Memorandum to the Joint Committee on Human Rights:
the Defamation Bill 2012

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Executive Summary

1. It is wrong to treat free speech as being a superior or primary right in a democracy as some reform campaigners have. Many of the values underpinning free speech – truth, individual autonomy and development, the maintenance of a democratic society - also underpin reputation itself. We should value robust protection for reputation for many of the same reasons that we value free speech itself. Moreover, reputation is specifically protected by Article 17 of the International Covenant on Civil and Political Rights and through the Strasbourg Court's interpretation of Article 8 of the European Convention on Human Rights (ECHR). We must be careful not to make changes that risk under-protecting this right.

2. The notion that English libel law is uniquely draconian and hence some kind of 'global disgrace' or 'laughing stock' as the Libel Reform Campaign (LRC) has repeatedly insisted, is straightforwardly false. In fact most major Commonwealth countries have followed the English *Reynolds* model – protecting *responsible* publication in the public interest. This approach is also clearly in harmony with that of the European Court of Human Rights, which has repeatedly stressed the duties of journalists to engage in responsible journalism and check stories carefully before making allegations, even where politicians are concerned. In contrast, the US *Sullivan* model has been rejected by nearly all major Western countries; none of them skew the law so far towards free speech and away from reputation. This does not mean that English libel law should not be reformed; but any reform must start from the fact that it is already firmly in the moderate mainstream of comparative free speech law.

3. The often-invoked criticisms by the UN Human Rights Committee of English libel law relate partly to procedure and costs and not substantive law. Insofar as they relate to the law, they make very little sense: if the UK were to follow their (tentative) proposals, it would probably place itself in breach of Article 8 ECHR – scarcely a desirable outcome in human rights terms. Moreover, since English libel law strikes more or less the same balance as those in a great many other Western democracies, the UN would appear to be requiring change in the laws of all such countries – a scarcely plausible conclusion.

4. The LRC has proposed a new defence in the Bill, which would radically tip the balance in favour of free speech; its approach apparently has the support of Ed Milliband and other MPs. It would relieve any media (or other) body from liability in defamation, for false and defamatory statements, however grave the allegations made, provided that three conditions were met: (a) the statement concerned a matter of public interest; (b) it was not published maliciously (i.e. it was honestly believed to be true at the time and not published in reckless disregard of its truth); (c) once the error was realised, a retraction or correction was published promptly and with "adequate" prominence. Unlike proposals to add specific areas of privilege (e.g. for academic journals) this defence would be of enormous breadth.

5. In its favour is that it would incentivise the prompt retraction or correction of false allegations – which is what most claimants want. However, there are two key objections to

it: first, it would seem likely to encourage irresponsible journalism. It is notable that the BBC has attracted enormous criticism for its Newsnight programme wrongly linking Lord McAlpine to child abuse allegations. But the BBC would undoubtedly fulfil the three tests above (honest belief, public interest, swift retraction). *So this proposed reform would remove from all journalists the very obligations of responsible journalism that the BBC has been so universally condemned for failing to follow.*

6. The second objection is that the proposed reform may well violate Article 8 ECHR. The proposal would deny a remedy for a claimant who had received a prompt retraction, even where he or she had suffered serious and identifiable damage before (or after) the retraction came. An example would be a person wrongly accused of being a paedophile who was quickly found and lynched by a mob, suffering serious physical injury and trauma. A retraction would be little comfort and would not in itself vindicate Article 8. There is Strasbourg case law holding that inadequate remedies can violate Article 8 itself. Moreover it would seem unjust and disproportionate to bar *all* such claimants from taking legal proceedings on the basis of a retraction only, regardless of what damage they have suffered.

7. The other proposed reform in this area has been put forward by Lord Lester and Lord Neil – and this Committee has urged Lord McNally to consider it. It would require only that the publisher honestly and reasonably believed publication to be in the public interest, plus a prompt retraction/apology. In my view it would not improve cl 4. If it were read in a media-friendly way so as to largely remove the responsible journalism requirements, it would risk breaching Article 8 ECHR. However, the courts, to avoid this would probably "read into" it the existing *Reynolds* requirements of responsible journalism - since the Convention itself requires such a standard, and the common law would guide the interpretation of the statute. Law governing Convention rights should be as clear as possible. This amendment, far from making the law clearer would, in the short term, create great uncertainty. In the longer term, following expensive litigation it would probably end up looking very like *Reynolds.*

8. In the cl 3 honest comment defence, the Government has removed the current common law requirement that the comment must be on a matter of public interest. This is an ill-considered change made from the draft Bill. It may suggest that defamatory comment upon private life requires no public interest to justify it, which is plainly *not* in accord with the Strasbourg approach and is objectionable in principle. It might even be read to mean that such defamatory comment should never attract liability, which would raise a strong risk of breaching Article 8. Moreover it would raise a complex set of interpretive questions concerning the interrelationship of clause 3 with the law governing misuse of private information, which would have to be worked out through expensive litigation. It is thus undesirable in principle, risks violating Article 8 ECHR and will create needless complexity. The public interest requirement should therefore be restored in clause 3.

9. The Bill fails to make any changes to the way the law deals with corporate claimants. This is incoherent, given the law's new orientation around human dignity and Article 8 ECHR. Moreover, the vast majority of cases concerning abuse of libel law to silence NGOs, consumer groups, scientists etc, have involved corporate claimants. The quickest and easiest way to deal with recent abuses of libel law would be to place stringent restrictions upon the ability of such claimants to sue in libel.

Detailed Evidence

1. I give this evidence as an independent academic expert. I was the academic member of the Ministry of Justice's Working Group on Libel (2010) and recently gave oral and written evidence to the Joint Committee on Privacy and Injunctions.[1] I have also written extensively on the subject of the balance between Articles 8 and 10 of the European Convention on Human Rights and my work in this area has been cited by the highest courts in this country and in New Zealand.[2] I draw on my published work on defamation in this evidence.[3]
2. I do not seek to deal with every clause in the Bill, but only with specific issues where I have concerns about the Bill's compatibility with the ECHR or, more broadly, its consonance with the values of a liberal democracy governed by the rule of law and respect for individual rights (an issue I hope the Committee will also consider). The Committee will be well aware that the Libel Reform Campaign (LRC) is keeping up its unremitting pressure on the Government and Parliament to amend the Bill further in a pro-defendant direction, even though nearly all the changes made between the draft Bill and the actual Bill before the House favour defendants. Moreover, the Labour Party Leader recently gave his support to the LRC and its campaign for a "proper" public interest defence[4] and the Government has deliberately left open the possibility of tabling further amendments to the Bill in the Lords. I therefore also briefly address some of the amendments to the Bill proposed by the LRC and others.
3. I start with some general observations about English libel law before moving on to some more specific points about clauses 3 and 4 of the Bill. In particular I seek to provide a counter-balance to what I believe has been a general tendency amongst most of those advocating reform to ignore or downplay the importance of Article 8 EHCR in this area or express the view that it can simply be shunted out of the way into privacy law. This tendency appears in the report of the Joint Committee that scrutinised the draft Bill[5] and much of the evidence submitted to it. The Report discusses Article 8 in relation to defamation just once – and then briefly,[6] otherwise mentioning it only in relation to the right to privacy and then to support a pro-defendant reform to the fair comment defence that is in fact dubious from an Article 8 perspective.[7] It is important in my view that the JCHR corrects this tendency, taking full account of the recent findings by the Supreme Court

