** From your experience, do you think that amending the way in which rules and procedures are actually applied could help to speed and thereby reduce the costs of defamation?

**Edward Garnier:** I have seen it happen in the past. It used to be the case 20 or so years ago that it took about 18 months between setting down a case that was ready for trial and its actually appearing in court before a jury. The then Master of the Rolls—I think that it was Lord Donaldson—invited the judge in charge of the jury list to greatly reduce that gap and he did so procedurally; he simply said that people must comply with the timetabling rules and that if they did not there would be cost implications. Within a very short space of time—six to 12 months, as I recall—you could be in the warn list very quickly after a case had been set down. If there is a will, if there is sufficient judicial management and if the rules are clear, it can be done.

**Q734 Mr Lammy:** We have had varying views on cost in this area of law. That cuts in two ways. One is obviously in relation to jury trials and their costs, although we have had quite a bit of evidence that there has been a downturn in jury trials for the last couple of years. There is also some concern that by legislating we will see quite a lot of challenges to find out where the law is in the coming years. I wondered what your views were on costs.

**Edward Garnier:** When you ask what my views are on costs, what aspect are you thinking of?

**Mr Lammy:** Is this an area where you, as Solicitor-General, are concerned that costs are not proportionate or are not what you would like them to be, particularly in a time of fiscal constraint?

**Edward Garnier:** In one sense, since there is no public funding for defamation cases, it does not touch on the Exchequer, other than that it takes judge time and court time to house the trial or application. There is a degree of misconception about the cost of libel actions, simply because historically there has never been any public funding for them. The costs of other forms of civil action where there has in the past been public funding have been hidden. I am afraid that there is no such thing as a free piece of litigation. It has to be paid for by someone. I am probably not answering your question, because I am not entirely sure where you are intending me to go.

**Q735 Mr Lammy:** There is a second question, on which I hope you would have a strong view. It is about justice and equity. How easy is it for Joe Bloggs or Joe Public to seek to defend their reputation in this country? The Committee has heard a lot about celebrities and famous people, but I think that the mood of the Committee is that we are very concerned about how the ordinary shopkeeper in Grimsby who feels defamed is able to seek justice and whether the costs are disproportionate to their doing that.

**Edward Garnier:** Again, I do not want to be unhelpful, but I think that it very much depends on the circumstances of each case and who the person is from whom you are seeking redress. If you are a small business or an individual without private means, access to a trade union or other financial help, yes of course it is difficult to do that, unless you can enter into a conditional fee arrangement, which has to some extent made access to justice in this area of the law easier. But one of the things that a litigant has to take into account, whether you are a defendant or a claimant, is whether you can afford it. That is just a function of non-publicly funded litigation. There was a time when the print media were economically far stronger and when, I suspect, they would use their financial might to cause financial strain to claimants. The print media are not as economically strong as they used to be and they now have to keep a much closer eye on the cost of defending litigation. But cost in any aspect of law, as you will know from your own experience as a member of the Bar, is something that litigants have to bear in mind.

**Q736 Stephen Phillips:** I think that you put your finger on it, Solicitor-General, when you used the words “access to justice”. The concern of the Committee may be that the costs presently associated with libel actions mean that there is no access to justice for the ordinary man or woman in this country. What we are really asking in the first instance is whether or not you can see that and whether or not you agree that that is the case.

**Edward Garnier:** I agree that for a person without private means and without assistance to legal aid or to trade union or other forms of financial support, bringing or considering the bringing of a defamation action is hugely expensive and hugely risky. I cannot take it much beyond that; it is almost a statement of the obvious.

**Q737 Stephen Phillips:** But as a result of that, to tie it back into the Lord Chairman’s opening question, it may be that, if that is one of the Committee’s major concerns, the most important reforms that we can suggest are those to the procedural rules dealing with defamation actions in order to bring the costs down and to bring access to justice within the reach of everybody in this country. Do you agree with that?

**Edward Garnier:** That is a noble aim, yes.

**Q738 Stephen Phillips:** Just to follow up, do you agree—you may not have a view; I do not know whether you were ever a defamation practitioner—that the procedures associated with defamation cases at the moment do not lend themselves to reducing costs? I give you this example. We heard evidence from those who sit in the jury list that, because there is the potential for a jury at the end of a case, the judge is far less prepared to grapple at an early stage with issues that may end up going to the jury in due course.

**Edward Garnier:** If you are to have a jury action, the judge must hold himself back from making findings that are properly those for a jury. I do not think that there has been a libel jury action for a year or so. Obviously the number of libel actions that fight is relatively small compared with the number of proceedings that are begun, but if you have a judge-alone action, judges can intervene in a way that may persuade the litigants to go and settle. If they are not prepared to do that, he or she may be able to reach conclusions about aspects in a case that, if left to a jury, would not be resolved until much later. To answer a question that you have not asked me, getting rid of juries or making juries not so central to libel actions would of itself reduce costs

anyhow, because actions would be quicker and shorter, but it would also allow the judge in charge of the particular case to resolve issues far earlier.

**Q739 Lord Bew:** Mr Garnier, I wonder whether I might take you back in time slightly to November 2008, I think, and the debate in Westminster Hall on this issue to which you contributed. I want to take up an issue in your remarks about libel tourism. It seems to me that you accepted in your remarks that this is a real problem. You referred to people suing in London on the basis of publications of which there might have been only five or six copies available in London. I know that you are well aware that it is not widely accepted in the senior judiciary that libel tourism is a real problem, so I just wondered whether you could give the Committee your considered view on that matter.

**Edward Garnier:** Until you reminded me, I had forgotten that I had taken part in that debate in Westminster Hall in 2008, but now that you have reminded me I seem to remember that it was Mr Denis MacShane—a journalist who is a Member of Parliament—who initiated that debate.

**Lord Bew:** That is correct.

**Edward Garnier:** He was supported by a number of other Members of Parliament, Michael Gove being one—another journalist—who were saying that libel tourism was a problem. If I remember correctly, I do not think that I shared their view. Indeed, I rather share the view of the judges who may have come in front of you—I am particularly thinking of Mr Justice Tugendhat, who I think has appeared in front of you—and of other current and former judges who have dealt with defamation cases. My impression is that the number of cases that could be described as being brought by libel tourists is quite small and that this is not a problem that the judiciary sees in quite the same way as others perhaps may. I rather share their view.

**Q740 Lord Bew:** Could I come back on that? In my reading of your remarks, I accept that you were more sympathetic to the judiciary than to the journalists in that debate—there is no question of that—but I think that you made a reference to the possibility of vexatious libel tourism cases. Do I interpret you correctly to mean that, either in the case of Reynolds or in the case of libel tourism, the real requirement is for the law to be made clearer rather than to criticise the judiciary for correctly interpreting the law as it currently stands? Particularly when you moved on to the case of Reynolds, that seemed to be what you were saying—that if people are uncertain about these matters, it is a question for Parliament to clarify and sort out rather than for an endless ragging of the judiciary.

**Edward Garnier:** I certainly do not approve of an endless ragging of the judiciary; I do not think that that is helpful at all. I simply cannot remember precisely what I said in the debate in Westminster Hall in 2008, so I cannot really help you; I cannot comment on what I may or may not have said, unless you read it out.

**Lord Bew:** I am merely asking you what your view is on these questions now.

**Edward Garnier:** Well, there is an argument about whether you need to codify or whether you do not need to codify any aspect of the law, be it the criminal law or the civil law and, if it is the civil law, be it the law of defamation. That is a matter on which the Ministry of Justice will have to reach a conclusion, no doubt armed with your advice. There are arguments both ways and you are familiar with them. To leave the Reynolds common law defence in the common law brings with it the advantages of flexibility and the advantage that the law does not become sclerotic and can adapt to particular facts and particular cases within a wider framework. The advantage, I suppose, of the codified system is that it is there in black and white and

practitioners, journalists and others who may be affected by the law of defamation can see what it is without having to look at Reynolds or any of the subsequent cases that have developed Reynolds. It is evenly balanced, I suspect, but I think that you need to identify what you think is the problem caused by the current situation and whether anything new would assist.

