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House of Commons

Joint Committee on the Draft
Defamation Bill

Draft Defamation Bill

Session 2010–12

Report, together with formal minutes

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The Joint Committee on the Draft Defamation Bill

The Joint Committee on the Draft Defamation Bill was appointed by the House of Commons and the House of Lords on 31 March 2011 to examine the Draft Defamation Bill and report to both Houses by 31 October 2011. It has now completed its work.

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The Report and evidence of the Joint Committee is published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/>

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Summary

The Government's draft Bill proposes worthwhile reforms of defamation law, notably in effectively removing trial by jury, with its associated high costs, and in providing better protection for publishers by introducing the new single publication rule. Yet the changes to the defences available against libel claims, while welcome, do not always achieve the clarification sought. For a Bill that is overdue, the Government's current draft may be thought modest. It does not, in some important respects, strike a fair balance between the protection of reputation and freedom of speech. More fundamentally, we have determined that it is procedural change that, while understandably omitted from the draft Bill, is essential to addressing the key problem in defamation law—the unacceptably high costs of litigation. There is also the challenge of enforcing defamation law in the global, online environment. The Government's reforms to defamation law and practice should form part of a strategic approach to the wider reform of civil litigation that embraces procedural change, the operation of the related law on privacy and the relationship between Parliament and the courts.

In our consideration of the Government's draft Bill and the wider issues on which the Government invites comment we have established four core principles, as follows.

- Freedom of expression/protection of reputation: some aspects of current law and procedure should provide greater protection to freedom of expression. This is a key foundation of any free society. Reputation is established over years and the law needs to provide due protection against unwarranted serious damage;
- Reducing costs: the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen. Early resolution of disputes is not only key to achieving this, but is desirable in its own right—in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort;
- Accessibility: defamation law must be made easier for the ordinary citizen to understand and afford, whether they are defending their reputation or their right to free speech; and
- Cultural change: defamation law must adapt to modern communication culture, which can be instant, global, anonymous, very damaging and potentially outside the reach of the courts.

These principles have guided us in developing our recommendations and are clearly evident throughout our Report. In support of the better protection of freedom of speech, we propose measures to prevent corporations from using their financial muscle to silence critics by the threat of legal action, unless the court accepts at the outset that there may be a likelihood of the corporation suffering substantial financial loss. We also recommend a higher threshold of seriousness in order for libel claims to progress; improved protection for scientific debate; some additional protection for publishers, particularly secondary

publishers, including those online; and a new?/specific? statutory protection of communication between constituents and their MP. We have also sought to provide balancing protection of reputation, for example in giving the courts a new power to order the publication of their judgments when necessary.

We have pursued our key aim of reducing the costs of defamation action by recommending a new approach which should encourage cheaper, more efficient alternative methods of dispute resolution, such as mediation and arbitration, and more effective management of those few cases that do reach court.

Our core principle of improving the accessibility of the law to the ordinary citizen has been promoted by our preference for putting aspects of the common law into statute and the introduction of easily-understood and relatively inexpensive new procedures, particularly in the online environment.

Modern means of communication represent perhaps the biggest challenge facing the operation of the law on defamation. The practical realities of policing a global conversation, straddling different legal jurisdictions, require us to adopt imaginative means of mitigating the serious damage to reputation that can be wrought at the click of a button. We propose a clear and simple regime governing the responsibilities of internet service providers and the means of redress available to those who believe their reputation has been damaged unlawfully online. This regime covers the publication of material on the full range of electronic platforms that currently exist and will no doubt develop further. As part of this approach we seek to promote a cultural change in order to limit the credibility of, and therefore damage that can be caused by, material that is published anonymously.

Some of the proposals we have brought forward will require further detailed work, but we believe they can be developed to secure lasting improvements to the operation of the law on defamation and its availability to the ordinary citizen. We look forward to the Government taking them forward speedily in a revised Bill and associated procedural reforms.

Conclusions and recommendations

Introduction

Themes emerging from the evidence

In summary, the operation of the civil law, including defamation claims, has been much reviewed in recent years, often at the Government's instigation, leading to some concern that there has been review at the expense of action. The publication of the draft Bill represents a welcome indication that long overdue legislation is finally to be delivered. We hope that this intention is realised. (Paragraph 6)

We note that the Government's response to the recent very public clash between a privacy injunction and parliamentary privilege was to establish a committee to consider these issues. This does not absolve the Government of its responsibility to develop a coherent and principled vision for what should be the interaction of the rights of privacy, reputation and freedom of expression rather than finding itself buffeted by successive tabloid or online revelations and controversial court decisions. (Paragraph 13)

Core principles

Freedom of expression/protection of reputation: some aspects of current law and procedure should provide greater protection to freedom of expression. This is a key foundation of any free society. Reputation is established over years and the law needs to provide due protection against unwarranted serious damage;

Reducing costs: the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen. Early resolution of disputes is not only key to achieving this, but is desirable in its own right—in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort;

Accessibility: defamation law must be made easier for the ordinary citizen to understand and afford, whether they are defending their reputation or their right to free speech; and

Cultural change: defamation law must adapt to modern communication culture, which can be instant, global, anonymous, very damaging and potentially outside the reach of the courts.

Parliament and freedom of expression

We recommend that the Government has particular regard to the importance of freedom of expression when bringing forward this Bill and developing proposals in its broader consideration of the law relating to privacy. (Paragraph 18)

Substance of the draft Bill

Improving clarity of the law

The Government should monitor whether, in due course, the codification carried out by the Bill is achieving its goal of improving accessibility and clarity of the law. (Paragraph 20)

It is essential that the Government makes clear, in a way that the courts can take into account, during the passage of the Bill if not before, when it is seeking to make changes of substance to the law and when it is simply codifying the existing common law. We have sought to make this distinction clear in the specific changes to the draft Bill that we propose. In future, we recommend that the Government always makes clear at the date of publication whether the clauses of a draft Bill are intended merely to codify the existing law, or to codify with elements of reform. There should be no ambiguity over this important issue. (Paragraph 21)

Trial by jury

We conclude that the presumption in favour of jury trials works against our core principles of reducing costs by promoting early resolution and, to a lesser degree, of improving clarity. We support the draft Bill's reversal of this presumption, so that the vast majority of cases will be heard by a judge. (Paragraph 24)

We believe that the circumstances in which a judge may order a trial by jury should be set out in the Bill, with judicial discretion to be applied on a case-by-case basis. These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake. (Paragraph 25)

Improving protection of freedom of speech

We recommend replacing the draft Bill's test of "substantial harm" to reputation with a stricter test, which would have the effect of requiring "serious and substantial harm" to be established. (Paragraph 28)

The threshold test should be decided as part of the proposed early resolution procedure and any claim that fails to meet this test should be struck out. (Paragraph 29)

Responsible journalism in the public interest

When deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication. (Paragraph 35)

The judge who upholds a public interest defence should make it clear when the truth of the allegation is not also proven. It may be appropriate, depending on the facts of the case, for the judge to order a summary of his or her judgment to be published, to make this clear. This would help to protect the reputation of the claimant, but without the practical and legal complications associated with declarations of falsity. The Ministry of Justice should

work with the Lord Chief Justice and senior members of the judiciary to implement this reform. (Paragraph 36)

On balance, we support the broad approach that is taken by the Government to the public interest defence, although in some detailed respects we prefer the approach of Lord Lester's Bill. (Paragraph 37)

Protecting the truth

We recommend that the name of the "truth" defence be changed to "substantial truth". [...] We recommend that the Government includes Lord Lester's provision as to what is required to prove the truth of a single allegation. (Paragraph 38)

We recommend that a court presiding over a defamation case should be given the power to order the defendant to publish, with proportionate prominence, a reasonable summary of its judgment. (Paragraph 40)

Freedom to express opinions

We support the Government's proposal to place the defence of honest opinion on a statutory footing as part of the draft Bill. We are not, however, persuaded that the draft Bill makes the law clearer, simpler or fairer to the ordinary person than it is at present. As a result, we recommend a series of amendments to the draft Bill. (Paragraph 43)

Absolute and quantified privilege

Academic and scientific debate

We recommend that a provision is added to the draft Bill extending qualified privilege to peer-reviewed articles in scientific or academic journals. (Paragraph 48)

We recommend that the Government prepares guidance on the scope of this new type of statutory qualified privilege in consultation with the judiciary and other interested parties. (Paragraph 49)

Protecting the democratic process

We recommend adding a provision to the Bill which provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate. (Paragraph 51)

We recommend that the Government adds a provision in the Bill protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege. (Paragraph 52)

Libel tourism

We believe that the extent of libel tourism has been exaggerated in some quarters but, in line with our core principle of protecting freedom of speech, we believe that the courts would benefit from more robust powers to prevent unwarranted legal action in this

country. This would also help reduce any international chilling effect. Foreign parties should not be allowed use of the courts in this country to settle disputes where the real damage is sustained elsewhere or where another jurisdiction is more appropriate. We therefore support the thrust of the Government's proposals but require some modifications, particularly to clarify that residents of England and Wales are not prevented from taking action here against an overseas defendant for damage caused abroad where the current law permits it. [...] We recommend that the Government should provide additional guidance on how the courts should interpret the provisions relating to libel tourism. We also believe that in such cases the courts should have regard to the damage caused elsewhere in comparison to the damage caused here. (Paragraph 56)

Further protection for publishers

Single publication rule

In our view the single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year. Further, the Government must clarify that merely transferring a paper-based publication onto the internet, or vice versa, does not in itself amount to republishing in a "materially different" manner, unless the extent of its coverage in the new format is very different. (Paragraph 59)

Innocent dissemination

We recommend that the Government amends the "innocent dissemination" defence in order to provide secondary publishers, such as booksellers, with the same level of protection that existed before section 1 of the Defamation Act 1996 was introduced. (Paragraph 60)

Recommended changes to the draft Bill

Clause 1: Substantial harm

We recommend replacing the draft Bill's test of "substantial harm" to reputation with a stricter test, which would have the effect of requiring "serious and substantial harm" to be established. (Paragraph 62)

Clause 2: Responsible publication on matter of public interest

The Reynolds defence of responsible journalism in the public interest should be replaced with a new statutory defence that makes the law clearer, more accessible and better able to protect the free speech of publishers. The Bill must make it clear that the existing common law defence will be repealed. (Paragraph 63)

Overall, we support the approach that is taken in clause 2 of the Bill. In particular, we agree that the term "public interest" should not be defined. [...] The list of factors that is used to determine whether a publisher has acted responsibly should be amended as follows:

- a) A new factor should be added that refers to the "resources" of the publisher;

- b) A reference to “the statement in context” should be added to clause 2(1)(c);
- c) The term “urgency” should be removed from clause 2(1)(g) and replaced with a more general test of whether “it was in the public interest for the statement to be published at the time of publication”;
- d) The reference to whether the publication draws “appropriate distinctions between suspicions, opinions, allegations and proven facts” at clause 2(1)(h) should be removed; and
- e) When deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication. (Paragraphs 64 and 65)

We recommend that the “reportage” defence at clause 2(3) is reformulated as a new matter to which the court may have regard under clause 2(2) namely “whether it was in the public interest to publish the statement as part of an accurate and impartial account of a dispute between the claimant and another person.” (Paragraph 66)

Clause 3: Truth

We recommend that the name of the “truth” defence be changed to “substantial truth” which better describes the nature of the test that is applied. We also recommend that the Government includes a provision, in line with Lord Lester’s approach, to make clear that a defamation claim should fail if what remains unproved in relation to a single allegation does not materially injure the claimant’s reputation with regard to what is proved. This should assist in providing clarity. (Paragraph 67)