[1] HL Paper 273, HC 1443 (2010-12).
[2] See Court of Appeal (in *Douglas* v. *Hello! Ltd* (No. 3) [2005] EWCA Civ 595 [2006] Q.B. 125 and *McKennitt* v Ash [2008] Q.B. 73; the former Judicial Committee of the House of Lords (*Campbell v* MGN [2004] 2 AC 457 and the New Zealand Court of Appeal (*Hosking v Runting* [2005] 1 NZLR 1.
[3] See G. Phillipson and H. Fenwick, *Media Freedom under the Human Rights Act* (2006, OUP), chapter 19 (with Dr C. O'Brien); 'The "Global Pariah", the Defamation Bill and the Human Rights Act' (2012) 63(1) *Northern Ireland Legal Quarterly*, 145-82.
[4] http://www.senseaboutscience.org/pages/miliband-lends-support-to-libel-campaign.html
[5] Joint Committee on the Draft Defamation Bill, First Report 'Draft Defamation Bill' HL 203, HC 930–I (2011-12), hereafter 'JC, Report'.
[6] Report, at para 18.
[7] *Ibid*, para 69(a).

that Article 8 is engaged by attacks upon reputation,[8] at least where such attacks are serious enough to risk interfering with personal integrity.[9]

The de-valuing of reputation and assertion of free speech as the primary right

4. Many commentators have noted how little attention has been paid in the libel reform debate to the importance of reputation.[10] Reformers have also frequently asserted that freedom of expression is the "primary" right in a democracy and that the crucial values underlying it do not also underpin the right to reputation. Hence the submission of the Libel Reform Campaign to the Joint Committee argued:

> 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...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.[11]

5. The purpose of this section is argue that this characterisation of reputation and speech as simply opposing principles, with free speech having inevitable categorical priority, is mistaken. By undertaking a very brief survey of the key rationales underlying free speech itself[12] I hope to show that there is in fact a strong congruence between the values underpinning both rights.
6. The argument that free speech is essential for the discovery of truth, one of the classical free speech justifications,[13] has evident affinity with the basic existence of defamation law and the public interest it serves in providing a public remedy in respect of false and damaging accusations that may distort public discourse, as well as defaming the individual concerned. Of course, libel law can be *mis*-used to silence truthful criticism, but the point is that the basic principle underlying the law is one that, like free speech, aims to *promote* truth. Much the same may be said about the argument that free speech is essential for individual self-development and flourishing; this rationale evidently argues *against* a right to publish stories that wrongly damage or destroy another's reputation: both the 'looking glass'[14] rationale for defamation law and that deriving from the vital human interest in forming social bonds and relationships[15] explain how gravely harmed an individual's ability to flourish may be when false accusations lead to them being shunned by society or their own self-esteem being badly damaged by seeing the poor image reflected back at them by the

[8] See *Re Guardian News and Media Ltd* [2010] UKSC 1, at [37]-[42 and *Times v Flood* [2012] UKSC 11 at para 44.
[9] *Axel Springer v Germany,* App No 39954/08, 7 February 2012. See Mullis and Scott, 'The Swing of the Pendulum: Reputation, Expression and the Re-centring of English Libel Law' (2012) 63(1) *Northern Ireland Legal Quarterly'* 27-58.
[10] Writers such as Mullis and Scott, 'Swing of the Pendulum' and David Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845–877 have sought to correct this tendency.
[11] JC Report, Supplementary Written Evidence, The Libel Reform Campaign (EV 13).
[12] For an excellent discussion, see Eric Barendt's *Freedom of Speech* (Oxford: 2nd ed, 2005), ch 1.
[13] Set out originally by JS Mill, *On Liberty*, in *Selected Writings of John Stuart Mill*; Everyman, (1972).
[14] That is, the social-psychology argument that how others see us has a critical impact on our self-image and thus self-esteem. See Mullis and Scott, 'Swing of the Pendulum', above.
[15] Advanced by Howarth: n 11 above.

world.[16] Thus while free speech *in general* is undoubtedly a vital condition for human development, its use to damage or destroy reputations may severely injure the development of those defamed; hence providing remedies for such misuse is in harmony with this rationale for free speech itself.

7. The related argument for free speech from moral autonomy[17] is also engaged by both free speech *and* reputation. While the moral autonomy of citizens is a powerful argument in favour of free speech in general, it is hard to see how such arguments, which are essentially dignitarian, can justify the kind of utilitarian calculus by which it is considered that allowing for the damaging of the dignity of certain individuals will be likely to produce better public discourse overall. To treat the individual's reputation as 'regrettable but unavoidable road kill on the highway of public controversy'[18] is plainly to use that person as a means to an end, failing thereby to recognise their inherent worth and dignity as individuals, which gives rise to the autonomy argument – and thus the right to free speech - in the first place.
8. By far the most important contemporary free speech justification is the argument from democracy, in which freedom of speech is viewed as a primarily *instrumental* good in enabling and sustaining democratic self-government.[19] Professor Barendt has rightly termed the democracy rationale, 'much the most influential theory in the development of 20th century free speech law,'[20] something that is clearly true in terms of both UK and Strasbourg jurisprudence.[21] While the importance of free speech to a democracy is self-evident, it should also be noted that a convincing argument can be made that the legal freedom carelessly to damage the reputation of others with false accusations actively undermines the quality of public debate and the democratic process. As Barendt has put it:

> The public has a free speech interest in the publication of fair, well-researched stories, not in those which are poorly put together and which gratuitously destroy the standing of people in public life. The House of Lords was, therefore, surely right to insist [in *Reynolds*] that the press and other media should be required to observe the standards of responsible journalism...[22]

As Lord Nicholls put it in *Reynolds,* when reputations are wrongly damaged by the media:

> 'society as well as the individual is the loser…Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.[23]

9. The *Reynolds* approach of course also recognises that it may be in the public interest to publish stories the truth of which cannot in the end be proven in court, provided that

[16] See Howarth, *ibid* at 854.
[17] See e.g. R Dworkin, 'Rights as Trumps' in J Waldron, (ed.), *Theories of Rights*, (Oxford: OUP, 1984).
[18] *WIC Radio Ltd v Simpson* [2008] 2 SCR 420, at para 2, per Binnie J.
[19] Advanced originally by Meiklejohn: e.g. The First Amendment is an absolute' (1961) Sup Ct Rev 245.
[20] Barendt, Freedom *of Speech,* n 12 above at 18 and 20 respectively.
[21] See e.g. Phillipson and Fenwick, n 3 above, 16-18, 37-79 & 689-90.
[22] See note 12 above, at 222.
[23] *Reynolds v Times Newspapers* [2001] 2AC127, 201 (hereafter, *Reynolds*).

reasonable attempts were made to verify the facts. Hence, the media should be free from the chilling effect of libel damages in relation to such stories, although, as many have pointed out, the value in truth *and* in informed public discourse surely require that, where it becomes clear in court that a given accusation was *not* true, the court should have power to order the newspaper to publish a correction, even though it is protected from liability in *damages* by the *Reynolds* defence.