**Q741 The Chairman:** We have had evidence that says that libel tourism is a problem. We have had evidence that says that it is so small that it is not really a problem; it is an irritant. Which do you favour?

**Edward Garnier:** As I said in response to a question from Mr Phillips, I think, I rather incline to the view that the number of so-called libel tourism cases is very small and that the courts' ability to police inappropriate cases brought by people with very little connection with this jurisdiction is there and is used. I accept that Clause 7 of the Bill is not what we are talking about—it talks about something rather different—but if you are talking about actions brought in this country by potential foreign claimants with little connection with this country, the evidence that I have seen suggests that the courts have a pretty good handle on it and do not permit cases that have no connection to be brought or continued.

**Q742 The Chairman:** Can we move to our last question for you, Solicitor-General? The Attorney-General has stated that the rule of law should be upheld on the internet. That is reasonably straightforward in the context of contributions on the internet that are sourced or identified. Do you think that it is realistic for those that are not sourced or identified or for those that cannot be sourced and identified after investigation with ISPs? If so, how do you hope we might go about offering advice to the Government on making that aspiration of the Attorney-General into a reality?

**Edward Garnier:** The first thing to draw to your attention is that the Attorney, when he made those remarks, was speaking in the context of the law of contempt and the interference with particular cases by people who were perhaps operating on the blogosphere or tweeting or whatever it might be. He was not directing his mind to what I think you are directing your mind to, which is the law of defamation. None the less, I dare say that there are some principles that are similar. The courts can only have jurisdiction over and enforce orders against people within the jurisdiction, unless there are treaties or other protocols that permit the orders of our courts to be enforced elsewhere. It seems to me that, if you cannot tell and there is no evidence about who is liable for the publication which is complained of or about which there is concern, there is not much you can do about it; you cannot do much unless you can fix liability on an identified person, be it an individual or a corporation. But there are in the publication of defamations sometimes a collection of people who will be jointly and severally liable. You may be able to fix liability on some but not on others. If you are asking me baldly whether there is anything that we can do about someone in California defaming someone in this country by means of some internet publication beamed, if you like, from California to here, the answer is probably not.

**Q743 The Chairman:** Thank you for that, although that was not actually what I was asking. That would mean that you knew somebody in California who was doing it, which raises other issues. I am interested in how you think that the Attorney-General's aspiration—I take your point that he was talking about contempt, but I also take your point that the principles of contempt and defamation in this particular context are probably pretty nearly identical—might be met for web contributions that are not, even after examination by ISPs, identified or sourced. Witnesses have

referred to that as the Wild West, but the Attorney wants something done about the Wild West and I was wondering if you could give us some assistance.

**Edward Garnier:** I think that the distinction between what he was talking about and what you are talking about is greater than perhaps you and I were about to agree. He was talking about something that relates to a case that I did the other day. A woman who was a member of a jury used the internet—Facebook, as it happens—in order to communicate with a defendant in the case that she was trying. That is a form of publication on the internet that came to light only because the defendant in that case provided evidence that that was happening. So much of this depends on evidence. If you do not have evidence of who is doing it, it is very difficult.

**The Chairman:** I understand that, Solicitor-General, but in that case you knew who the person was.

**Edward Garnier:** As it happened, yes.

**The Chairman:** But my question is: how would you wish us to advise the Government on the aspiration of trying to close down the Wild West for the unsourced and unidentified contributions on the internet?

**Edward Garnier:** I would suggest that we should not behave like King Canute. You need to have a fairly firm understanding of what is possible, but you also perhaps need to look at the existing relationship between the law of defamation and internet service providers at the moment. You will be familiar with the European directive and the terms of Section 1 of the 1996 Act. You will also be familiar, I imagine, with some of the common law decisions of the judiciary in relation to whether an internet service provider is in certain circumstances a publisher under the law of defamation anyhow. You may have to think about adjusting some or all of those in order to bring the internet in from the Wild West, but it is not going to be easy.

**Q744 The Chairman:** If I was to float to you the idea that maybe over time we could make progress on this aspect by treating the internet and its contents more in the cultural context than simply the traditional context, where culturally you might attach more weight to that which was sourced and identified over that which was not sourced and identified, do you think that over time that might be a helpful suggestion, albeit that it would take time to work its way through because, as we both know, cultural change takes a long time?

**Edward Garnier:** If I understand what you are saying, I think that we need to remember that the courts deal with evidence and that they apply the evidence to the law. The law as interpreted through custom and usage can be helpful, but I am not sure that the courts would say that there had been a cultural change and apply it in that way. I think that I would need to be a little clearer about the nitty-gritty of what you were suggesting.

**Q745 The Chairman:** I have one final question in this area and then I will on behalf of the Committee thank you for your time. Somebody defames a Minister in the present Government on the internet. What are the ministerial rules and procedures governing you—for the purposes purely of illustration, I hasten to add—if you are defamed on the internet? What does the rule book say about you as a Minister wanting to take out a defamation case against somebody like that? How do you have to proceed?

**Edward Garnier:** Under the *Ministerial Code*, which was republished by the Prime Minister in May of last year, Ministers have to inform the Law Officers that they are going to or are considering taking legal proceedings. That is because a Minister

taking proceedings may affect the integrity of the Government, so we need to know about it. I do not think that we can prevent a Minister from taking action if he thinks that it is a sensible thing to do, and we do not take over the case, as it is a private suit. There are practical difficulties sometimes about remaining a Minister and continuing with a piece of legislation, but again that is a matter of fact, degree and judgment.

**Q746 The Chairman:** But would it fall inside what may still be—it used to be—known as collective responsibility?

**Edward Garnier.** No, not quite. Let us say that I am the Minister for Drawing Pins and I have been defamed privately in some aspect of my life that is outside my ministerial work. I am perfectly entitled to seek advice and to take proceedings for defamation, but if I wanted to do that I would have to tell the Law Officers. The Law Officers may or may not say, “That’s up to you.” They may say, “If you do this, it has the following consequences, but it is entirely a matter for you.” The Prime Minister is entitled to say, “If you want to do that, you can’t remain a member of my Government.” Again, there is no hard and fast rule about that.

**Q747 The Chairman:** Are the Law Officers required to offer advice to the Prime Minister just as you would be offering advice to the Minister? In other words, if you said to a Minister, “It would be our considered view that you should not do this,” are you under an obligation to tell the Prime Minister that that is the opinion that you have given to one of his Ministers?

**Edward Garnier.** No, because I would not be giving a political consideration. I would simply be receiving information, going back to that Minister and saying, “Well, have you considered the following?” It may be that I would be required to have a discussion with the Prime Minister, the Cabinet Secretary or whomever, but I am not suggesting that there is a template of things that have to be done.

**Q748 The Chairman:** Solicitor-General, we are extremely grateful to you not only for your time but for the preparation that you have obviously put in. We thank you for both very much. We will adjourn for a few minutes to wait for the next witnesses.



**Paul Dacre and Matthew Parris**  
**Oral Evidence, 18 July 2011, Q 749–800**

*Witnesses: Paul Dacre, Editor-in-Chief, Associated Newspapers, and Matthew Parris, Journalist, The Times.*

**Q749 The Chairman:** Mr Dacre and Mr Parris, on behalf of the Committee I thank you very much for coming. For the record, we are particularly grateful because in both cases we ran into complicated diary procedures. I know that, in both cases, you have adjusted your lives to accommodate this, which is our last public witness session. We are extremely grateful to you for doing that and thank you. Secondly, we are being broadcast. Thirdly, it is very likely that there will be a short adjournment during our session, because there is likely to be a vote in the Lords and we shall have to go down to vote. However, we are pretty good at getting back within five minutes or so of adjourning. It will not be a long adjournment.