The Bill should be amended, if necessary by a new clause, to provide the judge deciding a defamation case at final trial with the power to order the defendant to publish, with proportionate prominence, a reasonable summary of the court’s judgment. In cases where media and newspaper editors are responsible for implementing such orders they should ensure that the summary is given proportionate prominence. (Paragraph 68)

Clause 4: Honest Opinion

We support the Government’s proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments:

- a) The term “public interest” should be dropped from the defence as an unnecessary complication;
- b) The Bill should not protect “bare opinions”. It should be amended to require the subject area of the facts on which the opinion is based to be sufficiently indicated either in the statement or by context;
- c) Neither the Government’s draft Bill nor Lord Lester’s Bill imposes any requirement that the commentator need know the facts relied on to support the opinion. In line with our concern to improve clarity, we welcome this change, which removes an undesirable layer of complexity;

- d) The Bill should require the court, when deciding whether an honest person could have held the relevant opinion, to take into account any facts that existed at the time of publication which so undermine the facts relied on that they are no longer capable of supporting the opinion;
- e) The Bill should require the statement to be recognisable as an opinion, in line with Lord Lester’s Bill; and
- f) The vague reference to “privilege” must be clarified to make it clear that this term is confined to the absolute or qualified privilege which presently attaches at common law or by statute to the fair and accurate reporting of various types of public proceedings or notices. (Paragraph 69)

Clause 5: Privilege

Qualified privilege should be extended to fair and accurate reports of academic and scientific conferences and also to peer-reviewed articles appearing in journals. (Paragraph 70)

Clause 6: Single publication rule

The single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year. It should be clarified that the simple act of making a paper-based publication available on the internet, or vice versa, does not in itself amount to republishing in a “materially different” manner. (Paragraph 71)

Clause 7: Action against a person not domiciled in the UK or a Member State etc

The Bill should make clear that residents in England and Wales may sue in this jurisdiction in respect of publication abroad provided there has been serious and substantial harm suffered by them. In particular, this section should not be applicable to residents of England and Wales who wish to sue in respect of publication abroad where there is permission under the current law. The clause should be confined to foreign parties using English courts to resolve disputes where the principal damage has not been suffered here. In line with the Lord Lester Bill, the courts should be required, when determining this issue, to assess the harm caused in this country against that caused in other jurisdictions. (Paragraph 72)

Clause 8: Trial to be without a jury unless the court orders otherwise

There should be added provisions setting out the circumstances in which a trial by jury may be ordered. These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake. (Paragraph 73)

Consultation issues

Early resolution and cost control

The Government's proposal

We agree with the Government's intention of promoting early resolution by allowing the judge to determine key issues in question at an initial hearing—within a few weeks, certainly not months—and believe that this will go a significant way towards improving the chances of early resolution. (Paragraph 77)

The changes to procedures proposed by the Government are largely a tightening up of existing mechanisms: they cannot be seen as radical and do not go far enough towards reducing costs to the extent that legal action will be realistically accessible to the ordinary citizen. (Paragraph 78)

A new approach

We propose an approach which is based upon strict enforcement of the Pre-Action Protocol governing defamation proceedings, and has three elements: a presumption that mediation or neutral evaluation will be the norm; voluntary arbitration; and, if the claim has not been settled, court determination of key issues using improved procedures. (Paragraph 79)

Initial stages of action: mediation or evaluation

We believe that ordinarily the first step following the initial exchange of letters under the Pre-Action Protocol should (in the absence of an offer of amends) be mediation or assessment by a suitably qualified third party, known as “early neutral evaluation”.[...] The mediation process must be swift, inexpensive and resistant to delaying tactics. To counter this latter possibility, any failure to engage constructively with the process should be punished if and when it comes to the awarding of costs. If there has been no mediation or neutral evaluation, the judge should have power to order it at the first hearing in the case. (Paragraph 82)

Arbitration

We encourage the Government to explore further the development of a voluntary, media-orientated forum for dispute resolution in the context of the current review of the regulatory regime governing the media. (Paragraph 84)

Arbitration represents a cost-effective alternative to the courts, and helps to reduce the impact of any financial inequality between the parties. The financial and other incentives to use arbitration must be strengthened as far as possible. (Paragraph 85)

Proceedings reaching court

To bring costs down further, more radical changes to the way in which our courts operate—not just in defamation cases—would need to be contemplated. Some suggestions include the application of maximum hourly rates, mandatory capping of recoverable costs,

paper hearings with limits on written submissions and changes to the Conditional Fee Agreement regime. Such issues extend well beyond our brief. Nevertheless, we recommend that the Government gives serious consideration to these and other measures, which are essential if court costs are to be attacked in a more radical and effective way. In the meantime, we believe that more aggressive case management can help to minimise costs, if it is applied fairly and consistently. We recommend that the Ministry of Justice and the judiciary take measures to ensure that judges personally and consistently manage defamation cases in a robust manner that minimises delays and costs incurred by both parties. (Paragraph 86)

Reform of civil litigation costs and access to justice

It is outside our remit to explore the impact of the Government's separate proposals on civil litigation costs reform in detail. Nonetheless we are sufficiently concerned about them to ask the Government to reconsider the implementation of the Jackson Report in respect of defamation actions, with a view to protecting further the interests of those without substantial financial means. (Paragraph 89)

Conclusions on Procedural reform

We recommend that the Ministry of Justice prepares a document setting out in detail the nature of the rule changes required to ensure that the Civil Procedure Rule Committee will implement the procedural changes we recommend in this section of our Report. This document should be published at the same time as the Bill. (Paragraph 91)

Publication on the internet

Introduction

We acknowledge the challenges that any national legislature faces when acting alone in relation to a global issue but do not regard these as an excuse for inaction. ...Specifically, we propose:

- a) A new notice and take-down procedure to cover defamation in the online environment; and
- b) Measures to encourage a change in culture in the way we view anonymous material that is user-generated, including via social media. (Paragraph 93)

Social networking, online hosts and service providers

We recommend that the Government takes action by:

- Ensuring that people who are defamed online, whether or not they know the identity of the author, have a quick and inexpensive way to protect their reputation, in line with our core principles of reducing costs and improving accessibility;

- Reducing the pressure on hosts and service providers to take down material whenever it is challenged as being defamatory, in line with our core principle of protecting freedom of speech; and
- Encouraging site owners to moderate content that is written by its users, in line with our core principle that freedom of speech should be exercised with due regard to the protection of reputation. (Paragraph 100)

Contributions published on the internet can be divided into those that are identifiable, in terms of authorship, and those that are unidentifiable, as described above. In respect of identified contributions, we recommend the introduction of a regime based upon the following key provisions:

- a) Where a complaint is received about allegedly defamatory material that is written by an identifiable author, the host or service provider must publish promptly a notice of complaint alongside that material. If the host or provider does not do so, it can only rely on the standard defences available to a primary publisher, if sued for defamation. The notice reduces the sting of the alleged libel but protects free speech by not requiring the host or service provider to remove what has been said; and
- b) If the complainant wishes, the complainant may apply to a court for a take-down order. The host or service provider should inform the author about the application and both sides should be able to submit brief paper-based submissions. A judge will then read the submissions and make a decision promptly. Any order for take-down must then be implemented by the host or service provider immediately, or they risk facing a defamation claim as the publisher of the relevant statement. The timescale would be short and the costs for the complainant would be modest. (Paragraph 104)

We recommend that any material written by an unidentifiable person should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves, in which case a notice of complaint should be attached. If the internet service provider believes that there are significant reasons of public interest that justify publishing the unidentifiable material—for example, if a whistle-blower is the source—it should have the right to apply to a judge for an exemption from the take-down procedure and secure a “leave-up” order. We do not believe that the host or service provider should be liable for anonymous material provided it has complied with the above requirements. (Paragraph 105)

The Government needs to frame a coherent response to the challenge of enforcing the law in an online environment where it is likely to remain possible to publish unidentifiable postings without leaving a trace. As part of doing so, the Ministry of Justice should publish easily accessible guidance dealing with complaints about online material. We recommend that the Government takes the necessary steps to implement the approach we outline. (Paragraph 107)

Corporations

It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss. However, we do not believe that corporations should lose the right to sue for defamation altogether.[...] We favour the approach which limits libel claims to situations where the corporation can prove the likelihood of “substantial financial loss”. (Paragraph 114)

We make the following additional observations:

- The test of “substantial financial loss” should focus on whether there has been, or is likely to be, a substantial loss of custom directly caused by defamatory statements;
- In our view, neither mere injury to goodwill nor any expense incurred in mitigation of damage to reputation should enable a corporation to bring a libel claim;
- A corporation should not be entitled to rely on a fall in its share price to justify bringing a libel claim; and
- Where a trading corporation can prove a general downturn in business as a consequence of a libel, even if it cannot prove the loss of specific customers or contracts, this will suffice as a form of actual loss (albeit unquantified). (Paragraph 115)

Corporations should be required to obtain the permission of the court before bringing a libel claim. (Paragraph 116)

The Ministry of Justice and the courts must be determined and creative in preventing corporations from using the high cost of libel claims to force publishers into submission. The requirement for a corporation to obtain prior permission before bringing a libel claim provides the perfect opportunity to control the corporation’s recoverable legal costs before they get out of hand, whether through cost capping or otherwise. Judges must redouble efforts to make the most of their case management powers by reducing the inequality of wealth that can exist between corporations and publishers. (Paragraph 117)

Our proposal to introduce a test of “substantial financial loss” applies only to corporations or other non-natural legal persons that are trading for profit; it does not extend to charities or non-governmental organisations. [...] Trade associations that represent for-profit organisations should be covered by the new requirements that we propose. (Paragraph 118)

1 Introduction

Policy Background

The law governing defamation

1. The law governing defamation is crucial to the proper functioning of any democratic society. It represents the dividing line between two established and powerful rights: freedom of expression on the one side; the right to reputation on the other.¹ Any slight shift in the balance between these two competing rights and the procedures governing our legal system can have far-reaching consequences for the way in which we conduct public debate.

2. In essence, the law exists to provide a means of redress for someone whose reputation has suffered unjustifiable harm by the publication of defamatory information. There is no statutory definition of what is ‘defamatory’, nor is one provided by the draft Defamation Bill that this Committee has been established to consider. The courts generally treat a statement as defamatory when it “lowers a person in the estimation of right-thinking members of society generally”.² There are two types of defamation: libel, when the defamatory statement is in writing;³ and slander, when it is spoken.⁴ Both individuals and organisations (with some exceptions) can begin defamation proceedings. Someone accused of defaming another person has a variety of defences available, a number of which are discussed in this Report.

3. Defamation is substantially governed by the common law. Statutory intervention has been rare: the last Act exclusively concerned with defamation was passed in 1996. This followed a review of some aspects of defamation law by the Committee chaired by Sir Brian Neill and updated a previous statute dating from 1952. There was a comprehensive review of defamation law in 1975 by the Committee chaired by Mr Justice Faulks. Its report covered many of the issues in the Government’s current consultation but none of the recommendations were implemented by the Government of the day.

Origins of the current draft bill

4. Recent years have seen increasing levels of concern expressed about the law relating to defamation, both outside and inside Parliament. A wide range of interest groups, including publishers, journalists and scientists, have joined forces in the Libel Reform Campaign to lobby for reform. Debate has also expanded in legal and academic circles, prompting a number of Government reviews. The Ministry of Justice (MoJ) conducted a consultation on reducing costs in defamation proceedings in 2009, which led to some limited changes and the establishment of pilot schemes on reducing costs.⁵ It also conducted a separate

1 The right to freedom of expression has for many years been recognised under the common law and is now protected by Article 10 of the European Convention on Human Rights; the right to reputation is recognised as being encompassed within the right to a private and family life under Article 8 of the Convention.