10. In short then, even a brief consideration of the key rationale for free speech shows considerable congruence with the values underpinning the right to reputation. This should encourage us to search for principled resolution of more practical and limited legal points of conflict between the two, rather than making the crude assumption of an inherent conflict with free speech figuring as the invariably superior value.

The (mis)-characterisation of English Libel Law as uniquely restrictive and contrary to human rights standards

11. Much of the case for reform of English libel law has depended upon a straight mis-characterisation of it as the "most draconian" in the world; the perception has been put about that English law is some kind of 'global 'pariah', as John Kampfner of Index on Censorship has repeatedly put it.[24] Similarly, the LRC briefing for Second Reading in the Lords[25] includes comments from the journal *Nature* that English libel laws are "antiquated" and widely perceived as "a national embarrassment".[26] Far from being able to show anything close to a 'global' consensus against English law, however, the usual comparison cites only the opposition of a single country, the United States. The US example has been convenient for reformers because that country recently passed an Act to protect US citizens from the enforcement of foreign libel judgments not compatible with US First Amendment protection for free speech.[27] This has had a profound effect upon perceptions in this country. The Commons Select Committee on Media, Culture and Sport concluded that it was 'a humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts',[28] a view echoed (this was a "mark of shame" for the UK) during Second Reading of the Defamation Bill.[29] Similarly, the Deputy Prime Minister has claimed that reforms are necessary to stop English libel law being an international 'laughing stock' and make it instead a 'model' for the world to follow. [30] All these comments feed the perception that only a *radical* re-balancing of substantive law in favour of free speech will cure this problem.
12. It is important to say, loud and clear, that **the premise of this argument is false:** English law has if anything already been something of a 'model' to Commonwealth countries, which have adopted variants of its nuanced *Reynolds* approach - which, broadly protects *responsible* journalism on public interest topics even where defamatory allegations turn out

[24] See e.g. 'Libel reform: a final push' *Guardian* 18 October 2011.
[25] www.senseaboutscience.org/data/files/Libel/Libel_Reform_Campaign_Briefing_on_Defamation_Bill_-_October_2012.pdf
[26] Appendix I
[27] The so-called SPEECH Act 2010.
[28] *Press standards, privacy and libel* (House of Commons Culture, Media and Sport Committee, 9 February 2010) (HC 362-I), 6.
[29] "It is a mark of shame against this country that New York state thought it necessary to pass an Act specifically aimed against this country" (HC Deb: 12 Jun 2012, col. 183, John Whittingdale).
[30] '"Laughing stock"' libel laws to be reformed, says Nick Clegg' *Guardian* 6 Jan 2011.

to be false; conversely they have clearly *rejected* the blanket US *Sullivan* doctrine, which effectively denies the protection of defamation law to all 'public figures'.[31] As a leading comparative scholar of defamation law points out:

> 'Changes have been seen in countries including Australia, Canada, Hong Kong, India, Malaysia, New Zealand, South Africa, and the UK itself. Generally *the developments outside the US* mean that, where material is published to a wide audience, defamation defendants can establish a form of qualified privilege if they show that the publication concerned a matter of public or political interest *and was made responsibly or reasonably.*'[32]

As another scholar, Richard Mullender has put it:

> In ... Commonwealth jurisdictions ... judges have pursued a common theme. Where journalists go about their business responsibly and in ways that serve the public interest,[33] they should not run afoul of defamation law--even if they are unable to prove the truth of the statements they make.[34]

He notes that, while there are differences of 'nomenclature and points of doctrinal detail', judges in Canada,[35] Australia,[36] New Zealand,[37] South Africa,[38] and the United Kingdom have all agreed on this basic approach.

13. To this may be added the fact that English libel law is also broadly consonant with the approach of the European Court of Human Rights to freedom of expression.[39] The Court draws on the common traditions of the European democracies and is in turn responsible for setting standards across the whole of the Council of Europe. It is clear that the Strasbourg Court has broadly pursued the Commonwealth, rather than the US approach, holding that even major public figures are entitled to reasonable protection for their reputations.[40] Hence in Strasbourg's view the mere fact that the subject matter of a publication relates to a politician, or other topic of legitimate public interest, can never *per se* justifiably afford it blanket protection from defamation law if it makes false and damaging allegations. Instead, the European Court has repeatedly held that journalists benefit from protection under Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability.[41] In *Bladet Tromso,* for

[31] Subject to them proving malice – generally an impossible burden: see *Sullivan v New York Times* (1964) 376 US 254.
[32] Prof A. Kenyon, 'What Conversation? Free Speech and Defamation Law (2010) 73 MLR 697, at 711 (emphasis added).
[33] Strictly speaking, under *Reynolds,* it is only required that the *subject matter* of the publication be on a matter of public interest.
[34] R Mullender, 'Defamation and Responsible Communication' LQR 2010, 126(Jul), 368, 370-71.
[35] *Grant v Torstar* (2009) 2009 SCC 61**.**
[36] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 HC (Aus).
[37] *Lange v Atkinson* [2003] 3 NZLR 385 CA (NZ).
[38] *National Media Ltd v Bogoshi* 1998 (4) SA 1196 SCA.
[39] See e.g. Milo, *Defamation and Freedom of Speech* (Oxford: OUP, 2008); above; G Phillipson (with C O'Brien), 'Defamation and Political Speech', (ch 21), Fenwick and Phillipson, n 3 above.
[40] See e.g. *Lingens v Austria* (1986) 8 EHRR 407, at [42].
[41] See, e.g. *Pedersen & Baadsgaard v Denmark,* App no. 49017/99 (17 December 2004); *Radio France v France,* App no. 53984/00 (30 March 2004).

example, the Court, in an oft-repeated phrase, said that the press should be protected, providing 'they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism'.[42] Moreover it is now clear that, where a state fails to provide a remedy when serious defamatory allegations are published without due care, Article 8 may be breached, due to the adverse impact on personal integrity that seriously defamatory allegations may have.[43] This has recently been re-stated in the clearest terms by the Grand Chamber, in *Axel v Springer*: "The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life".[44] Moreover, this applies even where the allegations relate to 'public figures', including politicians,[45] an approach that implicitly but necessarily rejects the US *Sullivan* approach as incompatible with the Convention.