I have two further opening remarks. First, if one of you says something that the other agrees with, it is not necessary—unless you wish to—for the other to say the same thing. We will take assent. However, if somebody says something that the other does not agree with, you must say so. In that way we streamline our procedures and cover a little more territory. Finally, I invite either or both of you to say in advance anything to the Committee that you wish to say before we start the questions.

**Paul Dacre:** Thank you. The first thing to say is that we broadly welcome many of the recommendations in the proposed Bill. The only observation that I should like to make—you may have heard this frequently before, but it needs saying loud and clear—is that everything that I want to say needs to be set in the context of the parlousness of the financial state of the newspaper industry as a whole. Much of the debate at the moment possibly ignores that fact. To describe the condition of the provincial press as almost terminal is probably not an overstatement. It is fighting for its very existence. By and large, it is not a lot better for national newspapers. Several papers are losing eye-watering amounts of money. We need to remember that. In my comments, I shall focus on costs because these are crucial to the survival of our industry.

**Matthew Parris:** First, no doubt your Committee is aware that I am an unremunerated member of the board of the Index on Censorship. I know that it has made a submission to you, which I have read. As far as I can understand it, it seems right, although I am speaking for myself, not for the Index on Censorship.

I once studied law and once understood it but I do not any more. However, from my broad understanding of jurisprudence and from life, I have reached the conclusion that of all the different ways that human beings can hurt each other, doing so through impugning each other's reputations by the printed or spoken word is peculiarly unsusceptible to being efficiently dealt with in a court of law, with squads of lawyers on all sides. Therefore, any changes that you can make—these changes seem to move in this direction—to settle cases more easily and quickly, even before they go to court, seem in principle to be a good idea.

From my experience as a journalist, always having had a huge corporation on my side and knowing that it could back me if I were sued, I have enjoyed a sort of freedom. However, I am well aware that journalists working for small publications, or even people who these days publish on their account, do not have that. The chilling

effect of the law on small publications, including individuals and NGOs, can be considerable.

Finally, we are in a very transitional phase with the internet. Who knows how it will all look in five, 10 or 15 years' time? Anything that we say or that is legislated for will probably soon be out of date. It strikes me that just as the law sometimes takes a different view of defamation by the spoken word from defamation by the printed word, the internet is a sphere of its own. It has to be treated as being quite different from the printed word. It has to be regarded as a lot of very small voices, some of which have no recourse to legal advice at all and could be very easily silenced. On the positive side, it is a sphere in which it is possible immediately to correct a mistake that you may have made by giving it as much prominence as the original mistake and by immediately apologising with as much prominence. On the internet, there seems to be enormous scope for dealing with things, short of courts of law. That is all.

**Q750 The Chairman:** Thank you. I start by asking a couple of questions to get us going. You have seen the draft Bill and the questions for consultation on matters which I rather naughtily assume were too difficult for the Government to find ways of putting in legislation, so they left them as questions. What is your sense of the balance between reputation and free speech, bearing in mind that the US has an amendment to protect free speech? Do you think we are maybe a little precious about reputation?

**Matthew Parris:** Yes. I am, after all, the kind of journalist who has traded throughout his career in being rude and impertinent about people. I am well aware that, certainly in politics, insult—which is not usually defamatory, I know—can seriously damage a reputation. Look at all the insults that Neil Kinnock had to endure—“Welsh windbag” and all the rest. None of them, I imagine, was defamatory but they did a great deal to undermine his reputation in the end. I think we have to be broad-shouldered about it. I have, on the whole, found Members of both Houses of Parliament to be very broad-shouldered. In my whole career I have been threatened with legal action only once. There was no doubt that I had, in a small way, defamed the MP concerned. *The Times* paid him £2,000 and that was that. However, I have spent nearly 30 years impugning the reputations of those whom I write about, and they have taken it with broad shoulders. It would be a good thing if we could encourage that attitude a degree more widely outside Parliament.

**Paul Dacre:** I echo much of what Matthew said. We are far too prim and slightly prissy about reputation. I come from a sector of the media in which robust cut and thrust, tail-pulling and mickey-taking are part of a long tradition—the robust tradition of popular newspapers in Britain. I hope our politicians are mature enough to accept that. Something would certainly be lost from British life if we detracted from that. I should like to talk later about confusing reputation with privacy, and how libel is merging into privacy. I presume that that will come up later but I can talk about it now if you wish.

**Q751 The Chairman:** We will come back to that—I will if none of my colleagues do. I have one further general question to start with. You will have seen that the Bill proposes “substantial harm” as the test. Lord Mackay, a very distinguished former Lord Chancellor, told us that he did not think that that was sufficient and that it would be better to use “serious and substantial harm”, which would effectively raise the bar. It would thereby deem trivial a lot of cases that might get in under the bar if it was set just at “substantial”. Do you think “substantial” is okay, or would you favour raising the bar to “serious and substantial”?

**Matthew Parris:** I would take the ordinary meaning of “substantial” as including “serious”. If, in law, substantial does not mean serious, we had better put “serious” in as well.

**Q752 The Chairman:** I think that that is the nub of it. In law it perhaps means something different from what it means in colloquial language.

**Paul Dacre:** In that case, incorporate it. Yes, I welcome “substantial” and, on balance, “serious”, and anything that can be done to preclude the growing incidence of trivial complaints against newspapers. Believe me, we now have to accept that we must correct the most minor and trivial thing because contesting it is so expensive that it is not worth the candle.

**Q753 Lord Grade of Yarmouth:** On juries, you will be reassured to know that in pretty well every session the issue of costs and how to reduce them—and speed up trials—has been a strong theme running through. Much of the expert testimony that we have heard suggests that the way to cut through this is to remove, as the Bill suggests, the presumption that there should be trial by jury. Do you agree with that? If you do agree with that, in which circumstances would you prefer to have a jury if you were defending?

**Paul Dacre:** First, I very much welcome the recommendation for the end of an automatic right to jury. Clearly, that would play a huge role in reducing costs and enable judges to operate a more sensible system of capping costs, which I would plead for. It would be a constant theme in my case. At the same time, I should like to see access to a jury remain if both sides or one side wished it. What kind of case? That is a difficult one. I suspect that in, say, a privacy case, we as the defendant might think that a jury might be more sympathetic to the newspaper’s arguments.

**Q754 Lord Grade of Yarmouth:** Some have suggested that a jury might be most welcome in cases where the claimant is some publicly appointed figure such as a Cabinet Minister, a local councillor or a policeman. Would you make that distinction?

**Paul Dacre:** I suspect so, but it is a very difficult question. Every case would be judged individually. But yes, a jury would be more likely to side with a newspaper if they thought that a member of the establishment was trying to exploit his position.

**Q755 Lord Grade of Yarmouth:** I am trying not to put words in your mouth, but would it be fair to say that it would not give you a problem if the presumption of trial by jury were removed, as the Bill proposes, and that you would be happy to leave it to the judge to decide whether there should be a jury? Once there is the possibility of a jury trial, how would you like that to be resolved? Should it be left to the judge?

**Paul Dacre:** I suppose the answer to that is: after we had been given the freedom to make a case to him. Does that make sense?

**Q756 Lord Grade of Yarmouth:** Yes it does. What we have been searching for in these sessions are some criteria to suggest that in this case it would be sensible to have a jury. However, we cannot get a handle on what such cases might be.

**Matthew Parris:** I would be a little doubtful about not having a jury unless one side or the other really wanted one. Presumably the side that thinks it will benefit from having a jury will want one. I am not sure that juries are necessary in this area of the law. Anything that will simplify things, speed them up and make them cheaper is good. Perhaps it could be left to the discretion of a judge, if there were overwhelming reasons why a jury was necessary. However, I think it should be the exception.

**Lord Grade of Yarmouth:** From what I am hearing, it is hard to imagine circumstances in which it would be obvious that you must have a jury for a particular kind of case.