2 See, for example, *Skuse v Granada Television Ltd* [1996] EMLR 278, per Sir Thomas Bingham MR at 286.

3 Or is so treated by statute: e.g. statements on radio or television.

4 A libel (or a slander) is an unlawful defamatory statement. Many defamatory statements are lawful because they are protected by the available defences.

5 Ministry of Justice, *Controlling Costs in Defamation Proceedings*, CP4/09, February 2009.

consultation on the single publication rule. The Master of the Rolls established a review of civil litigation costs in 2009 (the Jackson Review), the conclusions of which were then subject to Government consultation. The MoJ set up a Libel Working Group in March 2010 to explore specific issues such as libel tourism and a public interest defence. Most of the proposals of the Jackson Review were accepted by the Government and are awaiting implementation.⁶ The Libel Working Group did not always find a consensual view but its work served to inform the Government's thinking on the draft Bill.

5. Inside Parliament, the Culture, Media and Sport Select Committee identified in March 2010 a number of problems with the operation of existing defamation law in the context of a wider look at press standards.⁷ At the 2010 general election all three major political parties expressed support for reforming libel laws. The Coalition Agreement undertook a review of these laws to “protect freedom of speech”.⁸ Perhaps the most significant driver of reform was the Defamation Bill introduced by Lord Lester of Herne Hill in May 2010. He neatly summed up the main criticisms of the current law as follows:

Our law suffers from the twin vices of uncertainty and overbreadth. The litigation that it engenders is costly and often protracted. It has a severe chilling effect on the freedom of expression not only of powerful newspapers and broadcasters, but also of regional newspapers, NGOs and citizen critics, as well as of scientific discourse. That chilling effect leads to self censorship. It impairs the communication of public information about matters of legitimate public interest and concern.⁹

Lord Lester is a distinguished human rights lawyer who has been active in the field of libel law for many years. His Bill forms the basis of much of the Government's own draft Bill, although the two Bills adopt different approaches on some issues, such as the treatment of corporations. The evidence we have received from Lord Lester has greatly informed our own consideration of the draft Bill and we are extremely grateful for his thoughtful contributions to our work.

The draft Bill

6. The Government's draft Bill was published in a consultation document on 15 March 2011. It is a response to the reviews referred to above and an attempt to achieve the right balance between freedom of speech and the protection of reputation.¹⁰ As well as inviting comment on the relatively short draft Bill, the consultation document also raises a number of other issues which may be covered in the final Bill presented to Parliament. These include proposed procedural reforms aimed at reducing the length and cost of libel actions; questions relating to the ability of organisations to sue for libel; and the application of the law in the modern online environment. **In summary, the operation of the civil law, including defamation claims, has been much reviewed in recent years, often at the Government's instigation, leading to some concern that there has been review at the expense of action. The publication of the draft Bill represents a welcome indication that**

6 See paras 88–89 for a discussion on the impact of these proposals on defamation law.

7 Culture, Media and Sport Committee, Second Report of Session 2009–10, *Press Standards, Privacy and Libel*, HC 364-I.

8 *The Coalition: our programme for government*, May 2010, p 11.

9 Lord Lester of Herne Hill, “These disgraceful libel laws must be torn up”, *The Times*, 15 March 2011.

10 Ministry of Justice, *Draft Defamation Bill Consultation*, Cm 8020, March 2011, Ministerial Foreword, p 3.

long overdue legislation is finally to be delivered. We hope that this intention is realised.

Our approach to the draft Bill

7. We wanted to consider the additional issues raised in the consultation as well as the draft Bill itself. In view of their complexity, we sought and obtained from Parliament an extension to our original timetable in order to do so.¹¹ We listened to views from a wide range of interested parties. In response to our call for evidence, we received 66 written submissions; we also had access to the submissions made to the Government's own consultation exercise. Over a number of weeks we took evidence from many witnesses, including newspaper journalists and editors; writers and publishers; libel lawyers; academics and interest groups; current and former Government law officers; Lord Lester of Herne Hill; the Lord Chancellor, the Rt Hon Kenneth Clarke, and the Minister with responsibility for the Bill, the Rt Hon Lord McNally; the Master of the Rolls, Lord Neuberger and the Judge in charge of the jury and non-jury lists, Mr Justice Tugendhat.¹² We are extremely grateful to all those who took the time to give evidence to us, which we have considered very carefully. In the interests of producing a succinct and easily-read report, we have not sought to quote and dissect the evidence in great detail, but instead refer the reader to the submissions themselves, which are published separately, to see the relevant arguments in full.¹³ We would also wish to place on record our thanks to the staff from both Houses who have served this Committee, Chris Shaw, Kate Meanwell, Simon Fuller and Rob Dinsdale; and also our appointed specialist adviser, Mr Andrew Caldecott QC, for the support they provided to our consideration of the draft Bill.

Themes emerging from the evidence

8. A huge range of opinions and suggestions for reform were made to us in the course of our work, from which a number of ideas and concerns recurred consistently. Many of these ideas overlapped and complemented each other; sometimes they pulled in opposite directions. Perhaps the broadest consensus formed around the need to reduce the cost of libel litigation.

9. The cost of civil litigation generally tends to be high, but libel proceedings are particularly expensive. One study has shown that the cost of action in England is 140 times that of the average in other European countries.¹⁴ The complexity of the law and lack of clarity over its interpretation in the courts were identified as strong contributory factors to the high costs. Much time and money can be devoted to complex legal arguments over the meaning of words and the available defences. We heard that there is too much scope for the use of delaying tactics and that the procedures for speedy resolution are not strong enough.

11 The Joint Committee was established on 31 March 2011 and asked to report by 19 July. Both Houses subsequently agreed an extension until 31 October.

12 A full list of witnesses is included at p74; a list of written submissions is published in Appendix 2.

13 HC 930, Volumes II and III available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/>

14 *A Comparative Study of Costs in Defamation Proceedings Across Europe* by Programme in Comparative Media Law and Policy Centre for Socio-Legal Studies University of Oxford, December 2008, p 3. Available at <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>

10. It became apparent from the evidence we received that the key to reducing costs lies not only in reform of the law but, more significantly, in changes to the way it operates in practice.¹⁵ New mechanisms and streamlined procedures are required to enable parties to settle disputes more quickly and therefore cheaply. Without procedural reforms, any changes made by the Bill will have little impact on the problems that have been identified with defamation law. There was widespread agreement too that a rapid public correction, explanation or apology is often the remedy most valued by the claimant, and generally preferable to a lengthy legal case and consequent financial compensation, which too frequently would not meet the total costs of legal action. There was general support for the promotion of quick and proper apologies. It was also emphasised that nothing should threaten the right, guaranteed under the European Convention of Human Rights (ECHR), for seriously defamed individuals to seek redress from the courts if they choose.¹⁶

11. We received strong evidence that the combination of the high costs of legal action and uncertainty over the outcome of libel claims had led to a degree of defensive self-censorship, particularly by journalists, authors and scientists. The fact that some witnesses were only prepared to tell us their experiences on a confidential basis illustrates the extent to which people can feel intimidated. Furthermore, it was argued that the way in which the libel laws are used by some, particularly wealthy individuals and well-resourced businesses, serves to inhibit legitimate comment and, more fundamentally, undermines the right to freedom of speech.¹⁷ We were persuaded that this financial inequality has allowed the wealthy to use bullying tactics in threatening costly legal action in disproportionate responses to innocuous or legitimate criticism. These are the components of the ‘chilling effect’, which our defamation laws sustain.

12. Witnesses argued that the public interest is not being well served if legitimate material is being withheld from publication for fear of legal action and its attendant costs. The public interest is itself a key theme in the evidence we received. Defamation laws should encourage responsible journalism in the public interest and should equally encourage publishers to pre-notify those they intend to criticise, but this raises key questions around the definition of responsible journalism: how far should journalists be required to go to establish what is printed is true, and what are the remedies if it is not? For many, the overriding public interest lies in establishing the truth, or at least in the wide dissemination of accurate information on issues of public interest. This requires adequate protection to allow uninhibited participation in scientific and other debate. Others argued that regard for the truth also requires strong and effective remedies to deter libellous statements, in recognition of the immense difficulty—perhaps impossibility—of restoring reputation, once damaged.

13. Another major theme running through the evidence is the importance of the law being accessible to the ordinary person in respect of exercising the right to free speech and protecting their reputation. The potentially huge costs of libel claims make it difficult for people of ordinary means to protect their reputations or to defend themselves against defamation claims.¹⁸ Recent high profile cases concerning privacy injunctions seem to

15 See, for example, Professor Mullis and Dr Scott, Vol II, p120, para 2.

16 This right is guaranteed by Article 6 of the European Convention on Human Rights.

17 See, for example, Libel Reform Campaign, Vol II, p55–56; English PEN, Vol II, p89–93; Mumsnet, Vol II, p258 and 259.

18 See, for example, the evidence submitted by Dr Wilmshurst, Vol III, p22–26, paras 5(h) and 22.

suggest that the assertion of a right to privacy has become the preserve of the wealthy alone. The right to reputation is apparently heading in the same direction. Indeed, the overlap between privacy and defamation was highlighted by many witnesses, with the former often taking over from the latter as the preferred means of legal action, notably for celebrities. This is in spite of the clear distinction between an infringement of privacy—revealing a truth which the claimant wishes to keep private—and defamation—telling an untruth about the claimant that damages his or her reputation. Public concern about press responsibility and standards has been increased by ongoing revelations about the unacceptable conduct of certain journalists and the quality of the Press Complaints Commission’s performance. **We note that the Government’s response to the recent very public clash between a privacy injunction and parliamentary privilege was to establish a committee to consider these issues.¹⁹ This does not absolve the Government of its responsibility to develop a coherent and principled vision for what should be the interaction of the rights of privacy, reputation and freedom of expression rather than finding itself buffeted by successive tabloid or online revelations and controversial court decisions.**

14. To help combat the chilling effect, and improve accessibility, there were loud calls for greater clarity in the law itself, and greater certainty in the way the courts apply it. Yet there is another side to the accessibility concern. Some argued that our libel laws make our courts *too* accessible for libel claims. It was suggested that wealthy or high spending foreign litigants had exploited our libel laws to pursue cases with little relevance to this country. There were also concerns that the law allows too many trivial cases to go to court. The difference between the serious and the trivial is a vital one in the context of defamation and is at the heart of our attempts to reduce costs by improved procedures, which we explore in Chapter 3.

15. The need for the law to keep pace with developments in society was a further thread running through the evidence we received. Many questioned the suitability of a law designed for the written and spoken word in an age of a rapidly changing communication culture. The internet has enabled all of us to have instant access to an international audience from a country of our choosing. Social networking sites have permitted instant global communication on matters of everyday conversation. In their judgments, judges have considered whether some such online communication should be regarded more like conversation than the written word, in accordance with which it would be treated as slander rather than libel.²⁰ In some respects the online environment makes defamation more damaging: whereas newspapers are quickly thrown away, online archives will ensure that defamatory material will instantly be flagged up on an internet search. Not only does this last until taken down, it can be easily and instantly spread around the world. One well-publicised accusation, even if subsequently found to be untrue, can destroy a reputation.

19 A Joint Committee on Privacy and Injunctions was established in July 2011 shortly after John Hemming MP used parliamentary privilege to protect against his apparent breach of a court order requiring anonymity. The Committee is to look at privacy, freedom of expression and the public interest, as well as anonymity injunctions and aspects of media regulation. It is to report by 29 February 2012.