14. It is in light of the above that we must consider the now notorious criticisms of English libel law made in the 2008 Report of the UN Human Rights Committee,[46] also much cited by campaigners for reform as evidence of 'pariah' status. First of all, it should be noted that it was primarily 'the practical application' of the law of libel that was criticised; its adverse international impact was said to flow from the 'advent of the internet and the international distribution of foreign media', while one of the Committee's main recommendations concerned curbing excessive costs.[47] It is true that the Committee also referred to the law itself as being 'unduly restrictive' and suggested that the UK consider introducing a US-style *Sullivan* public interest defence – but this was a baffling suggestion, since not only would this imply a need to change the law in all the Commonwealth countries noted above, but it would also almost certainly place the UK in breach of its international obligations under Article 8 of the European Convention on Human Rights - presumably *not* a desirable outcome in human rights terms.
15. The violent criticism from *US* commentators stems from the fact that US free speech doctrine under the First Amendment is very much an example of what human rights lawyers know as 'American exceptionalism'. It undoubtedly forms a strong contrast to English law in this area – but in most other areas of free speech law is out on a limb compared to the Strasbourg-Commonwealth consensus. The most dramatic example is probably in the area of hate speech, in which the US stands alone in holding that intentional incitement to racial hatred is constitutionally protected speech.[48] But other examples of US free speech exceptionalism are easy to find and include its stance on whether the state may punish,

[42] (1999) 29 EHRR 125, at [65]

[43] See e.g. *Pfeifer v Austria* (2009) 48 EHRR 8; *Chauvy* v *France* (2005) 40 EHRR 706, at [31]; *Lindon, Otchakovsky-Laurens and July v France* (2008) 46 EHRR 35; *Petrenco* v *Moldova* [2011] EMLR 5; *Petrina* v *Romania* 78060/01 [2009] ECHR 2252.

[44] App No 39954/08, 7 February 2012, para 83.

[45] See e.g. *Lindon v France* (*ibid*) concerning the notorious political figure Le Pen; *Europapress Holding D.O.O. v. Croatia,* App No. 25333/06 (2009) concerning a Government Minister. In that case, the court remarked that 'the more serious the allegation is, the more solid the factual basis should be'.

[46] 30 July 2008, CCPR/C/GBR/CO/6 at [25].

[47] The Committee recommended that the UK consider 'limiting the requirement that defendants reimburse a plaintiff's lawyers fees and costs regardless of scale, including Conditional Fee Agreements and so-called 'success fees', especially insofar as these may have forced defendant publications to settle without airing valid defences.' It also said tentatively that the UK 'might consider' requiring claimants to show some 'preliminary evidence' of falsity and absence of ordinary journalist standards. However, these aspects of English law are again commonly found in other countries and are also in accordance with the Strasbourg jurisprudence.

[48] *RAV v St Paul*, 505 US 377 (1992); *Virginia v Black*, 538 US 343 (2003). This stance is also probably contrary to Art 19 of the International Covenant on Civil and Political Rights.

prevent or remedy by individual suit prejudicial media reportage of criminal trials in the interests of fair trial rights and the presumption of innocence;[49] how far the state may regulate campaign financing, [50] and the extent to which there should be a remedy for the publication of private facts by the media.[51] The often unique stance of the US in these areas is well known to comparative free speech lawyers, and it is no surprise, therefore, to find US law in an oppositional stance to English law in relation to defamation also. What *is* startling is the frequency with which media and libel campaigners routinely hold up US libel law as somehow being 'the standard' by which English law should be judged, without any acknowledgment that the US approach to the defamation of public figures has been rejected by virtually every major Western democracy. **Consideration of libel reform must then start with the clear acknowledgment that English law in this area is firmly in the moderate mainstream of comparative free speech law.** That does not mean that it could not benefit from reform: but it does mean that such reforms must be assessed on their merits, not be propelled by the Libel Reform Campaign's baseless assertion that 'English libel law is becoming a global disgrace.'[52]

16. It is important to emphasise this, because the libel campaign has said so many times that English libel law is the most draconian or claimant-friendly in the Western world that it seemed to became a kind of accepted truth just through repetition – a kind of "zombie argument" that staggers on, however many times it is shot down by informed argument. But, as the evidence above confirms, the English *Reynolds* approach is if anything, something close to an international standard-setter. Moreover, in the light of the recent revelations of gross press misconduct by the Leveson Inquiry and phone hacking scandal, it would seem a bad time to argue that the current standards of responsible journalism that the law imposes on the media should be relaxed. The idea of removing from British newspapers a requirement that, before defaming public figures, they should check their facts, would surely strike most as a decidedly unappealing prospect.

A public interest defence and clause 4

17. The LRC has consistently argued that *Reynolds* is *not* a public interest defence and that the Bill must provide one. At times it has been argued that defendants should be free from liability provided that they have published something that relates to a matter of legitimate public concern (e.g. politics, science, medicine, public health) and honestly believe it to be true. **It is plain beyond doubt that such an approach would violate Article 8 of the Convention.** The argument to justify this contention may be broken down into the following steps:
    a. As noted above, it is clearly established by the Strasbourg court and the UK Supreme Court that a person's reputation is an aspect of their rights under Article 8.
    b. English law must therefore interpreted and applied in a way that give sufficient protection to the protection of reputation so as to satisfy the UK's positive

[49] US Supreme Court: *Nebraska Press Association v Stuart* 427 US 539, 549 (1976); cf. the Strasbourg decision in *Worm v Austria* (1997) 25 EHRR 557 and the laws governing contempt of court in most Commonwealth countries.
[50] For the most recent, widely criticised Supreme Court decision, see *Citizens United v. Federal Election Commission*, 558 US 08-205 (2010).
[51] See e.g. *Florida Star v BJF* 491 US524 (1989).
[52] See http://libelreform.org/

obligations to ensure adequate protection for Article 8, as interpreted by the Supreme Court.

c. A vital aspect of this protection is the notion that journalists do not have a free hand in publishing defamatory material, even where the subject-matter is clearly of proper public concern. As noted above, in Strasbourg's view the mere fact that the subject matter of a publication relates to a politician, or other topic of legitimate public interest, can never *per se* justifiably afford it blanket protection from defamation law if it makes false and damaging allegations. Instead, the European Court has repeatedly held that journalists benefit from protection under Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability. The Grand Chamber has recently restated this position in the clearest possible way in *Axel v Springer*:

> the Court has held that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism.[53]

d. Therefore, to allow for blanket immunity from the law of defamation merely because a given publication dealt with a matter of public interest would not be in accordance with Article 10; moreover, where the libel was a serious one –which will be a threshold requirement once the Bill is passed[54] - and could affect personal integrity,[55] Article 8 would be breached by denying the claimant any remedy for it.

e. Therefore, any reform of the public interest defence must retain some requirements of responsible journalism, as enumerated, for example, in the illustrative 10 point checklist in *Reynolds*.

18. Perhaps in recognition of the above, reformers have recently moderated their demands in relation to a public interest defence. I will deal with two currently proposed amendments to the Bill: one suggested by the LRC, and one outlined by Lord Lester on Second Reading. I will suggest that the first poses a serious risk of violation of Article 8 in some circumstances, while the second would lead to a severe loss of legal certainly to no good effect.