**Q757 The Chairman:** Could I clarify something for the benefit of our witnesses? When Mr Rusbridger was here, he said that he wished that the Jonathan Aitken case had been heard before a jury. He thought that that would have given the decision—I do not want to put words into his mouth—more credibility with the public. Are we hearing that you are not as enthusiastic about that idea as Mr Rusbridger was?

**Matthew Parris:** I do not think that is a legitimate concern. The jury system is not there in order the better to blacken the reputation of somebody whom a newspaper does not like.

**Paul Dacre:** I am very happy for the judge to be the final decision-maker in that process, as long as he is taking the case on its merits.

**Q758 Baroness Hayter of Kentish Town:** Several journalists or their representatives—I cannot now recall—have said that if they act responsibly on a matter of public interest, that should be a defence, even if they have defamed somebody. The question then arises about acting responsibly, maybe in line with a journalists' code or something like that. Such codes obviously cover hacking, blagging and so on. Have you ever countenanced such activities by journalists?

**Paul Dacre:** Have I ever countenanced hacking or blagging? No.

**Q759 Baroness Hayter of Kentish Town:** What about if, as a defence—this is where the interesting thing comes—something is said that is defamatory or appears to be, even though there is no evidence? Would there be a temptation to blag or hack to support that?

**Paul Dacre:** Would you ask that question again?

**Baroness Hayter of Kentish Town:** In other words, it may not be used in the article but, if it came to a case, would the temptation be to use material obtained in that way? Would that be beyond the pale?

**Paul Dacre:** Goodness me—these are deep waters. I have considerable sympathy with the view, which was, I think, advanced in *The Sunday Times* this weekend, that if there is a great public interest and you are revealing wrongdoing, those questionable methods can be justified. Whether you can then use that material to defend yourself in a defamation case goes into the area of Reynolds, doesn't it? If you believed at that time that you were acting in the public interest, I suppose the answer is yes.

**Matthew Parris:** If I were being perverse, I could argue that it is because we set the bar so high that journalists sometimes resort to subterfuge. They feel that they must gather the information that they will need should they be sued. If we had more of a free-for-all in the press, people might not try so hard to tap people's telephones and find out what the truth is beforehand. Everything will revolve around the definition of "reasonably". To a degree, that is an unspoken defence in the common law. It certainly is not irrelevant whether the person acted reasonably or not.

**Q760 Baroness Hayter of Kentish Town:** My final question is: ought we, in this building, be less concerned with politicians than with the ordinary teacher, social worker and people like that, who are not from the school of hard knocks? Therefore, on the idea of something being in the public interest, does it make a difference if the journalist is acting responsibly or irresponsibly if the same amount of damage is done

to somebody? I am interested in how far you think a responsible journalist makes a difference to the outcome and what harm is done.

**Matthew Parris:** I think you are conflating two different areas of journalistic responsibility. A journalist has a responsibility to behave in a decent manner, which means not tapping telephones or hacking phone messages and so on. Journalists also have a responsibility to get the facts right. One might behave irresponsibly on the first count in order to behave responsibly on the second.

**Paul Dacre:** To clarify my earlier thoughts, you should never use hacking or blagging as a defence. Clearly, they are criminal charges. However, I am with Matthew on this. We are damned if we do and damned if we don't. If we get our facts wrong in an area of huge public interest, we cannot win. It is as simple as that.

**Q761 The Chairman:** To clarify something that is relevant to the Bill, at the moment there is a defence of fair comment. The Bill suggests honest opinion. Do you have an honest opinion on whether honest opinion is better than fair comment, or would you prefer fair comment?

**Matthew Parris:** I have one comment on that. From the lawyer's point of view—and that of professionals in the media—the meaning of terms is well known. I know that your proposals make it clear that honest opinion could not, for instance, just mean that you had heard something from somebody you thought was right and repeated it because you had heard it from them. In the ordinary usage of English, that might be an honest opinion. I have many honest opinions that have relied just on things that I have heard from other people. I would not publish them because I am not sure that I could back them up. There is a little danger with the term "honest opinion". Phrases such as "fair comment on a matter of public interest" enter the public mind.

**The Chairman:** Forgive me, Matthew, and make a note to yourself. With apologies, the Committee will adjourn for just a few minutes while some of us vote.

*Committee adjourned for a Division in the House of Lords.*

**Q762 The Chairman:** My apologies. We are back to being quorate, which is the good news. The bad news is that there may be another vote. Mr Parris, you were stemmed in mid-flow.

**Matthew Parris:** I was just saying that legal phrases enter common parlance and lodge in ordinary people's minds—in minds such as mine. Examples include "ignorance of the law is no excuse", "fair comment on a matter of public interest" and "driving without due care and attention". The danger with the phrase "honest opinion" is that people might think it means "honest opinion". It does not. It means "honest opinion responsibly held" or "honest opinion responsibly promulgated". That was my only comment.

**Paul Dacre:** Yes, I suppose "honest" is slightly better, although I prefer "free opinion" for the life of me. As long as it does not inflame a situation, is not racist and does not defame someone, the freer it is the better. Certainly, thinking about some of the things that Mr Littlejohn writes in my paper, I do not know whether they are honest but they certainly get people talking. The freer the better.

**The Chairman:** That is probably his Peterborough training.

**Q763 Mr Lammy:** Your paper could be described as robust.

**Paul Dacre:** I accept that. I plead guilty.

**Mr Lammy:** Can you give us a sense of the volume of action that your paper sees? How many people take action, feeling that they have been defamed?

**Paul Dacre:** I shall have to ask my legal director. There is not a day goes by when predatory lawyers such as Schillings and Carter-Ruck do not try it on, encouraged by the vast sums of money that can be made under the existing CFA, most of which goes to them. I think there are some every day. Very few come to action. That is the trouble; it encourages this terrible ambulance-chasing.

**Mr Lammy:** Has it got better or worse recently?

**Paul Dacre:** Undoubtedly, it has got exponentially worse over the past few years.

**Q764 Mr Lammy:** You talked about the pressures that the newspaper industry is experiencing. We all see that at a local level but there is a scramble at a national level as well. Do you link the increase to that problem?

**Paul Dacre:** I do not. I know what you are saying—that the more desperate circulation becomes, the more people are tempted to cut corners and get ever more sensational stories. However, one of the ironies is that, with the increased powers and strength of the PCC, which no one will admit to in this febrile climate, with the “no win, no fee” increase in defamation, with the back-door privacy law being introduced by judges and with the Data Protection Act and now the Bribery Act, newspapers are breaking fewer such stories.

**Matthew Parris:** Just to endorse what Mr Dacre says, I link it particularly to no win, no fee. I know you are looking at some proposals for what is, I think, called uplift. I think it is outrageous that lawyers are allowed, effectively, to double their fees on the basis that there is a 50% chance that they might not win, while the unlucky defendant who loses his case finds himself liable for what is really an actuarial calculation by the lawyer. It is absolutely outrageous. Until I saw these proposals I was unaware that lawyers were allowed to do that.

**Q765 Mr Lammy:** You mentioned the newspaper industry, no win, no fee and privacy concerns.

**Paul Dacre:** Privacy is the biggest motor there at the moment.

**Mr Lammy:** Those are applying pressure to the system. Do you understand—I am asking you because you are in a position to answer—why journalists in that environment might move to breaking the law to get what might be stories that they should not have, but might nevertheless be truthful?

**Paul Dacre:** No. I am arguing exactly the opposite. The law is becoming more onerous and journalists are having to become more respectful. By and large, I think they are. It is having a chilling effect, rather than encouraging them to try to break the law.

**Q766 Mr Lammy:** Under what circumstances would you see yourself entering into a system that better arbitrated before litigation?

**Paul Dacre:** Clearly, I am a great advocate of the PCC, as you know. I have been a commissioner for it for many years. It is a great unsung and unrecognised success story in this area. Every year it mediates in hundreds of cases. It adjudicates and provides satisfaction for many claimants. I should like to think that in different times—who knows what will happen in the next few months—the PCC could be used more as a court of first instance. Any system that encourages an earlier court hearing and resolves this in a cheap and sensible way is to be encouraged.