20 *Smith v ADVFN plc* [2008] EWHC 1797 (QB); [2008] All ER (D) 335 (Jul), per Eady J.

Core principles

16. In broad terms, we welcome the intentions behind the draft Bill, but we believe it needs improvement in many areas and that the Bill presented to Parliament will need to address the wider concerns that we identify, some of which are raised in the consultation document. In considering the draft Bill, we have faced the challenge of reconciling the sometimes contradictory strands of argument outlined above. To provide a coherent approach for our examination of both the draft Bill and the issues raised in the consultation document, we have settled upon four key principles, which we believe will best meet the interests of the public. When confronted by the many different options presented by the provisions of the draft Bill and the evidence relating to them, we have wherever possible been guided by one or more of the following four principles in making our recommendations.

- **Freedom of expression/protection of reputation: some aspects of current law and procedure should provide greater protection to freedom of expression. This is a key foundation of any free society. Reputation is established over years and the law needs to provide due protection against unwarranted serious damage;**
- **Reducing costs: the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen. Early resolution of disputes is not only key to achieving this, but is desirable in its own right—in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort;**
- **Accessibility: defamation law must be made easier for the ordinary citizen to understand and afford, whether they are defending their reputation or their right to free speech; and**
- **Cultural change: defamation law must adapt to modern communication culture, which can be instant, global, anonymous, very damaging and potentially outside the reach of the courts.**

17. We have explored the main issues presented by the draft provisions and reached conclusions which are, to the greatest extent possible, in line with our core principles. But we have not restricted ourselves to the draft Bill before us. Where necessary, we have focussed on the consultation issues to develop new proposals which we believe are in line with the Government's objectives. Following our principle of accessibility, we have tried to make this Report easily understandable to the layman; the detailed impact of our recommendations on the draft Bill's provisions we have collated in a separate section at the end of Chapter 2. **It is for the Government to revise the draft Bill and we urge it to present a revised version before Parliament without delay.**

Parliament and freedom of expression

18. In considering the balance between the rights to freedom of expression and reputation, we recall that when Parliament considered this balance in the context of the courts granting injunctions against publication, it amended the Human Rights Act 1998 to

require the courts to “have particular regard to the importance of the Convention right to freedom of expression”.²¹ We share the view that this provision has not had the effect in practice that many in Parliament envisaged. The rulings of the European Court of Human Rights have established that reputation is protected under the Article 8 right to a private life, and that this right should be given equal weight to the Article 10 right to freedom of expression when evaluating conflicts between the two rights. We accept that judges here must act compatibly with the European Convention on Human Rights and take into account rulings from Strasbourg. However, we also note that it is the application of defamation law in this country that appears to international publishers the most likely threat to their freedom of expression.²² We would like to see the expressed will of Parliament on freedom of expression upheld, to the full extent that this is possible, in cases where the competing rights are finely balanced.²³ This matter will no doubt be given further consideration by the Joint Committee on Privacy and Injunctions that was established in July 2011 to examine, among other issues, the balance between privacy and freedom of expression. **We recommend that the Government has particular regard to the importance of freedom of expression when bringing forward this Bill and developing proposals in its broader consideration of the law relating to privacy.**

21 Human Rights Act 1998, section 12 (4).

22 See Global Witness, Vol II, p254 and Q 390 [Harris]

23 Lord Nicholls, in the Court of Appeal judgment on the Reynolds case [1998] 3 W.L.R. 862, said: “Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression.[...] The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.”

2 Substance of the draft Bill

Improving clarity of the law

19. One of our core principles revolves around making it easier for the ordinary citizen to understand and use defamation law. The current law has developed through many judicial decisions of the courts over the years, which are scarcely accessible to the lay person. Not only is the law complex, it lacks clarity in some areas. As a consequence, the high degree of uncertainty in the outcome of libel claims undoubtedly serves to increase the risks and costs of proceedings, further contributing to the chilling effect. In the evidence we received there was consensus on the need for greater clarity in the law. However, there were strong differences of opinion on the benefits of seeking to enshrine existing common law in statute, often referred to as “codification”, as well as disagreement on what reforms are required and the extent to which existing principles can be refined using this approach.

20. We heard strong representations from some quarters that any change in the law would inevitably lead to more litigation and less, rather than more, certainty as the new laws are tested in their application in the courts. This argument can be advanced against all new legislation. In our view, any period of uncertainty as the new law takes effect does not outweigh the potential long term gains of having many core aspects of defamation law established in one place, readily accessible to all. Other cited advantages of the common law are that the published body of public judgments helps to provide greater certainty and also gives the courts the flexibility to respond to new developments, such as technological innovation. **We have considered carefully the potential advantages and disadvantages of codifying significant aspects of defamation law, particularly in respect of the defences of truth, honest opinion and reporting privilege. In general, we have come down in favour of some codification, in line with our core principle of improving accessibility.**²⁴ In other areas we recognise that the common law continues to have an important role to play. **The Government should monitor whether, in due course, the codification carried out by the Bill is achieving its goal of improving accessibility and clarity of the law.**

21. The draft Bill seeks to codify the existing law in some areas: the Secretary of State explained that “the objective was to clarify the situation and put it in modern language in statute without seeking to change the law.”²⁵ But it is clear from the consultation document that in other areas the intention is to codify with some elements of reform. We have a general concern that the Government has not always been clear when the intention is to replace the existing common law with a codified statutory version and when the law is being reformed as well as codified. As many witnesses pointed out, a lack of clarity on this point could significantly increase uncertainty and levels of litigation.²⁶ **If the changes being introduced by the Bill are not to risk increasing uncertainty, it is essential that the Government makes clear, in a way that the courts can take into account, during the passage of the Bill if not before, when it is seeking to make changes of substance to the law and when it is simply codifying the existing common law. We have sought to make**

²⁴ See paras 61–73 for our detailed recommendations.

²⁵ Q 473 [Clarke]

²⁶ Q 525 [Scotland]; Q 585 [Tomlinson]; Q 586 [Browne]

this distinction clear in the specific changes to the draft Bill that we propose in this chapter. In future, we recommend that the Government always makes clear at the date of publication whether the clauses of a draft Bill are intended merely to codify the existing law, or to codify with elements of reform. There should be no ambiguity over this important issue.

Trial by jury

22. Under the law as it stands any party involved in a defamation case may apply for trial by jury. This application can only be refused by the court where the trial cannot “conveniently” be conducted with a jury, for example if it requires lengthy examination of documents or scientific investigation.²⁷ For ease of reference we describe these criteria as “the convenience test”. In recent years judges have increasingly found the convenience test to be satisfied and then exercised their discretion to order trial by judge alone. In the years 2008 and 2009, only eight out of the 21 defamation claims that reached the High Court were decided by a jury.²⁸ The Government’s draft Bill seeks to abolish the convenience test and with it the current presumption in favour of jury trials. This would bring defamation broadly into line with the vast majority of civil cases.²⁹ Under the proposed change, rather than responding to any request by either party, the judge would only order a trial by jury where it was in the interests of justice to do so. The draft Bill provides no guidance on what this might mean in practice.

23. The Government’s consultations revealed “widespread support” for the removal of the presumption in favour of jury trial.³⁰ The evidence we received reflected this assessment. The few who favoured the current law did so on the grounds that trial by jury was important to maintaining public confidence in trials which often involve figures in political or other authority, and that when assessing damage to reputation and the determination of the ordinary meaning of words, the view of a jury, as representing the general public, was more appropriate than that of a judge.³¹ The main arguments against trial by jury focus on the negative impact that the possibility of jury trial often has on the chances of resolving a claim early by the resolution of key issues by the judge, which may either determine the case or lead to prompt settlement. It is commonly not possible to apply the convenience test fairly at an early stage, by which time very substantial costs have often already been incurred. At present it falls to a jury to determine key issues of fact, such as what defamatory meaning the words bear and whether they are statements of fact or opinion. Such issues are often critical to the outcome of the case. Unless and until the mode of trial has been determined as being by judge alone, judges can only make early rulings on these issues where they are satisfied that any reasonable jury, properly directed, would be in agreement. Delaying the resolution of these issues often prolongs cases and substantially increases the costs. The possibility of trial by jury may also be exploited by a party for

27 Senior Courts Act 1981, section 69; County Courts Act 1984, section 66.

28 Ministry of Justice, Report of the Libel Working Group Report, March 2010, p 85; there have been no trials by jury in defamation cases for more than 18 months: see Q 30 [Lester].

29 The right to apply for jury trial exists only in claims relating to fraud (although it is not in practice ordered), false imprisonment and malicious falsehood.

30 Cm 8020, p 37

31 Liberty, Vol II, p233–236.

precisely that reason.³² The increased costs associated with trial by jury have been estimated at 20–30% and the whole process may take up to twice as long.³³ Another drawback of jury trials is that they do little to add clarity to how the law is applied, as there is no reasoning given to support decisions relating to meaning and the other defences. In contrast, a decision by a judge is supported by a reasoned judgment (that is subject to appeal) which sets out precisely and publicly how the law has been interpreted and applied.

24. We recognise the force of the argument that certain issues, such as what is and is not in the public interest, are more appropriately determined by a jury of ordinary citizens.³⁴ But, on balance, we consider that any perceived benefits of a judgment by a jury do not outweigh the enormous costs in terms of time and money that this option entails and the precluding effect these can have. Also, reasoned judgments often confer significant benefit in terms of transparency and fairness. In our view, jury trials are not only more expensive in themselves; their availability can serve to work against early settlement. The reversal of the presumption in favour of jury trials is essential to many of the recommendations we make, particularly those relating to early resolution. **We conclude that the presumption in favour of jury trials works against our core principles of reducing costs by promoting early resolution and, to a lesser degree, of improving clarity. We support the draft Bill’s reversal of this presumption, so that the vast majority of cases will be heard by a judge.**

25. We do not share the minority view that jury trials should be abolished altogether in defamation cases.³⁵ We accept that there may be exceptional circumstances in which trial by jury is in the public interest. Opinions amongst our witnesses on what these precise circumstances should be varied but we found there was a general view that it may be appropriate for cases involving the credibility of those in positions of special power and authority in society to be tried by jury so as to retain confidence in the administration of justice. This would be subject to judges using their discretion to decide whether jury trial is appropriate. We can, for example, see that in some cases there would be very substantial benefits in having a reasoned judgment, which a jury cannot give, and in other cases jury trial would still be disproportionate. It would be undesirable to restrict this discretion, but it should be possible to outline general principles. We intend trial by jury to be exceptional. A libel action brought by a serving judge is an obvious example where a jury trial may well be appropriate. In accordance with our core principle of improving accessibility by providing clarity on the face of the Bill, **we believe that the circumstances in which a judge may order a trial by jury should be set out in the Bill, with judicial discretion to be applied on a case-by-case basis. These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake.**

32 Cm 8020 p 37; Q 611 [Mr Justice Tugendhat]. The same arguments that are heard initially by the judge are often replayed again in front of the jury, which results in increases to costs and the length of proceedings. There are also potential additional costs if there is a hung jury and a retrial.

33 Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* [hereafter, “the Jackson Report”], Chapter 32, para 6.3. The Law Reform Committee estimates that jury trials last “perhaps twice as long” as non-jury trials (Vol III, p 153).

34 As the law stands, public interest is an issue for the judge, not the jury, in relation to both honest opinion and qualified privilege.