The LRC proposal: no liability where libel concerns a matter of public interest and prompt retraction given

19. The LRC is now suggesting, **as an addition** to clause 4, a defence based on a combination of "public interest" *and* a discursive remedy. It is worth considering this possibility, because it may command widespread support in Parliament.[56] The proposed clause would apply, as the LRC puts it, where "public interest statements, which cannot be shown to be true, are promptly clarified or corrected with adequate prominence".[57] In simple terms, this replaces the "responsible journalism" requirements in *Reynolds* with the prompt offer of an apology: it is important to note that under this proposal, if a prompt retraction or correction were given, the claimant would be absolutely barred from pursuing a libel action, regardless of

[53] At para 93, citing numerous authorities.
[54] Clause 1.
[55] This would presumably *not* apply in the case of business libels or where the claimant was a corporate body.
[56] See http://www.senseaboutscience.org/pages/miliband-lends-support-to-libel-campaign.html
[57] See note 25 above, pp 9-10.

how serious the original allegation was or what damage he or she had suffered. The positive aspect of this proposal is that it aims to furnish a swift and cheap remedy for the claimant in the form of a retraction. Many on both sides of the libel reform debate have argued for reforms that would make the prompt provision of so-called "discursive remedies" – retractions, corrections and apologies – a centrepiece of reform. This both avoids the chilling prospect of extended litigation, with high costs and damages, and gives the claimant a prompt remedy that in many cases would restore his or her reputation. However there are two key objections to this proposal.

20. The first is that, by completely freeing the press from the fear of a libel action, provided a newspaper is prepared to issue a prompt correction, it may well encourage irresponsible journalism. The media body would know that, provided the topic was broadly one engaging the public interest and that it was honestly believed to be true at the time, then provided it was prepared to issue a prompt retraction if it got something wrong, it could publish even the most serious allegation, without making any real attempt to verify it, or seek the claimant's side of the story.[58] Despite the argument that such retractions constitute reputational damage to newspapers, it is implausible to believe that this would furnish the same kind of deterrence that a large award of damages and major legal costs do currently. In the Leveson era, in which the most grave examples of press irresponsibility and outright criminality have been revealed, it would seem strange indeed to make any change to the law that encouraged an even more careless and irresponsible attitude towards truth and reputation than sections of the media already display today.

21. It is notable in this respect that the BBC has attracted enormous criticism for its *Newsnight* programme wrongly linking Lord McAlpine to child abuse allegations, so much so that the Director General was forced to resign and the Corporation plunged into crisis. But the BBC would undoubtedly fulfil the three tests above (honest belief, public interest, swift retraction). **So this proposed reform would remove from all journalists the very obligations of responsible journalism that the BBC has been so universally condemned for failing to follow.[59]**

22. The second objection to such a provision is more specific: **in absolutely disabling the claimant from pursuing an action for damages, it could breach Article 8.** Cases may arise in which the original allegation is so serious that even a prompt retraction may not be an adequate remedy. However, the proposal bars the claimant from further action even where, for example, they have suffered provable financial loss. Consider, the following examples:
    a. A serious allegation of professional misconduct is made against A, just at the time she is applying for a post with another employer. Because of adverse publicity generated by the allegation, she fails to get the job - the retraction comes too late.
    b. B is accused of being a paedophile by a newspaper – he is swiftly located and set upon by a lynch mob. He suffers serious physical injury and mental trauma. It subsequently turns out to be a case of mistaken identity, and the newspaper apologises and withdraws the allegation.
    c. A newspaper publishes an allegation of child abuse against C. As a result, his spouse leaves him and succumbs to a depressive illness, and his children suffer bullying at

[58] Provided only that it did not act with reckless disregard for the truth – a very hard thing to demonstrate.
[59] See my comment to this effect in the *Guardian:* http://www.guardian.co.uk/law/2012/nov/14/lord-mcalpine-defamation-bill-newsnight-libel-reform

> school. A retraction and apology is subsequently published, but only after C and his family have gone through intense emotional trauma for several weeks with possible lasting damage to their mental health.

Not only does it seem plainly unjust to bar such claimants from any further remedy, there is evidence from the Strasbourg case law that this could breach Article 8. Two cases will be considered in this respect.

23. The first is *Peck v United Kingdom.*[60] The applicant had been captured on Council CCTV cameras, wandering through the street carrying a knife, immediately after he had attempted to commit suicide by cutting his wrists. This footage was passed by the local authority on to a news broadcast and a popular television programme, *Crime Beat*, both of which showed extracts from the CCTV footage, from which the man was recognisable, to an audience of hundreds of thousands. The Court found a breach of Article 8. It noted that the broadcast regulators (then the ITC and BSC) had the powers not only to fine broadcasters (ITC only) but to require them to carry apologies and retractions and a summary of their adjudication.[61] In other words, they could impose a "discursive remedy". Nevertheless, the Court made a very clear finding:

> The Court finds that the lack of legal power of the Commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant.[62]

24. The Court's finding was thus that the denial of any right in damages to the claimant breached Article 8: powers to order apologies or retractions were not enough. This at the least raises a serious doubt as to whether a retraction or correction could *always* satisfy Article 8, regardless of the seriousness of the allegation or the actual damage caused. There are of course relevant differences between the *Peck* scenario and the proposed measure: the complaints mechanism of the regulators did not produce very "prompt" apologies or retractions (the offending programmes were broadcast in March and adjudications were not published until June). Moreover, many have argued that retractions of defamatory allegations provide a much more satisfactory remedy than apologies for invasions of privacy: the former can (at least partly) restore reputation, whereas the latter cannot restore lost privacy. Nevertheless, it is argued that the above case shows that a blanket prohibition on the ability to obtain damages for a seriously defamatory allegation, regardless of what actual damage has been caused to the claimant, *may* breach Article 8.
25. This conclusion draws some support from the decision in *Armonas v Lithuania,*[63] which confirms that the Strasbourg Court is prepared to find that inadequate remedies in this area can themselves breach Article 8. The applicant's husband had brought a successful action for invasion of privacy against a newspaper that had revealed his HIV status. National law limited the maximum award for non-pecuniary loss to €2,896. The applicant applied to Strasbourg, alleging that this limit on recovery of damages to such a small sum had deprived her husband of an effective remedy. The Court agreed, finding a breach of Article 8. The

[60] (2003) 36 EHRR 41.
[61] Paras 49 and 50 of the judgment.
[62] Para 109.
[63] 36919/02 (25 Nov 2008).

state party argued that, 'The State enjoys a wide margin of appreciation in determining the measures required for the better implementation of [the] obligation [to respect private life]'. The Court agreed that in general, the precise means of ensuring respect for Article 8 in domestic law fell within the state's margin of appreciation, but went on:

> The Court nonetheless recalls that Article 8, like any other provision of the Convention…must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[64]

Thus, 'the State had an obligation to ensure that the husband was able *effectively* to enforce [his Article rights] against the press.[65] The Court went on to find that while reasonable limits to the award of damages would of course be permissible, 'such limits must not be such as to deprive the individual of his or her privacy *and thereby empty the right of its effective content.*'[66] The Court found that the severe limit placed upon the quantum of damages was such that the state 'failed to provide the applicant with the protection that could have legitimately been expected under Article 8…'.