**Q767 The Chairman:** Can I clarify something? We have worked hard here to avoid trickery. My question is not meant to be trickery. When the editor of the *Guardian*, the deputy editor of the *Telegraph* and the former legal adviser to *The Times* group were here, they postulated a mediation arrangement in which they would want to play an active part, even to the point of providing some of the resources to pay for it. However, they were pretty robust in saying that it had to fall outside the PCC and that they would not have as much confidence if it was within the PCC. It seemed that you were arguing the opposite. I wanted to be clear that that is what you were arguing.

**Paul Dacre:** I was arguing that I have great faith in the PCC system as it has been working to operate a free and quick service of resolving complaints and adjudicating between a claimant and a defendant to bring some form of vindication and justice. I know you have been looking into mediation. I have to tell you that our experiences have left us somewhat sceptical about it. It depends on whether both sides go into it absolutely determined to be constructive. In all our cases—we have had three recently—the claimant’s side has been utterly intransigent and unreasonable. The costs have soared anyway. Because all such proceedings are held in camera—in secret—the unreasonableness of the other side never emerges. I am afraid we are slightly sceptical about mediation. When we discuss self-regulation in the inquiries, I hope we can argue more passionately for a stronger role for the PCC in this area.

**Matthew Parris:** The work of the PCC is often of much more merit than is recognised. I am afraid that the constitution of the PCC—looking as though it were in the pockets of the newspaper industry, which is not a fair description but is what people think—has probably doomed it. Something like the PCC, but not the PCC, will have to be created but will probably need to start again. I am a huge believer in mediation. I served for five years on the Broadcasting Standards Council and was very much struck, first, by how reluctant any broadcaster is either to apologise, ever, or to correct anything, and, secondly, by how satisfied most complainants are if they can simply persuade somebody to apologise for or correct what they have written or published. I am sure that, to the extent that this proposed legislation moves things in the direction of mediation, it has to be an advantage.

**The Chairman:** We are not here to offer you encouragement but let me offer you some encouragement. That has been the broad thrust of the evidence that has come to us.

**Q768 Mr Lammy:** Is broadcasting not far more regulated than the newspaper industry?

**Matthew Parris:** Yes it is, but there are still many people who feel offended on their own behalf or that of some group. They want some means of putting that right. If they can be persuaded that a body of people has looked hard, reached a conclusion and, when their complaint is upheld, upheld it in a fairly public way, that is mostly all that they want; they do not want money.

**Paul Dacre:** To question that slightly—I may have this around my neck—the BBC has very light-touch regulation. It almost regulates itself.

**Q769 Lord Grade of Yarmouth:** See me afterwards. What underpins broadcasting regulation is something that is completely irrelevant to newspapers, namely impartiality.

**Paul Dacre:** Looking into complaints against the BBC—

**Lord Grade of Yarmouth:** It is an absolute nightmare.

**Paul Dacre:** Arguably, the PCC is slightly more rigorous than the BBC system.

**Lord Grade of Yarmouth:** It took Primark three years to get the BBC to admit that it had faked some filming on “Panorama”.

**Paul Dacre:** I just wanted to correct that.

**Q770 Stephen Phillips:** Can I take us back to mediation? I think Mr Dacre raised a perfectly legitimate concern about mediation, which is twofold. First, an intransigent party can go to mediation and refuse to settle. Secondly, there is the related problem that a party with significant means can simply use mediation to push up costs.

**Paul Dacre:** Precisely.

**Stephen Phillips:** One of the things that the Committee might consider recommending to the Government is a scheme of compulsory mediation. In that context, would it deal with the issues that you have raised if the mediator was able to report back to the court on any unreasonable conduct, behaviour or position adopted by one or other party?

**Paul Dacre:** Off the top of my head, that sounds like an eminently constructive suggestion.

**Stephen Phillips:** Would you particularly agree with this if the intransigent party was then punished in costs in some way?

**Paul Dacre:** I would wholeheartedly endorse that.

**Q771 Stephen Phillips:** One of the things that Mr Parris said earlier, which must be correct, is that a journalist has a responsibility to get the facts right. Although we are not dealing with the issues that have loomed large over the past couple of weeks, we cannot deal with defamation in a complete vacuum. I was interested in one of the answers that Mr Dacre gave earlier in relation to obtaining material unlawfully—by phone hacking and so on. You told the Committee that you have never countenanced it. I entirely accept that. However, under your editorship, has the *Daily Mail* ever published a story that you knew at the time, or subsequently came to know, was based on a hacked message or any other source of material that had been obtained unlawfully?

**Paul Dacre:** Absolutely not.

**Stephen Phillips:** I am grateful; I just wanted to clarify what you had said. The answer is that you have never published a story that you knew was based on a hacked message.

**Paul Dacre:** Absolutely not.

**Q772 Stephen Phillips:** You said at the start that we would come back to the crossover between libel and privacy, so I shall now do so. Privacy is a growing area. As matters presently stand, in privacy people come to learn that you are writing a story and get an injunction to stop you publishing that story. In defamation, the story is published and then people sue, if they want to, to try to protect their reputation. One consequence of that is that there is, in English law, essentially a right to defame, subject to the payment of damages. Do you think that is an acceptable position, or ought the remedy of injunction be available to those who are about to be defamed in the same way that it is in the law of privacy?

**Paul Dacre:** That would be a hugely retrograde step for press freedom. To recapitulate what you have said, as we know, increasingly, defamation claims are going under privacy claims. At present, you cannot have injunctions under defamation. If you have injunctions under defamation, the rich and powerful will reach for their phones on a Friday night and get through to Schillings. The probability is that an ex parte injunction will be immediately granted. To give you an example from our



own newspaper, we had to appeal an injunction that was granted to Lord Browne. It took £900,000 and four months of deliberation, during which he sadly lied to the court, to resolve that. Injunctions under defamation will not bring down costs or increase justice. I repeat: it would be a terribly bad day for press freedom if that were to happen.

**Q773 Stephen Phillips:** I am assuming, unless you want to add anything, Mr Parris, that you agree with Mr Dacre.

**Matthew Parris:** I completely agree with Mr Dacre. On mediation, you have a submission somewhere before you suggesting that in internet cases it might be made a requirement that one had to notify in some formal way the person—or the internet service provider or site—against whom one was making the complaint. Perhaps a clerk to the court could ask for a set form to be completed. I think you have had reported to you an experiment that might now be called blagging or subterfuge, I imagine. Somebody tried publishing Thomas Paine’s *Rights of Man* on an internet site. Someone else, impersonating a lawyer, got in touch with the operator of the site, said it was defamatory and asked for it to be taken down. I think eight out of 10 or 12 took it down without an argument. Anything that causes those who want to make a complaint to jump through a small hoop before they get any further with it and, again, encourages mediation is worth consideration.

**Q774 Stephen Phillips:** We have received a lot of evidence that—this may eventually be the Committee’s view—the real problem with the existing law of defamation is cost. There are costs from the perspective of a defendant, which therefore have a chilling effect, and costs from the perspective of claimants, who may be defamed but simply do not have the resources to sue. We have already heard a little evidence about juries. One other recommendation that the Committee might make is for a very early determination of meaning. This tends to take a long time to decide, partly because judges, where there is the possibility of a jury, are reluctant to decide questions early. They leave those questions to the jury, which they know will be empanelled in due course. Would you, first, favour an early judge-led resolution of meaning? Secondly, can you think of any other ways in which we might reduce, through procedural or other means, the costs associated with libel actions?

**Paul Dacre:** The answer to the first question is yes. In answer to the second question—I know this is impractical and not going to happen—it would be a wonderful solution if we could have a system of specialist county courts, with specialist lawyers and judges, to deal with these matters without the huge, unnecessary, though understandable, encumbrances of the High Court. I realise that it is probably not going to happen.