35 Law Reform Committee, Vol III, p 153; Q74–75; Professor Mullis and Dr Scott, Vol II, p 140.

Improving protection of freedom of speech

26. Publishers repeatedly told us that the cost, length and complexity of libel proceedings effectively requires them to withdraw or modify their work when faced with the potentially ruinous consequences of ignoring a threatening letter from a solicitor, irrespective of its legal merits. This applies not only to individuals who publish at home on a blog or newsletter without access to legal advice and the protection of an employer, but also to scientists, consumer organisations, non-governmental organisations, journalists, booksellers and many other types of professional publisher. As we indicate in Chapter 1, we are persuaded that free speech is being threatened, or “chilled”, to an unacceptable degree. A situation has arisen where many publishers feel cowed every time that someone disputes what they have said or wish to say. The boundaries of free speech should not be dictated by lawyers and their clients relying on bullying tactics to intimidate publishers into silence. We propose in Chapter 3 an overarching solution that reduces cost and complexity through a range of procedural and substantive changes to the law. In this section, we focus on the discrete issue of publishers facing legal threats in relation to trivial, insubstantial or irreverent remarks that should not take up the time and resources of the courts and publishers.

27. Under the existing common law, the courts have power to throw out any claim that fails to meet a “threshold of seriousness”, including where no “real and substantial” wrongdoing can be demonstrated.³⁶ In practice, this represents a surprisingly low hurdle for would-be claimants to overcome since these tests have been interpreted as being met whenever more than minimal harm is caused to the claimant’s reputation.³⁷ The draft Bill would replace the existing common law tests with a new statutory provision requiring the claimant to prove “substantial harm” to their reputation as part of bringing a claim. The lack of clarity in the application of this test was apparent from the evidence.³⁸ The Secretary of State for Justice, the Rt Hon Kenneth Clarke MP, suggested during oral evidence that it would raise the bar by making it harder for claimants to pursue trivial claims.³⁹ This was subsequently contradicted by the Minister of State, the Rt Hon Lord McNally, who wrote to us stating that the new test is intended to reflect the existing law, merely giving it new prominence rather than a stricter meaning that makes it harder to bring a libel claim.⁴⁰ This is not likely to help promote the free speech of publishers. We believe it important that the draft Bill is strengthened; it must ensure that wealthy individuals and organisations cannot stifle comment and debate that has no significant impact on their reputation. The public interest requires our law and its procedures to prevent trivial claims from being started and, where that happens, ensure that they are stopped.

28. One proposal made by a number of witnesses is to require claims to be “serious” or “serious and substantial” in order to proceed.⁴¹ We consider that a threshold test that focuses on the seriousness of the allegation would raise the bar in a meaningful way and

36 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946.

37 *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946.

38 Some witnesses believed that the introduction of this test risked lowering the existing threshold (e.g. Q 91 [Stephens]), while others considered that it would either stay the same or be raised higher than the existing law (e.g. Law Society, Vol III, p 89).

39 Q 491 [Clarke]

40 Letter to the Committee from Lord McNally, dated 28 June 2011, Vol II, p424

41 See for example Q 303 (Mackay) and Libel Reform Campaign, Vol II, p71

give greater confidence to publishers that statements which do not cause significant harm, including jokes, parody, and irreverent criticism, do not put them at risk of losing a libel claim. The threshold test should relate to harm to reputation and not to feelings, although the latter is an important aspect of damages if an action proceeds. Due allowance should be made for such matters as the nature of the charge, prompt apologies, the width of publication and any other relevant background. We accept that there may be a period of litigation while the courts spell out the precise meaning of “serious and substantial” as part of the threshold test, but over time this will create a better balance between free speech and reputation. **Therefore, we recommend replacing the draft Bill’s test of “substantial harm” to reputation with a stricter test, which would have the effect of requiring “serious and substantial harm” to be established.**

29. A new harm test will only better protect publishers if the courts ensure that trivial claims are dismissed promptly before unnecessary time and money is expended. The Ministry of Justice plans to make sure that a judge determines whether the harm test is satisfied at a very early stage in legal proceedings. It has stated that judges will be able to use their existing powers to dismiss any claim that fails to meet the required threshold of seriousness. This is essential: **the threshold test should be decided as part of the proposed early resolution procedure and any claim that fails to meet this test should be struck out.**⁴² Some witnesses expressed legitimate reservations that determining the degree of harm at an early stage could lead to costs being “front-loaded” at an early stage of the proceedings. We do not pretend that early resolution comes without the risk of increasing costs at the start of a claim, but the potential advantage of sifting out weak cases will be a major advantage to both sides: the winning party will not be dragged through lengthy proceedings where that can be avoided and the losing party will have their case dismissed before fruitlessly investing even more of their time and resources into it.

30. Further, the context in which a statement is made must be considered carefully when deciding whether the harm test is satisfied. For instance, the sting of a defamatory allegation is likely to be lessened or removed altogether where the publisher makes a rapid correction or apology. Equally, there may be less chance of serious harm where a notice is attached to material on the internet indicating that it has been challenged as libellous.⁴³ The law must encourage attempts by publishers to correct false information in support of responsible free speech and the protection of reputation; this should include recognising that prompt action can undo the risk of harm. As we also mention in our section on the internet,⁴⁴ the court must additionally take into account the nature of the setting in which the statement was made as part of considering its full context. The Ministry of Justice should work with the judiciary to ensure that this approach is implemented in the courts in relation to the draft Bill’s new test.

42 Chapter 3 sets out our views on the early resolution procedure that should lead to key issues, such as the substantial harm test, being decided at an early stage in the proceedings.

43 The courts offered support to this approach in *Loutchansky v Times Newspapers Ltd & Others* [2001] EWCA Civ 1805, [2002] 1 All ER 652.

44 See Chapter 3

Responsible journalism in the public interest

31. It is vitally important to the health of society that issues of public interest can be discussed and debated. One of the most significant recent developments in defamation law was the creation of a specific defence to protect statements that are published responsibly in the public interest.⁴⁵ The courts have identified ten non-exhaustive guidelines for use in deciding whether a publication was made responsibly as part of what is commonly known as the Reynolds defence.⁴⁶

32. Our inquiry has revealed universal support for a dedicated public interest defence, particularly to protect investigative journalism that legitimately goes beyond the boundaries of what can be proved to be true. In this respect, the public interest (Reynolds) defence has been relied upon to protect publications relating to the funding of terrorism, involvement in international crime, police corruption, drug taking in sport, and the use of child labour, among other issues.⁴⁷

33. There is, however, debate about whether the current defence is operating satisfactorily.⁴⁸ The most sustained criticisms are that it is unpredictable, inflexible, complex and costly.⁴⁹ More specifically, we have heard concerns that the ten non-exhaustive responsibility guidelines have sometimes been treated as a rigid checklist and are not always appropriate to publishers who fall outside the traditional media, including non-governmental organisations, notwithstanding recent efforts by the courts to put this right.⁵⁰

34. The Government's draft Bill adopts a broadly similar approach to Lord Lester's Bill by placing the existing defence on a statutory footing, although there are significant differences in the detailed wording. In doing so it seeks to improve the defence by modifying some of the factors that are used to determine responsibility. The clause seeks to make clear that these factors are treated as an illustrative list of issues to be taken into account rather than a rigid series of tests.⁵¹ The aim is to make the defence clearer and simpler for publishers to rely upon.

35. There are two general arguments of principle that we considered during our inquiry in relation to the public interest defence. First, there were calls for a more radical overhaul of the existing defence with a view to protecting any statement on a matter of public interest provided the author was not acting recklessly or maliciously.⁵² This would dramatically widen the scope of the defence and bring it closer to the United States model. On balance,

45 *Reynolds v Times Newspapers* [1999] 4 All ER 609, [2001] 2 AC 127

46 *Reynolds v Times Newspapers*, above; *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946

47 *Loutchansky v Time News Ltd* (Nos 2-5) [2001] EWCA Civ 1805 (international crime); *Charman v Orion Publishing Group Ltd* [2007] EWCA Civ 972 (police corruption); *Armstrong v Times Newspapers Ltd* [2005] Civ 1007 (drug taking in sport); *James Gilbert v MGN Ltd* [2000] EMLR 680 (use of child labour).

48 Some witnesses considered that the defence is working satisfactorily and should not be reformed (e.g. Q 206 [Rusbridger]; others felt that the defence would benefit from codification and/or reform (e.g. JUSTICE, Vol III, p77)

49 Cm 8020, paras 9–12; Libel Working Group at paras 62–66; Simon Singh, Vol II, p386; Global Witness, Vol II, p249-251; National Union of Journalists, Vol II, p352–353.

50 See *Jameel v Dow Jones* [2005] EWCA Civ 75; NUJ, vol II, p 353; JUSTICE, vol III, p75.

51 See clause 2 of the Government's draft Bill; see clause 1 of Lord Lester's Bill.

52 Libel Reform Campaign, Vol II, p73–74; see also the similar but alternative proposals put forward by Which?, Vol II, p242-243 and Marcus Partington (Q 110) based on section 32 of the Data Protection Act 1998.

we are in agreement with those witnesses who felt that this approach is inappropriate.⁵³ It would offer insufficient protection to people whose reputation is harmed by untruths and overly focus on the mind of the publisher rather than the objective responsibility of the publication.⁵⁴ We accept that publishers often face difficult editorial decisions concerning what to publish, and that on some aspects of a publication their reasonable judgments should be given due weight. A better approach, in our view, is to require the following: **when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication.**⁵⁵ This is consistent with the approach adopted elsewhere in Europe and was favoured by Lord Lester, who told us that the Bill “should allow sufficient room for editorial discretion, so that the courts do not sit in judgment on matters of editorial judgment beyond their proper province.”⁵⁶ This should provide some comfort to publishers who face pressured decisions about publication and, in so doing, we hope that it will provide greater protection to free speech, whilst not risking the irresponsible undermining of an individual’s reputation.

36. Second, a wide range of witnesses called for declarations of falsity to be made available as a remedy in any case where the publisher relies on what is currently the Reynolds defence.⁵⁷ The rationale is that a person may not be able to win a libel claim in relation to an untrue and damaging allegation if it was published responsibly in the public interest. A declaration of falsity would give that person the ability to vindicate their reputation without removing the public interest defence from the publisher. The aim of using declarations of falsity to protect the truth and to vindicate a person’s reputation is undeniably attractive. Ultimately, however, we do not accept that they should be made available. It is not the function of the courts to determine categorically that something is false; such a remedy could lead to a declaration of falsity being made in relation to a statement which is later proved to be true. There may also be legitimate reasons for a publisher being unable to prove the truth of an allegation. For instance, the publication may be based on information provided by a confidential source who cannot openly verify its truth. A preferable approach, in our view, is as follows: **the judge who upholds a public interest defence should make it clear when the truth of the allegation is not also proven. It may be appropriate, depending on the facts of the case, for the judge to order a summary of his or her judgment to be published, to make this clear. This would help to protect the reputation of the claimant, but without the practical and legal complications associated with declarations of falsity. The Ministry of Justice should work with the Lord Chief Justice and senior members of the judiciary to implement this reform.**

37. We have already set out our views on codifying the law.⁵⁸ **On balance, we support the broad approach that is taken by the Government to the public interest defence,**

53 Lord Lester of Herne Hill, Vol II, p15; Law Society, Vol III, p 91–92; Q 147 [Tait].

54 A further alternative was put forward by Alastair Brett under which statements on issues of public interest are protected provided the (allegedly) defamed person is given a right of reply or apology. We have already expressed our view that rights of reply and apologies are best taken into account in this context when considering whether a matter is sufficiently serious to be treated as defamation.