26. It is particularly noteworthy that the Court did not even find it necessary to invoke the Article 13 right to an effective remedy[67] in this case. The applicant argued a breach of that provision, but the Court said simply that in its view 'the complaint under Article 13 as to the absence of an effective domestic remedy is subsidiary to the complaint under Article 8.'[68] In other words, the low level of damages awarded did not just mean that there was no effective remedy under Article 13: rather Article 8 *itself* was breached thereby. The Court thus held that the state's positive obligation to show respect for private life in *itself* requires a certain kind of remedy – a striking example of just how interventionist the Court has become in this area.
27. The conclusion then is clear: were a clause such as that proposed by the LRC be added to the Defamation Bill (which I do *not* support), then, in order to minimise the risk of a breach of Article 8, it should *not* contain a blanket prohibition on recovery of damages. Instead, such a clause should allow for judicial discretion to allow a case to proceed, notwithstanding that a retraction had been forthcoming, where the damage caused to the claimant was such that a retraction or correction would not amount to an adequate remedy. Such an exception could be triggered where (a) the original libel was particularly serious; (b) the claimant had suffered severe and demonstrable damage, whether professional, financial or emotional as a result of it, before or after the retraction was made; (c) the interest of justice therefore required that an action be allowed to proceed, notwithstanding the retraction made.
28. Finally, if such a clause were to be accepted, then two conditions should be clarified: first, any retraction or correction should be published not just with "appropriate", but with *equal prominence* to the original allegation. Such a provision would do something real to deter irresponsible journalism, as well as ensuring that as many readers as possible became aware of the true state of affairs. Second, the meaning of "prompt" should be clarified by the stipulation of at least a prima facie time limit.

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[64] *Ibid,* citing *Shevanova v. Latvia*, 58822/00, (2006), [69].
[65] *Ibid,* [43] (emphasis added).
[66] *Ibid* [46] (emphasis added).
[67] Article 13 provides for the right to an "effective remedy" in domestic courts for breach of Convention rights.
[68] At para [23].

The Lester proposal: honest and reasonable belief that publication is in the public interest.

29. At Second Reading, Lord Lester outlined a replacement for clause 4, which he credited to Sir Brian Neill.[69] The Committee has pressed Lord McNally to accept such an amendment (letter, 18th October). In brief, the proposed new clause would, like clause 4, apply to statements on a matter of public interest. But it would then part company with clause 4 by requiring only the defendant show that he "honestly and reasonably believed at the time of publication that the making of the statement was in the public interest."[70] In addition, the defence would not apply where "the claimant shows that he asked the defendant for the publication of a correction of the statement complained of and that the request was unreasonably refused or granted subject to unreasonable conditions."
30. In my view, such a formulation, although superficially attractive, would not be helpful. The clause is ambiguous – and indeed how it would be read has already been the subject of strong disagreement on an important legal blog.[71] Read one way, it would probably breach Article 8; read another, it would simply lead the courts back to something like *Reynolds*. Hence it is likely simply to generate costly and prolonged litigation to no good purpose. The first reading would note that, on the face of it, the new defence appears to drop entirely the core principle of *Reynolds* and similar common law defences, such as that under *Grant v Torstar* in Canada,[72] that the newspaper must *act responsibly* in publishing the statement (or as Australian legislation puts it, that the "*conduct* of the defendant in publishing [the statement] was reasonable in all the circumstances").[73] Instead, the journalist would only have to show that he honestly and reasonably believed that making the statement was in the public interest. This could be read as meaning that a journalist could reasonably believe that it was in the public interest to publish a serious allegation on a matter of the highest public importance (concerning e.g. major corruption by a senior politician or chief constable) even though little attempt had been made to investigate the truth of it. The journalist might argue that the allegation had such serious implications for public life that public debate around it was essential, so that the truth could emerge – and that his paper was prepared to withdraw the allegations and apologise if they turned out to be false. A judge granting a wide latitude to the view of the editor on this point (as the proposed defence requires) might agree. Interpreted this way the defence would come close to removing the requirement that the newspaper establish that it acted *responsibly* in researching and verifying the story, replacing it with an examination of what the editor of the newspaper *thought* was in the public interest, subject only to a what might become a weak requirement of reasonableness in forming that view. This might lead to the clause importing only very weak requirement of responsible journalism: it has been suggested that the BBC would have been able to rely on this clause in the McApline case, despite its obvious failures to check the story properly.[74]
31. For the reasons given above, it seems tolerably clear that a clause thus interpreted would be out of step with Strasbourg's fairly strict insistence upon compliance with the ethics of

[69] HL Deb, 9 Oct 2012, col. 954.
[70] Wide discretion is to be granted by the court to the view of the editor or publisher on both these factors.
[71] Cf. http://inforrm.wordpress.com/2012/11/11/the-bbc-lord-mcalpine-and-libel-law/ - and see the comments - with the view taken by Mullis and Scott: http://inforrm.wordpress.com/2012/11/08/a-new-style-public-interest-defence-in-libel-law-andrew-scott-and-alastair-mullis/
[72] (2009) 2009 SCC 61.
[73] E.g. *Defamation Act* 2005 (Qld) s 30(3).
[74] http://inforrm.wordpress.com/2012/11/11/the-bbc-lord-mcalpine-and-libel-law/

journalism; it would under-protect reputation and, at least in cases of serious libels, risk breaching Article 8. The proposal that, to run this defence, the defendant would also have to publish a reasonable retraction or correction reduces this possibility, since the claimant would receive something by way of remedy. However, as discussed above, in really serious cases, a retraction may not be enough to compensate a claimant fully.

32. The other alternative is that a court would use section 3(1) HRA to "read into" the clause the basic requirement *Reynolds* and the Strasbourg case-law imposes of responsible journalism. A court would reason that a journalist's view that publication was in the public interest could only be considered *reasonable* when the newspaper had taken reasonable care in publishing it. (Note that a court would have to decide how to interpret "reasonable belief" regardless of the view it took over whether the retraction provision might satisfy or partially satisfy Article 8 ECHR). In then deciding whether the newspaper *had* taken reasonable care, the court would presumably then use at least some of the *Reynolds* factors that now appear in clause 4, such as the steps taken to verify the evidence, whether the claimant's side of the story was given, and so on. Hence the new clause would end up meaning more or less the same as *Reynolds,* plus reasonable retraction. The disadvantage of this approach is that it would import considerable uncertainty into the law, which would require extensive litigation and judicial consideration, quite possibly invoking section 3 HRA, to resolve. After all, the notion of "reasonable belief" that publication is in the public interest is not, on the face of it, the same as a straightforward requirement of "*responsible* publication in the public interest." Whereas at present, clause 4 reflects the *Reynolds* test, which is both firmly rooted in the Strasbourg case-law and in harmony with the dominant, Commonwealth approach, courts would be confronted with a new provision, *replacing* the current clause 4 codification of *Reynolds*. Defendants would argue that Parliament could not have intended simply to reproduce the common law defence when it had deliberately taken such a different route. Judges might well disagree about themselves as to the meaning of the new provision, and as to how far it was legitimate to use section 3 HRA to read the *Reynolds* factors back in. At its worse, several trips to the appellate courts, possibly even an application to Strasbourg, might be needed to resolve the issue. In the end, the clause would probably end up meaning much the same as *Reynolds,* but only after huge legal costs had been run up and a prolonged period of uncertainty endured. This would be an unfortunate result of the new law, which is designed precisely to limit expensive libel litigation.