**Q775 Lord Bew:** We have already talked about, or made glancing reference to, privacy issues. Several witnesses have come to us and said, “Whatever you do, keep this discussion of defamation separate from the privacy issues”. I have a sense from what you have said this afternoon that you do not think that that is possible. However, I should like a clear account from you.

**Paul Dacre:** I do not think I can add anything to what I have said. More and more, the Schillings of this world seek defamation under a privacy claim. I have argued for why that is wrong. Where there is blurring, it is between privacy and reputation. More and more footballers or whoever have huge investments in their name and their brand. They seek damages under privacy when the last thing on their

mind is their family. It is their huge earning potential that concerns them. That is an area that worries us in the press.

**Matthew Parris:** I think the two are separable. At the centre of the law on defamation is the question of truth. I realise that it is not quite as simple as that but it comes down to whether what was said was true. At the centre of the law on privacy is the question of appropriateness. They are two completely different questions. Like Mr Dacre, I think the creeping law on privacy is probably a greater threat to press freedom than the existing law on defamation.

**Q776 The Chairman:** Can I ask a clarification question? We have heard evidence that suggests that newspapers may be guilty of writing what they think interests the public, rather than what is in the public interest, and that this may be contributing to ramping up the privacy realm. In some cases, what is written—you mentioned footballers and I guess I know a little about it—is not so much in the public interest as what interests the public. Is there, in the head of either of you, a sense of observing a mild confusion between these two in your industry? If so, is that contributing to your concerns about privacy?

**Matthew Parris:** I hope we are interested in what interests the public. If, as a journalist, you do not care about what interests your readers, you will not get very far. Indeed, you will not get any readers reading about what is in the public interest; you will not get any readers. An absolutely central concern with what interests your readers is a perfectly proper thing for a journalist.

**Paul Dacre:** I could not agree more. With the greatest respect—I know it is a great debating point and a bit of an old chestnut—what interests you and what interests the man in the Dog and Ferret is totally different. I passionately believe that newspapers should be free to interest the public and not necessarily act in the public interest. I know that is a slightly controversial statement. Who is to decide what is in the public interest? I would prefer parliamentarians to do that than judges, who, despite their undoubted intelligence and integrity, in my considerable experience have rather a narrow view of the world. Hardly any of them have ever read a tabloid newspaper. If they have, they probably have rather an enduring animus against that area of the media. At the risk of being a little too topical, I would cite the *News of the World*. I think many people in this room would not think that it is in the public interest that such a newspaper exists. I personally would not have it in the house but I would die in a ditch to defend its right to publish. The *News of the World* had many very prurient stories, but it also published serious political news. Its death last week diminished democracy in this country. Five million people were buying it and, in that process, were engaged in governance and democracy in this country. My guess is that at least a third of those people will never buy a newspaper again.

**Q777 Lord Bew:** You were involved in the committee that reviewed the 30-year rule with Professor David Cannadine and Sir Joe Pilling. Did you consider the implications of that for libel law? Ultimately your suggestion that we move to a 20-year rule for the release of records—as I strongly believe we should—is bound to lead to a lot of records coming out. It is bound to lead to unflattering judgments on politicians still living and active. One of the features of the draft Bill, in Clause 5, is the Government's attempt at least to strengthen academic freedom. It may be helpful to historians who will look at the material that will be available in how they present interpretations of it. Were you aware of that when you were doing it? Were you aware that this would open up a whole new era? Was your attitude, "Let the chips fall where they may"?

**Paul Dacre:** Yes, I think we were aware of it on the margins. I would not say that it was one of the central issues. Over many months we saw many papers from the National Archives that had not yet been released. My impression is that defamation was not a primary worry. To answer your question, under freedom of information virtually any of that stuff can come out now anyway. No one quite realised this. It is slightly more insidious. Under the patchwork effect of freedom of information, we get only specific information without what is either side of it. It could be seen to be more defamatory than something that is set in context. Also, do not forget that these papers will be redacted. If I may be so bold, parliamentarians are pretty successful at libelling each other through their leaks to newspapers while they are currently in Parliament. Nor do they seem to pull their punches in their memoirs. Is that an answer?

**Q778 Lord Bew:** It is. My follow-up question is simply this: while I accept your point about redaction and so on, none the less you can be certain that it will create problems for historians. Clause 5 is an attempt by the Government to offer a degree of protection. I am just assuming that in such a context you would be sympathetic to the thinking behind Clause 5. I just want to get that on the record.

**Paul Dacre:** Yes.

**Q779 Chris Evans:** I am interested in the internet and should like to come back to your comments on that. I watched an item on Sky News about something that you have already alluded to—the falling off of newspaper sales. iPads will probably come down in price in the next 10 years from £400 to, say, £100. The *Daily Mail* has a very good website; I find it easy to negotiate. Do you feel that you have adequate protection when somebody posts a defamatory comment at the bottom of an article?

**Paul Dacre:** I think Matthew said that this is a whole new cosmos—a new frontier. Just to layer the argument, the Mail Online is a very successful site. It is about to become the world's most popular news site. We legal it as far as we can but you have to understand that it throws up a huge amount of material. It changes every minute of the day and there is far more than goes into any newspaper. Stuff that goes into a newspaper is very carefully invigilated; it goes through subs and lawyers et cetera. We do a pretty good job there. As for the rest of the stuff, we have what I think has now been recognised by the industry as the only way forward. We have a pretty strong self-policing system. The moment anybody has cause to post a complaint about something, we have a panel of adjudicators, which moves very quickly to remove an offending item. We also seed the computer with dangerous words, such as BNP and so on. They flash up and we can make a judgment. However, things will slip through and who should be responsible for defamation on the blogs and so on is a matter for huge debate—one that will evolve over the next few years.

**Q780 Chris Evans:** In your personal opinion, who is responsible? Is it the person who posted or the Mail site that is hosting the post at that time?

**Paul Dacre:** I do not think the Mail site can be. I do not want to go back to the start but the site makes no money. It costs an awful lot of money. That is why it has to be self-policing. Maybe the search engine has to bear responsibility—I do not know. This is part of the debate and I welcome taking part in it. Ultimately, if a blogger wants to say something defamatory on our site, I suppose that blogger should be responsible.

**Q781 Chris Evans:** I notice—and think it is sensible—that where there is an ongoing legal case you do not take comments at all. Have you had any difficulties where someone has posted a comment and you have received a solicitor's letters a few days later or something like that?

**Paul Dacre:** By and large, we do not get many solicitors' letters, but their number is growing. The legal ambulance-chasers are watching. I do not remember who said this earlier, but remember that we can correct these mistakes—in cases of defamation—very quickly, almost within minutes. We can even move to correct them. At that stage, they will not have been seen by many people. It is very different from newspapers. The system of adjudication or legislation will have to be much more forgiving in that sense than it is with newspapers.

**Q782 Chris Evans:** In your view, what is the difference between a newspaper article and a contribution to, say, a web chat or a blog under libel law? Should they be treated differently? In libel, should an article that is written online be treated differently from a blog or somebody's opinion? Do you think they are treated differently at the moment?

**Paul Dacre:** As I have just said, a lot of defamation and inaccuracies can be dealt with quickly. I suspect, although I should like to think about this a little more, that if a carefully written blog is defamatory but persists in keeping the material up despite complaints—bearing in mind that it can be taken down immediately—it should be treated in the same way as a newspaper. This reminds me of King Canute. I do not know what we will do. I do not know what the courts will do with sub judice. The Lord Chief Justice was fretting about this a few weeks ago. We are in whole new cosmos, as I say.

**Matthew Parris:** It is a different medium, in which different and more informal rules are slowly evolving. It is far too early to know what the result will be. Certainly, we have online comment after columns in my paper, *The Times*. A week does not go by without some online readers defaming me in their comment, in the sense that they impugn my honesty, my competence, my honour or my integrity. Neither Mr Dacre nor I would dream of suing just because somebody said online that we were monsters. I would not, anyway.