55 See Media Lawyers Association, Vol II, p172; Which?, Vol II, p242-243; Lord Lester of Herne Hill, Vol II, p15.

56 Lord Lester of Herne Hill, Vol II, p15.

57 See, for example, Law Reform Committee, Vol III, p146–148 and Q 122 [Tait]

58 Para 20

although in some detailed respects we prefer the approach of Lord Lester’s Bill.⁵⁹ Reforming this vitally important public interest defence within the draft Bill has the advantage of making it more accessible to publishers and the ordinary citizen.⁶⁰ It also provides an opportunity to improve the existing defence by making it clearer and better able to protect free speech, including by making it apply more effectively outside the mainstream media to the growing number of citizen publishers. To achieve this aim, we recommend various detailed amendments to the draft Bill’s public interest defence as outlined at paragraphs 63–66 below.

Protecting the truth

38. In defining one of our Report’s core principles as the protection of freedom of speech we emphasised that the law should encourage this right to be exercised responsibly. Having respect for the truth is fundamental to what we mean by this. From the perspective of free speech, any person who publicly states a matter that is substantially true should never be liable to pay damages for defamation, irrespective of the harm or embarrassment that may be caused.⁶¹ The courts have for many years recognised the common law defence of “justification” which protects publications that are substantially true. Where multiple allegations are made, the 1952 Defamation Act ensures that a claimant will fail if, having regard to those allegations proved to be substantially true, the claimant’s reputation is not materially injured by those allegations that are not.⁶² This is a fundamental defence in this area of law. The draft Bill would replace the current defence with a statutory equivalent which goes under the more accurate name of “truth”. We welcome this proposal, which will help to make the law clearer and more accessible. However, **we recommend that the name of the “truth” defence be changed to “substantial truth”** which better describes the nature of the test that is applied. Our attention was drawn to a proposal made by Lord Lester which provides that in relation to a single allegation, a claimant will still fail if what remains unproved does not materially injure the claimant’s reputation with regard to what is proved. This may well already be covered by the word “substantially” in clause 3(1) of the Bill but this opportunity should be taken to remove any uncertainty. **We recommend that the Government includes Lord Lester’s provision as to what is required to prove the truth of a single allegation.**⁶³

39. While there is great value in standing up for the truth and holding the powerful to account, the public interest is not served by irresponsible publishers failing to correct statements that are demonstrably inaccurate and untrue. Damages awards may provide some compensation, but they may be little comfort to someone whose friends, relatives and business associates have been exposed to untrue allegations about them, which are not

59 Those who favoured leaving the existing defence alone included Alan Rusbridger [Q 209]; and former members of the senior judiciary including Lord Hoffmann, HL Deb, 9 July 2010, col 432. Radical proposals for reform were put forward by Libel Reform Campaign; Which?; Alastair Brett, as considered above at paragraph 35.

60 See, for instance, the Law Society, Vol III, p91; JUSTICE, Vol III, p77–78.

61 There may be occasions where the law has to restrict what can be published for reasons of national security, privacy or confidentiality. Whilst we note the degree of overlap that can arise between these different areas of law, our comments and recommendations relate exclusively to the law of defamation particularly in light of the ongoing inquiry of the Joint Committee on Privacy and Injunctions on which further information is available at <http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/>

62 Defamation Act 1952, section 5.

63 See para 67 for details.

publicly corrected. Many witnesses remarked that most people who consider bringing a claim for defamation are far more concerned about setting the record straight than recovering damages.⁶⁴

40. In very limited circumstances under the statutory summary relief procedure,⁶⁵ the court has the power to order a summary of its judgment to be published in terms agreed by the parties or determined by the court.⁶⁶ We considered whether this power should be extended to all defamation proceedings. Where a publisher has got something seriously wrong, the public interest and the interests of the victim require that a suitable correction is made. We share the dissatisfaction expressed by many about the practice of some newspapers of hiding away corrections in materially less prominent parts of the paper. We do not accept the protestations of newspaper editors that this does not go on. Mr Dacre told us that it is “one of the great myths of our time that newspapers somehow bury these things at the back of the book”.⁶⁷ We point to the recent example when the Daily Mail, along with seven other newspapers, had to apologise and pay damages in respect of wrong allegations in highly prominent coverage—on the front and inside pages—of the questioning of a murder suspect. As a result, the Daily Mail reported this apology in 83 words on the inside middle of page two—hardly proportionate on any objective view.⁶⁸ In principle, we are attracted to the idea of the retraction or correction having a degree of prominence that is proportionate to the original article and would support efforts to make this standard practice. **We recommend that a court presiding over a defamation case should be given the power to order the defendant to publish, with proportionate prominence, a reasonable summary of its judgment.** This is in line with the Press Complaints Commission (PCC) Editors’ Code of Practice that already requires a newspaper to publish the outcome of an action in which it may be involved.⁶⁹ There is scope for the PCC to monitor its members and to assist the court in enforcing compliance with this proposal.

41. Several witnesses also raised the issue of whether the court should have the power to order the publication of an apology. Not surprisingly, media representatives generally were hostile to the prospect of mandatory apologies, believing that this was an infringement of editorial control and, potentially, the ECHR right to freedom of speech.⁷⁰ They agreed with most witnesses that *voluntary* apologies ought substantially to reduce damages awards whenever made promptly and fully. We see no value in forcing a person to make an apology that is neither meaningful nor sincere.

Freedom to express opinions

42. It has been recognised for many years that striking a fair balance between free speech and reputation requires the law of defamation to protect anyone who publishes their

64 See, for example, Q 137 [Clarke-Williams] and Q 141 [Christie-Miller].

65 Defamation Act 1996, section 9.

66 See Cm 8020, consultation questions 35–36.

67 Q 796

68 *Daily Mail*, 30 July 2011, p 2.

69 Paragraph 1(iv) of the Code.

70 See, for example, Q 794 [Dacre]; Q 196 [Johnston]; Q 300 [Wakeham]; Q 198 [Rusbridger]

honestly held opinion. Some expressions of opinion, most obviously value judgments, may by their nature be incapable of being proved to be right or wrong. The important public interest in issues being discussed and debated would be seriously damaged if proving the truth of a statement was the only defence available to a libel claim. Yet the law should not allow critics to ride roughshod over the reputation of others simply by dressing up any kind of attack as an expression of opinion. There has to be a careful consideration of what constitutes an opinion and the circumstances in which a defamatory opinion ought to be legally protected.

43. The Supreme Court recently carried out this challenging exercise by setting out the circumstances in which the existing comment defence is available, including by changing its name to “honest comment”.⁷¹ A number of witnesses suggested that the defence should not be further reformed given this important development.⁷² We note, however, that the most senior judge in the Supreme Court, Lord Phillips of Worth Matravers, stated that the defence should be reviewed either by Parliament or the Law Commission.⁷³ He felt that it was inappropriate for the Supreme Court to carry out a fundamental reshaping of the underlying policy and scope of the defence beyond the limited issues of law arising on the facts of that case. In line with Lord Phillips’ request for the defence to be examined, and further to our earlier conclusion on the merits of codification, **we support the Government’s proposal to place the defence of honest opinion on a statutory footing as part of the draft Bill. We are not, however, persuaded that the draft Bill makes the law clearer, simpler or fairer to the ordinary person than it is at present. As a result, we recommend a series of amendments to the draft Bill.** These are outlined in paragraph 69.

Absolute and qualified privilege

44. A person who publishes a defamatory statement may be able to rely on the defences of “absolute” and “qualified” privilege in a wide variety of circumstances. The defence of absolute privilege, as its name suggests, protects the publisher whatever their motive for publication. The defence of qualified privilege is defeated if the publisher was malicious in the sense that the dominant motive for publication was improper. Examples of absolute privilege include testimony by a witness in court and contemporaneous reports of proceedings in open court. Although often classified as “Parliamentary privilege”, Members of Parliament participating in Parliamentary proceedings are similarly protected. This category of privilege reflects a particularly strong public interest in there being no inhibition on being able to speak or write freely even if there is an adverse impact on the other person’s reputation. The defence is central to the proper functioning of an orderly and democratic society.

45. Qualified privilege can protect private communications that contain defamatory material where there is a shared duty and interest between the publisher and the recipient.

71 *Spiller v Joseph* [2010] UKSC 53. Prior to *Spiller* case the defence was known as ‘fair comment’. Following the Supreme Court’s judgment the defence is available where: a) the words complained of constitute comment, rather than a statement of fact; b) the words, at least in general terms, specify what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about; c) the facts upon which the comment is made must be true; d) the comment is one which a person could honestly make, however prejudiced, on the relevant facts (even if the comment was objectively unreasonable given the relevant facts); e) the comment is on a matter of public interest (which in this context means legitimate public concern); and f) the publisher did not act maliciously.

72 See, for example, Q 544 [Scotland].

73 *Spiller v Joseph* [2010] UKSC 53 at para 117.

This defence is well established at common law. We agree that this aspect of qualified privilege is best left to the common law to develop. However, qualified privilege also applies by statute to a wide range of reports of public proceedings and notices, provided the relevant material is on a matter of public concern and for the public benefit.⁷⁴

46. The draft Bill expands the defences of absolute and qualified privilege in a number of different ways, primarily to protect publishers who report on a wider range of international legislatures, courts, tribunals, companies, and other organisations than are covered by privilege at present.⁷⁵ We strongly support this proposal, which represents helpful additional protection of freedom of expression. There are, however, two areas in which we believe that the Bill should go further in order better to protect scientific debate and the democratic process.

Academic and scientific debate

47. It is vital that members of the scientific and academic communities can engage in vigorous and uninhibited debate provided they do so responsibly and honestly, since their work helps to shape every aspect of the world in which we live. This includes medical research into matters of the greatest public importance. Historic examples include the safety of smoking or the risks associated with a drug such as Thalidomide, where the truth emerged over time thanks to persistent and impartial research. A process of critical review is essential through which the work of one person, or group, is published and subsequently challenged by others. It is unavoidable that these efforts to uncover the truth and expand the limits of our understanding sometimes turn out to be wrong or to clash with the commercial and personal interests of other individuals and corporate organisations within society. For example, publishing research that reveals a particular product as unsafe or inefficient could seriously damage the business of its manufacturer, but may save lives. There is convincing evidence that defamation law is being used to silence responsible members of the medical and scientific community in order to protect products and profits.⁷⁶ In particular, we were informed that 10% of all libel claims involve science and medicine, and that 80% of GPs feel inhibited in discussing medical treatments publicly due to fear of facing a claim.⁷⁷ At a cultural and social level, it is also important for historians, geographers, political scientists and other academics similarly to be able to research and publish without undue fear of litigation. We took evidence from various individuals who have first-hand experience of the lengthy and costly trauma of being dragged through the courts.⁷⁸ For most scientists and academics defending libel proceedings is unthinkable, with the effect that important issues are either not being discussed publicly or at all.⁷⁹

48. The draft Bill goes some way towards tackling this problem by extending qualified privilege to include fair and accurate reports of what is said at a “scientific or academic

74 Originally contained in the Defamation Act 1952 and now set out in the Defamation Act 1996, section 15 and Schedule 1.

75 See clause 5.

76 See, for example, Dr Wilmshurst who outlined the chilling effect on members of the medical profession, Vol III, p26 at para 22.

77 Q 41 [Tracey Brown]

78 Dr Simon Singh, Vol II, p385–403; Dr Ben Goldacre, Vol II, p379–381; Dr Peter Wilmshurst, Vol III, p21–37; our attention was also drawn to threats of litigation made against Dr Henrik Thomsen and Dr Dalia Nield, among numerous other less publicised examples.