33. Moreover, while uncertainty in the law is always undesirable, it is particularly objectionable when the law in question is one that governs and restricts and exercise of Convention rights, which should be reasonably clear.[75] In short therefore, the proposed clause is thoroughly undesirable: if it significantly changed the law it would risk falling foul of Article 8; if the judges used the HRA to read it down to make sure that it did not, it would cause prolonged legal uncertainty and major legal costs to sort out – precisely the opposite result from that which reform of the law of libel is designed to achieve. It would be preferable instead, to leave clause 4 more or less as it is, **but add to it the valuable part of the Lester/Neil proposal - the requirement of a prompt and reasonable retraction.**

Honest Comment and Article 8 – clause 3

34. I have serious concerns about clause 3 of the Bill, which codifies and reforms the "fair comment" defence. The Bill as drafted requires only that a given statement be one of

[75] *Sunday Times v UK case* (1979-80) 2 EHRR 245, para 49.

opinion, that it indicates the factual basis of the opinion, and that an honest person could have held the opinion, based on a pre-existing fact or something asserted to be a fact in a privileged statement (cl 3(1)-(3)). The Bill has thus dropped the requirement of the common law, which was present in the Draft Bill, that, to be protected, a defamatory comment must be on a matter of public interest. This change was recommended by the Joint Committee,[76] strongly supported by the Libel Reform Campaign. However, my submission is that the dropping of this requirement, far more making the law simpler, will raise very complex issues concerning the interrelationship between clause 3 and the right to privacy, and risk violating Article 8 ECHR.

35. Those who supported dropping this requirement seemed to believe first that it was 'an unnecessary complication,' [77] and second that the law need not concern itself with the implications for Article 8, since that could be taken care of by the law of privacy. The Media Law Resource Center took this line, noting in relation to the Government's Article 8 concerns:

> We strongly urge that concerns for respect for private life not be imported into defamation law. Defamation law is designed to protect reputation in the community and should not be blended haphazardly with concern for privacy rights which are subject to different legal theories and defences.[78]

Such comments evince the desire noted above to keep Article 8 out of libel law. Similarly, JUSTICE said:

> We can see no good reason why the freedom to express one's opinions, honestly held, should be constrained by a requirement to demonstrate that the opinion relates to a matter of public interest. We note that Lord Phillips in *Spiller v Joseph* also doubted the need for this requirement...Any article 8 concerns are properly the subject of the law governing privacy, not defamation.[79]

I would note first of all that the first sentence of this paragraph is plainly misleading. No-one is suggesting that there should be a general legal requirement that one may only voice opinions on matters of public interest. What the common law requirement does is to require that where someone utters an opinion *that seriously defames another person* it must be on a matter of public interest to avoid liability in defamation. The reason for this, in human rights terms, is simple: comment that disparages a person's private life may invade their privacy rights and reputation, justifying restrictions on Article 10 expression rights.[80] In order to justify making such a comment in Convention terms, one would have to show that the intrusion into Article 8 it represented was outweighed by the Article 10 rights of the speaker. But Strasbourg has repeatedly found that, to benefit from Article 10 protection, speech should concern a matter of *public interest.* As the Court said in its seminal *Von Hannover* judgement:

[76] JC Report, at para 69(a).
[77] JC Report, para 69(a).
[78] JC Report, Written Evidence, HL 203 & HC 930-III, at p. 46.
[79] *Ibid* at p. 80.
[80] See e.g. Tammer v Estonia (2003) 37 EHRR 43. The Court found that Estonia was justified in punishing highly disparaging comment about the private life of a former Prime Ministerial aide.

> the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the [publication] make to a debate of general interest. [81]

As the Grand Chamber observed in its recent decision in *Axel Springer v Germany:*

> A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions...Whilst in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – even where the persons concerned are quite well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect"[82]

36. Thus, where speech consists of a critique of someone's private life, lacking any public interest quality, it will be seen as of decisively lower value, easily outweighed by reputational or privacy interests. Tugendadt J in the High Court has given recent consideration to whether the requirement that common must be on a matter of public interest is compatible with Articles 8 and 10.[83] His conclusion was that it *was* compatible: noting the *Von Hannover* case, Tugendadt J concluded that a celebrity's Art 8 rights included the right not to be subject to 'comment...about their private life'. [84] Defamation law should continue to recognise this by requiring that defamatory comments should be on a matter of public interest in order to attract protection under the 'honest comment' defence. This would ensure that both defamation and privacy law continue to develop in a harmonious way that answer to the relevant Article 8 and 10 values. Otherwise the result will merely be complex litigation in which newspapers seek to use 'comment' as a way of dragging peoples' personal lives into disrepute in circumstances where to make the *factual* allegations that could justify the opinion would incur liability under the tort of misuse of private information. [85]
37. One possible reply to the above argument would be to say that, if disparaging comments about private life *are* made, the remedy may be found in the law of privacy, in particular the law of misuse of private information. This is what the Joint Committee seems to have had in mind in stating that, 'The law's protection of the right to personal privacy and confidentiality...can be used to prevent people from expressing opinions on matters that ought not to enter the public domain.'[86]' However, such comments fail to appreciate the

[81] [2004] E.M.L.R. 21 at [76].
[82] Axel Springer at [91].
[83] *Andre v Price* [2010] EWHC 2572 (QB)). This recent libel case concerned disparaging comments made by Katie Price about whether her ex-husband, Peter Andre, loved one of his children, H, unconditionally.
[84] Ibid at paras 82 and 92.
[85] See generally *Campbell v MGN* Ltd [2004] 2 AC 157 (HL).
[86] *Ibid.*

complexity of this area. In fact, analysis reveals that, if disparaging comment on issues of private life *is* permitted by the new Bill, then, far from simplifying the law, this will set up a complex and uncertain relationship with the tort of misuse of private information. This would be likely to require extended consideration by the courts and much litigation to resolve. The complexities that this change would give rise to may be demonstrated by considering three different scenarios.

38. The first is the scenario in which private facts about an individual have *previously* been published *and* given rise to liability under the new extended action in confidence/tort of misuse of private information; is adverse *comment* on those facts to be permissible under the "honest comment" defence in defamation law? The Media Law Resource Centre addressed this scenario, saying:

> In the Max Mosley privacy case the High Court held that reports about Mr. Mosley's German-themed S&M sessions did not involve a matter of public interest. It would be ludicrous to carry this forward and hold that opinions about his conduct are defamatory and not to be uttered because the conduct involved a private matter. [87]

39. However, it is not at all clear that such a finding would be 'ludicrous'. As noted above, the Bill will rightly not protect 'bare opinions', regardless of whether there is a public interest requirement or not: there must be at least some factual basis for defamatory comment. In the scenario above, newspaper commenting adversely on Mosley's private life would be relying on the facts being generally known to the public (no injunction was granted in Mosley's case). However where the facts should have never have been revealed to the public, because doing so involved a breach of Article 8, it would appear to be arguable that the same or another media body should not be able to rely on the legal wrong of another in publishing those facts, in order to be able to use them to render their defamatory comments immune from liability.
40. The counter-argument would be that, once the facts *are* generally known, it would be futile to try to prevent others commenting on them; the analogy would be the view the courts take that, once confidential *information* has been widely published – even if wrongly - it would be pointless and therefore disproportionate to seek to enjoin further publication of those facts, since the 'ice-cube' of confidentiality has now melted and the damage to privacy done.[88] If this argument were accepted, the result would be that defamatory comment on private matters *would* be permitted in such circumstances *except* where publication of the relevant facts had been enjoined. (Where there *was* an injunction, the commentator would breach it if they published the relevant facts[89] or at least risk incurring liability in damages). But which view the courts would take on this matter would require expensive litigation to resolve.
41. Second there is the scenario in which a newspaper expresses a defamatory opinion about a person's private life *without* relying on previously stated facts; consider, for example, of a

[87] Note 78 above, EV 14. The reference is to *Mosley* [2008] EWHC 1777 (QB) [2008] EMLR 20.