**Paul Dacre:** I certainly would not.

**Q783 The Chairman:** Could you sue the newspaper for not suing them?

**Matthew Parris:** Technically, perhaps. We have a mediator and it strikes me that the mediator lets almost everything through. If the mediator is not letting everything through, I should like to see the stuff that is not getting through.

**Q784 Chris Evans:** I liked your comments about the transitional phase, which you explained quite well. Perhaps I am misquoting you, but you said that a piece of legislation could quickly become out of date. We are looking at this draft Defamation Bill. What elements can we include to ensure that this piece of legislation does not become out of date 18 months, three years or five years down the line? Is there anything specific, particularly related to the internet?

**Matthew Parris:** I am no expert on the internet. I am an ageing columnist, struggling to get to grips with the new technology, so I cannot speak on it with any great authority. However, I can see where the problems are. I do not think that anything but time will be the solution.

**Q785 Lord Marks of Henley-on-Thames:** We have heard a great deal about the chilling effect on freedom of speech and about companies threatening defamation proceedings to stifle criticism of their techniques or whatever it may be. Do you think that the problem facing newspapers that are threatened by companies is more significant or no more significant than similar threats from individuals who may bring defamation proceedings?

**Matthew Parris:** I do not know.

**Paul Dacre:** Certainly, we do not feel that large corporations are a more significant threat to the kind of middle-market journalism that we produce.

**Q786 Lord Marks of Henley-on-Thames:** Do you notice such a chilling effect with other organisations, such as NGOs or scientific organisations?

**Paul Dacre:** We had a case recently involving a cosmetic gel—a boob job gel, if you will forgive my French—that was guaranteed to increase ladies' figures or statistics. We quoted quite an eminent researcher who said that this was absolute rubbish. He, rather than the *Daily Mail*, was subsequently sued by the pharmaceutical giant. In that sense, yes, we are concerned about it. It was a classic case of a corporation trying to use its muscle.

**Matthew Parris:** It is indicative that the plaintiff decided not to go to the newspaper but to find somebody smaller to pick on. That is where the problems with the internet are.

**Paul Dacre:** This was in the paper as well.

**Q787 Lord Marks of Henley-on-Thames:** It was your paper that published the story?

**Paul Dacre:** They did not sue us in this case. They went for the small guy. He was an academic whom we quoted. Some qualified privilege for academics is very desirable, if I may say so. It does not rear its head a lot for papers such as the *Daily Mail*, but I should have thought it was a problem for more specialist papers.

**Q788 Lord Marks of Henley-on-Thames:** From what you know, do you see any argument for restricting the right of corporations to sue for defamation?

**Paul Dacre:** I am not an expert but if they have suffered large financial damage, it affects the number of people they can employ, and if the defamation was not justified, they should have the same rights as an individual.

**Q789 Lord Marks of Henley-on-Thames:** Would you restrict it to those cases where they have suffered such damage?

**Paul Dacre:** I think so, yes. It would need to be carefully restricted.

**Matthew Parris:** I agree with that. The development of the law generally over the past 30 or 40 years has invested corporations with the kind of personality that can commit criminal and civil offences. It is in the public interest that the law should have developed in that way. I see no reason why defamation should be exempt from that, except that some of the elements of defamation—the hurt and psychological wounding that can come from having one's reputation impugned—cannot really be attached to a corporation in the way that it can to an individual. However, the courts are perfectly capable of taking that on board.

**Q790 Sir Peter Bottomley:** I take as the basis of our discussion that newspapers have the job, beside entertainment and listings, of producing things which are true—things which are news and which matter. In lay terms, I also take it as a basis that

defamation becomes actionable if it can be shown to be untrue, not privileged and damaging. Sometimes we divide ourselves. There are scientists, such as the Association of British Science Writers, who will take up the case, as they did in the example of Dr Peter Wilmshurst, who raised genuine doubts about the efficacy of heart devices. Then we have, on the side of major newspapers, every now and then, the kind of revelation that, were it to be published, would transform what a corporation does. I use the example of Trafigura. If it had openly had to defend the dumping of waste in Africa, it would have stopped doing so earlier. The problem comes, in my view, when you can start a case but do not complete it. I understand that Peter Wilmshurst has been facing a case since 2007. Having discussed a case on the radio in 2009, he faces a writ served in 2011. That is four years afterwards, when the critical issue was whether the heart device was effective and whether it was right to raise the question in a professional conference. How do you think we should adjust the law to stop the obvious excessive uses of libel against someone who can clearly show that he is a responsible scientist and, whether on Trafigura or Dr Peter Wilmshurst, was justifiably reported in a major paper?

**Paul Dacre:** It is not an area in which I am an expert. This was very much the *Guardian's* story. This brings us back into the territory of injunctions. An injunction was granted and it was only Parliament that brought the matter to light, as it did with subsequent cases that upset the judiciary so much. However, at least the judiciary was upset. That matter would never have come to light if it was not for Parliament. Therefore, I suspect that Parliament should look at the granting of these injunctions rather more critically. After that, I am out of my pay grade. If I may say so, you have to find a way of giving qualified privilege to these people. Research, academia and scientific views must somehow be above issues of defamation, mustn't they? I leave it to the expertise here. It is not something that I know a lot about.

**Q791 Sir Peter Bottomley:** Chairman, can I rerun an example that I have used once or twice before? It concerns a big commercial company with a major financial interest. In 1950, two researchers, Richard Doll and Bradford Hill, who were trying to research the effect that tarmac might have on people, came up with two suggestions that they thought were correct. One was that smoking is bad for your heart and lungs; the second was that asbestos is critically bad for your lungs. I was speaking today to the widow of someone who died of mesothelioma aged 69 at around the time that this started. Any company could have said, "If this is reported in a mainstream paper, it will be very damaging to our business. People may smoke tobacco less often and may not use asbestos in building products or in ships." If that kind of researcher had been taken to court, what would have happened to science? What would happen to that kind of advance? Would the effect be as damaging as I fear it would be?

**Paul Dacre:** It is a matter of deep concern. Again, I would pass it back to the Committee. You need to address that. I add in parentheses here that in our deliberations over the 30-year rule we came across the fact that the Government suppressed the fact that cigarettes kill people for many years. However, that is not helpful; it is a distraction.

**Matthew Parris:** Around 12 years ago, I wrote a column about the effect on me of the anti-malarial drug Lariam, which was quite like LSD. It was extraordinary. The lawyers for *The Times* could well have said that I could not prove this and it was just my own experience and view. Hoffmann-La Roche, or Roche products, who produced the stuff, could well have sued. However, because I work for a big newspaper that on the whole thinks, "They probably won't sue and if they do we can stand up to them", the column was printed. Everything that I said has subsequently

turned out to be right. A smaller scientific journal just does not have those resources. I know that the Government's draft proposals look at that. Anything you can do to beef that up would seem right to me.

**Paul Dacre:** With great respect to Matthew's paper—it is a great paper—I am not sure his lawyers would have the courage to take that on today. It would be an action that could cost literally millions of pounds. It is no secret that *The Times* already loses an awful lot of money. I repeat: you have to find some way of giving privilege to this view and to responsible journalism. Some kind of defence must be given to that.

**Q792 Sir Peter Bottomley:** If Parliament, having considered whatever conclusions it and the Government come to, decides that it must make a choice between allowing people to say things that are likely to be defamatory and not actionable successfully or at all, or having a law that will virtually guarantee that nothing defamatory is said and that virtually all defamation will be actionable, what would be your advice?

**Matthew Parris:** Could you repeat that?

**Sir Peter Bottomley:** There are casualties. If the choice for Parliament, in making the law, is either to make it virtually impossible for anyone to be defamed or, if they are defamed, to be able to take action successfully, or to have a law that on several occasions will mean that someone who has been defamed will not be able to take action successfully because of privilege or cost control, which way do you think we should go?

**Matthew Parris:** I do not see them as being mutually exclusive. Give me an example of why you could not have some of one and some of the other.