79 See the illustrations provided by Dr Peter Wilmshurst, Vol III, p34 and his article, *The effects of the libel laws on science—a personal experience*, Radical Statistics, Issue 104, p 13–23.

conference”.⁸⁰ We welcome this development, provided the conference is reputable. However, our inquiry revealed unanimous support for extending protection of qualified privilege to peer-reviewed articles published in scientific or academic journals, as recommended in 1975 by the Faulks Committee when the law of defamation was last reviewed comprehensively. Peer-reviewed articles are arguably the main platform for scientific and academic debate, and more reliable in their quality than conferences.⁸¹ Such articles may, in principle, be protected by other types of legal privilege, including qualified privilege and the so-called Reynolds defence, but the Reynolds defence in particular is often time consuming and costly to make out.⁸² In our view a proper peer review process should lead to the publication being treated as responsible and should have special protection in the public interest without the burden of having to prove “responsibility” in every individual case. Scientists and academics must not be left in fear of being sued simply for doing their job. **We recommend that a provision is added to the draft Bill extending qualified privilege to peer-reviewed articles in scientific or academic journals.**

49. This raises the question of whether the terms “scientific or academic conference” and “peer-reviewed article” should be defined within the Bill in order to provide clear and appropriate boundaries for these new categories of qualified privilege. The Government has stated that it would be difficult to provide a clear and comprehensive definition of “scientific and academic conference” in statute. We accept that this is correct in principle and note that no witness has suggested a suitable form of words. The same applies to the definition of “peer-review”. In particular, while the basic elements of peer-review are well established, the precise nature and extent of the process varies between different publications and subjects. Representatives of leading journals did not support attempts to include a precise statutory definition.⁸³ We accept that leaving it up to the courts to interpret the meaning of these terms would provide greater flexibility for the future, but it would also lead to uncertainty and create greater opportunity for litigation and abuse.⁸⁴ We note that the Committee chaired by Mr Justice Faulks proposed a registration system, such that conference reports and peer-reviewed articles appearing in scientific or academic journals would only receive qualified privilege where the organiser or publisher is listed in an official register. We are not convinced by the practicality of this approach due to the large and expanding number of journals in existence (now numbering in their tens of thousands), together with the resources required to determine which journals should receive such protection, and the risk that legitimate publications may be omitted from the list by ignorance or oversight. We are also concerned about the Government being called upon to determine which scientific or academic conferences and journals are more worthy of protection than others. It is preferable for the court to determine in any particular case whether the article or report is protected. In line with our core principle of accessibility and clarity, **we recommend that the Government prepares guidance on the scope of this new type of statutory qualified privilege in consultation with the judiciary and other**

80 Clause 5(7); it is only the report of a conference that is protected, specifically the speaker at the conference does not receive protection under clause 5(7) and would have to rely on an existing defence if pursued for defamation in relation to their contribution at a conference.

81 We emphasise that our reference to journals does not include the editorial or other types of entry besides articles that have undergone a peer-review process before being published.

82 For example, see the evidence of Dr Simon Singh, Vol II, p386–387.

83 Q 441 [Godlee]; Q 442 [Campbell and Singh].

84 Mr Justice Tugendhat and Lord Neuberger (at Q 638), who directed their observations to the potential ambiguity of the term “scientific and academic conference”.

interested parties. Our aim is to enhance the protection of free speech by giving certainty to publishers who report on conferences and authors who contribute peer-reviewed articles to journals, but without repealing any part of the existing law.

Protecting the democratic process

50. The strength of our Parliamentary democracy depends on Members of Parliament being able to speak freely while fulfilling their role in Parliament, without being in fear of legal proceedings. The Bill of Rights Act 1689 has for many years provided Members with important protection in relation to anything said during Parliamentary proceedings. This is known as Parliamentary privilege and it means, for example, that a defamation claim cannot be based on statements made by Members during a debate. The precise scope of Parliamentary privilege is complex, unclear and in some respects outdated.⁸⁵ For these reasons, the Government has committed to a process of reviewing Parliamentary privilege leading to the publication of a draft Bill in due course.⁸⁶ We accept that this is a sensible course of action given the complexities that arise, but we are concerned by how much time may elapse before such a Bill reaches the statute book. Recent events have highlighted the need for more immediate and decisive action in relation to two issues: the reporting of Parliamentary proceedings by the press; and the protection offered to communications between constituents and their MP. Both require urgent legislative solutions that can subsequently be incorporated within a Privilege Bill if and when enacted.

51. First, it is of fundamental importance that proceedings in Parliament can be reported upon freely by the press to ensure that people can discover what is being said and done by elected representatives on their behalf. Our faith in this essential aspect of Parliamentary democracy and press freedom was shaken recently when the Guardian newspaper reported that it had been gagged from reporting a Parliamentary question submitted by Paul Farrelly MP. The question related to the oil company, Trafigura, which had obtained a court ordered injunction prohibiting disclosure of a confidential report concerning its activities in Ivory Coast. The court order also included a prohibition on the disclosure of Trafigura's identity and the existence of the injunction itself, making it what is known commonly as a "super-injunction". There are provisions in the common law and the Parliamentary Papers Act 1840 aimed at ensuring that the press can report on proceedings in Parliament, but these have long been considered outdated and in need of reform.⁸⁷ In this respect, the lawyers of Trafigura and the Guardian both agreed that reporting on Paul Farrelly's question would, as an unintended effect, have breached the super-injunction and therefore may have placed the newspaper in contempt of court.⁸⁸ This case, and super-injunctions more generally, were recently reviewed by a committee established by the Master of the Rolls, Lord Neuberger, which concluded in its report that "no super-injunction, or any other court order, could conceivably restrict or prohibit Parliamentary

85 See the Report on the Joint Committee on Parliamentary Privilege, HL 43–/HC 214–I, April 1999, available at <http://www.publications.parliament.uk/pa/jt/jtpriv.htm>

86 Queen's Speech, 25 May 2010, available at <http://www.publications.parliament.uk/pa/ld201011/dhansrd/text/100525-0001.htm>

87 See the 1999 Joint Committee on Parliamentary Privilege, above, para 374; Culture, Media and Sport Committee, *Press Standards, Privacy and Libel*, para 101.

88 Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, May 2011, para 6.2.

debate or proceedings”.⁸⁹ We agree but equally note the report’s observation that the press does not under the current law have a clear and unfettered right to report on what is said in Parliament where such reporting appears to breach the terms of a court order.⁹⁰ We find this uncertainty in the law unacceptable and in need of immediate reform. Lord Lester’s Bill would have replaced the 1840 Act with a modern equivalent that is fit for purpose and which could, in our view, form a useful template.⁹¹ **We recommend adding a provision to the Bill which provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate.**

52. Secondly, one of the main functions of Members of Parliament is to provide advice and representation to their constituents, which may lead to highly sensitive communications taking place between them. Less attention has traditionally been focused on the legal protection offered to these communications. In this context Lord Neuberger’s report stated that they may be covered by parliamentary privilege “to a degree, and in some circumstances”.⁹² In particular, a defamatory communication would only be protected from court proceedings where it is closely connected to Parliamentary proceedings, such as forming part of a Member’s preparation to speak in a debate or table a specific question. Where, however, the communication has no link to Parliamentary proceedings then it would not be protected by parliamentary privilege. Therefore, it could potentially lead to a defamation claim, unless an alternative defence of absolute or qualified privilege were available. John Hemming MP has drawn Parliament’s attention to recent examples of constituents being told that court orders prevented them from discussing their concerns with him.⁹³ In our experience, some constituents do feel inhibited in what they can discuss with their MP following threatening letters from lawyers. Although we consider that qualified privilege at common law would attach to such communications, in our view the democratic process is unacceptably hindered by a lack of certainty and awareness among constituents about their right to engage in open and frank discussions with their Westminster representative. We are aware of the concern that extending absolute privilege to cover all communications between constituents and their MPs might encourage malicious complaints to MPs which damage the reputation of third parties.⁹⁴ This is a potential problem that requires careful thought, but our view is that such communication would, and should, only receive the protection of qualified privilege. However we believe that the protection is of such importance that it should be made clear by statute. **We recommend that the Government adds a provision in the Bill protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege.**

89 Lord Neuberger’s report, above, at page vii.

90 As above, para 6.33.

91 Clause 7

92 Lord Neuberger’s report, above, para 6.12.

93 See the examples provided by John Hemming MP during a Westminster Hall debate on 17 March 2011, available at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110317/halltext/110317h0001.htm>

94 Lord Neuberger’s report, above, para 6.14.

Reporting court proceedings

53. As we have already indicated, the press and other publishers are protected by absolute privilege when reporting contemporaneously on what has been said during court proceedings, provided the report is fair and accurate.⁹⁵ It has been drawn to our attention that newspapers frequently cover the opening stage of criminal trials during which the prosecution's case is outlined in detail. However, there is often little or no coverage of the defendant's case, with the consequence that the public may receive an unbalanced picture of the trial and the defendant. It was encouraging to discover during our inquiry that at least some newspaper editors view this state of affairs as being problematic.⁹⁶ We heard that discussions are ongoing with the judiciary to help ensure that the media is kept informed about key stages of a criminal trial, including the defence. We encourage the press to be more proactive in making sure that their coverage of criminal trials is balanced. The MoJ should monitor the progress of ongoing discussions with the judiciary and provide support to the extent that is necessary.

Libel tourism

54. There have been growing concerns in recent years that defamation law in this country has come to be more protective of reputation than elsewhere in the world to such an extent that London has become the preferred location for defamation actions involving foreign parties with only a tenuous link to this jurisdiction. Those of most concern arise where both the claimant and defendant come from outside the EU. Some say that London has developed a reputation as the libel capital of the world and that the judgments of its courts are having a chilling effect on freedom of speech in other parts of the world. Apparently in response to this, legislation was recently introduced in the United States specifically to prevent foreign libel judgments being enforceable there.⁹⁷ The draft Bill seeks to prevent claims against defendants who are not domiciled here or in another EU member state without a strong link existing to the jurisdiction of England and Wales. It prevents a court from hearing such a case unless it is satisfied that this jurisdiction is the "most appropriate" place for a defamation action to be brought.

55. In the evidence we received, there was a divergence of views on the extent to which libel tourism remains a problem. We found that whilst there have been recent examples of foreigners attempting to use the London courts to pursue libel claims against foreign defendants with little connection to harm suffered in the UK,⁹⁸ in reality such cases are extremely rare: no similar cases have proceeded to trial in the last two years. The existing law allows the courts quite wide discretion to refuse to hear cases where another jurisdiction is more appropriate.⁹⁹ But some organisations argued that the small number of cases going before the courts does not accurately reflect the scale of the problem and the extent to which free speech is being curtailed by the threat of legal action in London. For

95 Defamation Act 1996, section 14

96 Q 228 [Rusbridger]

97 The SPEECH Act (Seeking the Protection of our Enduring and Established Constitutional Heritage) was passed in the United States in 2010.

98 See, for example, the unsuccessful litigation brought by the Ukrainian businessman, Rinat Akhmetov, against two Ukrainian newspapers which was dismissed by the High Court earlier in 2011.

99 Under the common law *forum non conveniens* doctrine, although under EU law a person domiciled in a Member State can be sued in another Member State if that is where the harmful event occurred.

instance, we received convincing evidence that articles in journals published internationally had to be edited or withdrawn purely because of the risk of legal action in this country.¹⁰⁰ This is harmful to this country's reputation as a place that values and protects free speech.