[88] See e.g. *Douglas* v. *Hello! Ltd (No 3)* [2006] QB 125, at [105] – suggesting that the same principle might not apply to re-publication of widely-seen intrusive photographs.

[89] Depending upon which media bodies the injunction applied to. But see *Attorney General v. Punch* [2003] 1 AC 1046 in relation to contempt liability for frustrating the purpose of an injunction against one media body by publishing the confidential information covered by that injunction.

prominent, married QC: 'she may be a good advocate but her private life is totally immoral'. It is too hasty to say, as the Joint Committee and others above do above, that such statements could be dealt with by privacy law. The above is a defamatory *opinion*, not the disclosure of private *information.* The tort of misuse of private information is concerned with the latter,[90] and so seemingly could not capture publication of such an opinion.[91] The issue in defamation law would then turn on whether any facts were stated to support the opinion, under clause 3(3). If no factual basis was stated then the opinion would be a 'bare' one and there would be liability in defamation, regardless of whether there was a public interest requirement or not. **This shows that it is essential to retain the requirement currently in clause 3, that the commenter must indicate the factual basis for the comment.**

42. If the commenter *did* state the facts that could give rise to the opinion then we would be in a third scenario. Suppose that the facts stated to justify the "totally immoral" comment were that the QC had an 'open relationship' with her husband, whereby both parties occasionally had sex with other people, with their spouse's full knowledge and consent. If the requirement for stating the factual basis for the comment is retained, then the court would be presented with a somewhat contradictory position. As the defendant would argue, Parliament would have deliberately removed the requirement that comment must be on a matter of public interest, thus signalling that even defamatory comment on private life was permitted. To allow liability in respect of the facts stated to underpin the comment would undermine Parliament's intent. Hence no liability for such facts should arise in either defamation or privacy. The claimant would, however, argue that the publication, by revealing personal information about her sex life, should attract liability under the tort of misuse of private information. If the court followed this argument, it would then have to make the rather awkward finding that a defendant, by adducing relevant facts, and thus satisfying clause 3 in relation to defamation, had simultaneously committed a different tort – a perhaps brave finding.
43. An alternative course would be for the court to hold that, where the facts relied on to support the opinion could not be stated without violating Article 8 and incurring liability under the privacy tort, then they should be held to be legally 'inadmissible' for the purposes of supporting the honest comment defence in defamation. The argument would be that the defendant could not rely on their own legal wrong of publishing private facts in order to render protected their otherwise defamatory opinion. It would follow that, since the supporting facts could not adduced in court, the comment would be treated as a 'bare' one and thus not protected by the 'honest comment' defence; hence liability in *both* defamation and privacy would arise.
44. But a third possibility would be for a judge to conclude that the deliberate dropping of the current requirement that the opinion must be on a matter of public interest signalled Parliament's intent that there should be no question of opinion supported by some facts incurring liability on the grounds that it concerned private life. The result of this would be to allow a form of circumventing of the private facts tort through the publication of disparaging and damaging opinions on private life.

[90] See e.g. *Douglas* v. *Hello! Ltd (No 3)* [2006] QB 125, at [83].

[91] Although there could be a remedy under the Data Protection Act 1998; under the Act 'personal data' 'includes any expression of opinion about the individual' (s 1(1)).

45. It can be seen therefore that removal of the "public interest" requirement, far from rendering the law less complicated, would actually raise exceedingly complex issues concerning the relationship between privacy and defamation law. The simplest way of preventing such confusion arising would be to restore the public interest requirement into clause 3. Such a requirement is well established in the courts' case law; removing it will only cause confusion.

Treating corporate claimants identically with natural persons

46. As many commentators have noted, one of the most disappointing omissions from the Bill is any kind of restriction on the ability of corporations to sue in libel. The arguments in favour of removing or restricting this right have been set out extensively elsewhere, and there is no need to rehearse them here. While making no change here would seemingly not breach Article 10,[92] the current position fails to reflect the human rights values now underpinning defamation law: given the Article 8-focused view of defamation, it seems clear that it is incoherent to treat corporate claimants – who have neither personal integrity, feelings nor dignity – identically with natural persons.[93] It is also notable that a large majority of the notorious cases of the misuse of libel laws to attack scientists or science writers have involved corporate claimants.[94] Howarth, in an article that is largely critical of the current reform proposals, argues that: 'Removing corporate rights to sue comes closest to eliminating those cases in which purely scientific debates have become embroiled in defamation'.[95] Evan Harris similarly contends that this would 'at a stroke remove much of the chill from the worlds of investigative journalism and the citizen critic.'[96]

47. However, there are good arguments to the effect that this would be too drastic, particularly in the case of small companies, which could be ruined by a defamatory allegation, but would have little or no chance of succeeding under the tort of malicious falsehood.[97] Hence the proposal of the Joint Committee may be a good compromise here. They suggest first limiting libel claims to situations where the corporation can prove the likelihood of 'substantial financial loss' ('substantial and serious' would be preferable) and second, requiring the permission of the court for a corporate claimant to sue.[98] The latter proposal would also be a powerful bulwark against the *fear* of even unwinnable libel suits that allows corporations to 'bully' scientists and writers. An alternative approach would restrict corporations to discursive remedies, such as a retraction, unless they *can* show substantial financial harm. [99] However, this would still raise the spectre of large legal costs for defendants, continuing the current 'chilling effect'.

[92] *Jameel v Wall Street Journal* [2006] UKHL 44.
[93] See in particular, Mullis and Scott, 'Swing of the Pendulum', Howarth, n 10 above.
[94] Howarth notes that this holds for 'all except one of the cases referred to in T Brown, 'Science and Libel'(2011) 122 *The Author* 13. See also the list of cases cited by the Libel Reform Campaign in written evidence to the JC at p 73.
[95] Howarth at 875.
[96] Joint Committee, Report, EV 05, at p 73.
[97] Such instances might also raise arguments under Article 1 of Protocol 1 to the ECHR, concerning the protection of property rights.
[98] Report at para 116.
[99] See Mullis and Scott, 'Reframing Libel: taking (all) rights seriously and where it leads.' (2012) 63(1) NILQ, 21.