**The Chairman:** I think Sir Peter has had his answer. That is helpful.

**Q793 Baroness Hayter of Kentish Town:** Taking up what was said earlier, we are looking at things that are not true, not privileged and damaging. Come over to our side: how can we stop you writing things that are not true, not privileged and damaging?

**Matthew Parris:** I am in a freer position than Mr Dacre on this. I do not think it is altogether a bad thing if journalists are occasionally able to write things that turn out not to be true, are not privileged and are damaging. A world in which everybody tiptoed around anything that might prove to be damaging or untrue would be a world in which many things that were true, though damaging, would never be printed. To the extent that we err, I would rather err on that side.

**Q794 Baroness Hayter of Kentish Town:** In that case, I shall really upset the Chair and ask what the remedy is for those people who are caught by that.

**Matthew Parris:** You have the remedy before you: the Government's draft proposals. They move modestly—perhaps slightly too modestly—in the direction of giving a little more freedom, which is good.

**Paul Dacre:** I agree and would add that I expect that the PCC in its present form will need to be radically reformed and reborn. I passionately believe in self-regulation and hope that it stays in this country. It has been emulated all around the world and I suspect that it is the least imperfect system known to man. I remind people that accuracy is the cornerstone of the existing PCC. I should just like to make a general observation, which is not fashionable these days. News does not grow on trees; it is jolly difficult to get. Perhaps he is not a good voice to quote but the original Lord Northcliffe said that the news is what someone else does not want printed. By and large, journalists have to jump through huge legislative and

regulatory hoops to find and substantiate stories at the moment. I totally endorse what Matthew said. Anything that suppresses that hunger to be slightly dangerous and to investigate what should not, perhaps, be investigated—as long as it is within clearly defined laws—is to be applauded. There is a very great danger of throwing the baby out with the bathwater in this country as regards the freedom of the press. Perhaps it is a subject for another day, but that is how I feel.

**Q795 The Chairman:** In bringing this session to a conclusion, it falls to me to tidy up one or two things that we have not yet touched on. The first should not detain us for too long. Mr Parris encouraged us to treat big corporations like individuals, yet the evidence we have heard is that when that sort of thing happens the chilling effect reaches a maximum. Earlier in the session, my sense was that you both recognised the chilling effect and were encouraging us to find some way of reducing it. Our evidence, including yours, seems to show that doing nothing about corporations means doing nothing about a large slice of the chilling effect. Is that a fair summary of what you have been saying?

**Matthew Parris:** I think you have quite reasonably put your finger on, if not an internal contradiction, at least a tension between two halves of what I was trying to say. As someone who was always interested in jurisprudence, I cannot see why, since a corporation is capable of inflicting harm and suffering harm, it should not be capable of either being taken to court or taking other people to court. You just have to find ways of limiting the extent to which it does that.

**Q796 The Chairman:** That is helpful. Secondly, we have heard quite a bit of evidence to do with when something goes wrong and a newspaper defames someone and it gets to court. We have quizzed witnesses as to whether newspapers should be required by the court to print apologies. The evidence, overwhelmingly, has been no—an apology requires a degree of sincerity and the court cannot impose sincerity if people do not believe they have done something wrong. However, something that has emerged as a sort of compromise position is that the judge should have the right to make newspapers print retractions, court statements or whatever the form of the judgment might be in a location and of a size that is broadly comparable to the original source of difficulty. Do you have a view on that?

**Paul Dacre:** I apologise for harking back to this again but it is something that I have been devoted to for many years. The PCC already has the right to place a correction or adjudication in a paper. Where it goes in the paper has to be agreed by the director of the Press Complaints Commission. It is one of the great myths of our time that newspapers somehow bury these things at the back of the book, as 80% of the corrections carried by newspapers are either on the same page as the original offending article or before that page.

Secondly, it will not surprise you to hear me argue that this would be a usurpation of the editor's right to edit his paper. He has gone to court, argued his case and lost but still passionately believes that his newspaper was right. He has possibly paid exemplary damages. It is not up to any court then to order him to carry that statement. The PCC insists that the newspaper carries the result but not the statement. I suppose we are now leading to the ultimate sanction of a front-page apology. Again, I think that would be the court taking away the editor's right to edit and the thin end of all kinds of undesirable wedges. It is perhaps a technical point, but a newspaper's front page needs to sell itself. A newspaper has to be viable. If it does not sell itself, no one will read the correction inside. Finally—this is slightly contradictory—in truly heinous offences, a front page can and should be considered



by the editor. There are quite a few precedents for that but I should not want the court to have the right to insist on it.

**Matthew Parris:** Here I must break ranks. Journalists and editors hate apologising. A fulsome apology can often settle something that could otherwise drag on at great expense. Whereas it would be a pity if a judge ever had to dictate the terms of an apology, that reserved right on the part of a judge might persuade people at an earlier stage of mediation to apologise appropriately. That is a change that newspapers ought, perhaps, to accept.

**Q797 The Chairman:** My last question gets us to the internet. I think I heard in Mr Parris's earlier comments a reflection of the idea that some bits of the internet are just "down at the pub" conversations. Some of these seem to take place at 3 am. I am not sure what it is about 3 am. Maybe we ought to cut some slack for this sort of activity. On the other hand, you are either defamed or not defamed, whether it is 3 am or 3 pm, and whether you have all your senses or only half of them. If you are the victim, you are defamed. Are you trying to encourage us away from that latter thought?

**Matthew Parris:** Yes, I am. You say that if you are defamed, you are defamed. To be defamed in a drunken bar-room conversation at 3 am is different from being defamed in a *Times* leading article on page 2 of that newspaper. That is to do not just with the size of the audience but with the context in which the defamation takes place and how seriously it will be taken. The courts and the law have always understood that context is important in applying the law on defamation. What we must learn to do with the internet is understand the many layers of context that are still developing within it.

**Q798 The Chairman:** So there is one law for newspapers and another for unsourced, unidentified defamation.

**Matthew Parris:** Yes, to a degree—or rather the law takes into account those differences. The law would probably take into account the difference between something printed in a scurrilous rag and something printed in the *Financial Times* or *The Times*. It would take a different view. You have to look at the context.

**Paul Dacre:** It is also a matter of pragmatism. You will not be able to legislate for the 3 am drunken conversation. We have to find, as Matthew said, a way of differentiating. There is an irony here. Newspapers should therefore be seen as much more responsible outlets for news and opinion, which I think they are. That is one of the strengths that needs to be recognised by the courts and everybody.

**Q799 The Chairman:** Would another way of putting that be that the cultural drift at the moment appears to be in the direction of the internet and that it might be a good idea if we all worked together to try, if not to reverse it, at least to stem that cultural drift?

**Paul Dacre:** I go back to King Canute. I do not know. When you say "stem the cultural change"—

**Matthew Parris:** No, there is nothing we can do about it, and nor should we. When a magazine called *Scallywag* printed an article saying that, as a Member of Parliament, I had given transvestite parties in the upstairs room of the nearest pub, wearing high-heeled shoes, with Dr Rhodes Boyson as my guest, wearing lipstick and asking to be called Ruby, neither Rhodes nor I thought it was worth dealing with. That was not because a lot of people did not read *Scallywag* but because it was *Scallywag*. The difference in context within newspapers gives rise to the same

argument, in principle, as the difference between papers and the internet, and between some parts of the internet and others. It is a jungle with different terrains.

**Q800 The Chairman:** Might it be helpful if we wound up in a situation—however we get there—where, if something is unsourced and unidentified on the internet, we create an environment in which nobody pays much attention to it?

**Matthew Parris:** It might be the case.

**The Chairman:** It falls to me on behalf of the Committee to say a very sincere thank you to both of you, not just for your time today but for the time that you obviously put into preparing to come here. We appreciate that and thank you for letting us pick your brains, experience and wisdom. We are very grateful. We will adjourn for two minutes while our guests leave and then the Committee will go into private session.