56. We believe that the extent of libel tourism has been exaggerated in some quarters but, in line with our core principle of protecting freedom of speech, we believe that the courts would benefit from more robust powers to prevent unwarranted legal action in this country. This would also help reduce any international chilling effect. Foreign parties should not be allowed use of the courts in this country to settle disputes where the real damage is sustained elsewhere or where another jurisdiction is more appropriate. We therefore support the thrust of the Government's proposals but require some modifications, particularly to clarify that residents of England and Wales are not prevented from taking action here against an overseas defendant for damage caused abroad where the current law permits it.¹⁰¹ We note that the draft Bill does not give any further indication of the factors the court should bear in mind when determining the most appropriate place for the case to be heard. In line with our core principle of improving accessibility through clarity, we recommend that the Government should provide additional guidance on how the courts should interpret the provisions relating to libel tourism. We also believe that in such cases the courts should have regard to the damage caused elsewhere in comparison to the damage caused here.

Further protection for publishers

57. As a general rule, claims for defamation must be started within one year of publication.¹⁰² The aim is to protect publishers from facing open-ended liability for what was said and done in the past. This widely accepted principle does not always work in practice due to a legal principle, known as the multiple publication rule, under which each republication of the material restarts the one-year period.¹⁰³ For example, a claim can be pursued in relation to paper publications, such as a printed newspaper or magazine, where a single back-copy has been sold within the last year, even though the original edition may have been published and then forgotten about many years earlier.¹⁰⁴ The rule operates with particular harshness in relation to many electronic communications, since the one year period restarts every time that an online article or webpage is viewed. A huge amount of published material is now stored in online archives, leaving many publishers exposed indefinitely to defamation claims.

Single publication rule

58. We strongly support the draft Bill's introduction of a single publication rule, under which the one year period runs from the date of original publication and does not restart

100 See Libel Reform Campaign, Vol II, p78; Global Witness, Vol II, p254; Reuters submission to Government consultation (not published).

101 See para 72 for detailed changes required.

102 Limitation Act 1980, section 4A

103 This rule was established in *Duke of Brunswick v Harmer* [1849] 14 QB 185.

104 In making this observation, we note that the courts have power to strike out claims that are based on minimal levels of publication.

each time the material is viewed, sold or otherwise republished. This measure strengthens freedom of speech by providing far greater protection to publishers.¹⁰⁵ It equally safeguards the right to reputation since the court has discretion to extend the one-year time-period whenever it is just to do so; and, further, the new rule applies only to material that is “substantially the same” as the original publication.¹⁰⁶ It specifically will not apply to material that is published in a “materially different manner” taking into account the level of prominence and extent of the subsequent republication.¹⁰⁷ We acknowledge that any republication of a defamatory allegation can be damaging, but the person who is harmed can bring a defamation claim where justice requires. We accept that some increase in the level of litigation may arise while the courts establish the precise workings of a “single publication” approach, including the meaning of “substantially the same” and a “materially different” publication. But, on balance, the draft Bill represents a far fairer scheme for publishers, both online and in print.

59. We are, however, concerned that the single publication rule is too narrow as presently drafted. While it protects the individual who originally published the material once the one year period has expired, it does not protect anyone else who republishes the same material in a similar manner. For instance, an archive that publishes material written by someone else could be sued successfully, even though the original author could no longer be pursued for continuing to make the material available to readers. A publisher who republishes material previously published by a different person will similarly be exposed. **In our view the single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year.**¹⁰⁸ **Further, the Government must clarify that merely transferring a paper-based publication onto the internet, or vice versa, does not in itself amount to republishing in a “materially different” manner, unless the extent of its coverage in the new format is very different.** Otherwise the usefulness of the single publication rule would be undermined. It would also create a disincentive against making publications widely available in different mediums.

Innocent dissemination

60. As a final point in relation to the protection of publishers, we were made aware that what appears to be a change to the so called “innocent dissemination” defence, when it was put on a statutory footing by the Defamation Act 1996, has weakened the position of “secondary publishers”. It means in effect that any secondary publisher such as a bookseller who is not the original author and has no editorial control over the published material becomes liable as soon as being made aware that some of the publication’s content may be defamatory. Prior to 1996 the secondary publisher appears to have had a defence if they reasonably believed (for example, on the basis of reasoned assurances from the author or primary publisher), that the defamatory material was defensible.¹⁰⁹ The reform

¹⁰⁵ Alternatives to the single publication rule were put forward, such as for a new defence of “non-culpable republication”, but we do not accept that it improves on the Government’s proposals: Professor Mullis and Dr Scott, Vol II, p128–130.

¹⁰⁶ Clause 6(2)–(5)

¹⁰⁷ Clause 6(4)–(5)

¹⁰⁸ Lord Lester of Herne Hill, Vol II, p27; Libel Reform Campaign, Vol II, p77; Dr Simon Singh, Vol II, p392.

¹⁰⁹ The problem is explained by the Booksellers Association as follows: “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

implemented by the 1996 Act has, in this respect, been unduly harsh on secondary publishers. **We recommend that the Government amends the “innocent dissemination” defence in order to provide secondary publishers, such as booksellers, with the same level of protection that existed before section 1 of the Defamation Act 1996 was introduced.**

Recommended changes to the draft Bill

61. This section summarises the changes we recommend are made to each clause of the draft Bill, with additional reasoning where the arguments are not made in earlier sections of this chapter.

Clause 1: Substantial harm

62. **We recommend replacing the draft Bill’s test of “substantial harm” to reputation with a stricter test, which would have the effect of requiring “serious and substantial harm” to be established.**

Clause 2: Responsible publication on matter of public interest

63. **The Reynolds defence of responsible journalism in the public interest should be replaced with a new statutory defence that makes the law clearer, more accessible and better able to protect the free speech of publishers.¹¹⁰ The Bill must make it clear that the existing common law defence will be repealed.**

64. **Overall, we support the approach that is taken in clause 2 of the Bill. In particular, we agree that the term “public interest” should not be defined.** It is far better for this term to be interpreted flexibly by the courts, as at present, than risk a definition that restricts the defence by failing to cover all of the disparate issues which may engage the public interest.

65. **The list of factors that is used to determine whether a publisher has acted responsibly should be amended as follows:**

- a) **A new factor should be added that refers to the “resources” of the publisher** since it is not appropriate to expect the same level of pre-publication investigation from a local newspaper, non-governmental organisation or ordinary person as we should expect from a major national newspaper. It is entirely appropriate to treat “responsibility” as a flexible standard that considers resources alongside other important issues such as the seriousness, nature and timing of the publication;¹¹¹

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.” Vol II, p345.

110 The PCC’s Editors’ Code of Practice attempts a definition: “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.” This may be too restrictive in the context of defamation law.

111 Lord Lester of Herne Hill, Vol II, p14; Index on Censorship, Vol II, p94 and 101; JUSTICE, Vol III, p79.

- b) A reference to “the statement in context” should be added to clause 2(1)(c) to make it clear that the publication must be read as a whole rather than focusing primarily upon the words that are subject to complaint;
- c) The term “urgency” should be removed from clause 2(1)(g) and replaced with a more general test of whether “it was in the public interest for the statement to be published at the time of publication”. There is a danger that referring to urgency will make the defence narrower than is appropriate by focusing unduly on whether the publication could have been delayed to allow for additional investigation, rather than considering whether it was published at an appropriate time;
- d) The reference to whether the publication draws “appropriate distinctions between suspicions, opinions, allegations and proven facts” at clause 2(1)(h) should be removed. The purpose of this expression is to make it clear that opinion is fully protected by the public interest defence, which we support. However, this approach creates a risk that the courts will be drawn into an overly analytical examination of the publication line by line. In our view, it is sufficient for the Bill to refer to the “tone of the statement” at clause 2(1)(h). We note that the seriousness of the imputation (for example, whether it is pitched as suspicion or guilt) is already something that may be taken into account under clause 2(2)(b); and
- e) Further, **when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication.**

66. We acknowledge the criticisms that have been expressed about the breadth of the reportage¹¹² defence at clause 2(3) of the draft Bill.¹¹³ In particular, it would appear to allow publishers to repeat almost any defamatory remark made by a third party in a context of a current controversy that relates to a matter of public interest. There are occasions, especially in political debate, when there is a public interest in neutrally reporting both sides of a dispute without having to form a responsible judgment as to who is right. However, we agree that a limit is required. Our preferred option is to permit publication only when the reporting of the dispute is in the public interest (and not merely when the dispute concerns a matter of public interest). We also believe that the neutral reporting of a dispute should form one of the factors for determining responsibility, rather than automatically being viewed as responsible. Therefore, **we recommend that the “reportage” defence at clause 2(3) is reformulated as a new matter to which the court may have regard under clause 2(2) namely “whether it was *in the public interest* to publish the statement as part of an accurate and impartial account of a dispute between the claimant and another person.”**

Clause 3: Truth

67. **We recommend that the name of the “truth” defence be changed to “substantial truth” which better describes the nature of the test that is applied. We also recommend**

¹¹² The defence of “reportage” is intended to protect a publisher who neutrally reports on a dispute between two other parties. It represents a departure from the “repetition rule” which prevents publishers from being able to rely on a defence based on repeating the words spoken, or allegations made, by another person.

¹¹³ See, for example, the Law Reform Committee, Vol III, p148–150.

that the Government includes a provision, in line with Lord Lester’s approach, to make clear that a defamation claim should fail if what remains unproved in relation to a single allegation does not materially injure the claimant’s reputation with regard to what is proved. This should assist in providing clarity.

68. The Bill should be amended, if necessary by a new clause, to provide the judge deciding a defamation case at final trial with the power to order the defendant to publish, with proportionate prominence, a reasonable summary of the court’s judgment. In cases where media and newspaper editors are responsible for implementing such orders they should ensure that the summary is given proportionate prominence.

Clause 4: Honest Opinion

69. We support the Government’s proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments:

- a) **The term “public interest” should be dropped from the defence as an unnecessary complication.** The law’s protection of the right to personal privacy¹¹⁴ (which is another aspect of Article 8 of the ECHR) and confidentiality are now well established and can be used to prevent people from expressing opinions on matters that ought not to enter the public domain. In this respect, the public interest test no longer serves a useful purpose. It also creates the potential for confusion with the identically worded, but narrower, public interest test under the draft Bill’s defence of responsible journalism in the public interest. Further, we note that it may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not;¹¹⁵
- b) At present, the Bill protects “bare opinions” by which the author makes a statement without any indication of the nature of the facts on which it is based. For instance, a bare opinion would include a statement that ‘in my view Mr X is a disgrace as a surgeon’. Historically this type of allegation was treated as a statement of fact and was not therefore protected by the honest opinion defence. As the Supreme Court recently pointed out, this approach is artificial because it plainly is an expression of opinion. The reason for being cautious about offering legal protection to such a bare statement of opinion is clear. Readers are left without any way of assessing the real nature of the criticism, and the victim is seriously handicapped in defending him or herself in response. If the general subject matter of the opinion is known (for example, it may be the surgeon’s safety record or merely the dress that he or she wears on ward rounds), it informs the reader who may also then be better able to judge its merit and helps the person who is attacked to better defend their reputation. A further benefit is that it allows the court to limit the scope of its factual inquiry which will save time and costs in line with our core principles. **The Bill should not protect “bare opinions”. It should be amended to require the subject area of the facts on which the opinion is based to be sufficiently indicated either in the statement or by context.** We emphasise that the

¹¹⁴ *Campbell v MGN Ltd* [2004] UKHL 22

¹¹⁵ *Lingens v Austria* (1986) 8 EHRR 407 at [46]

context will often be more than sufficient to make the general subject matter of the opinion entirely clear to the reader;

- c) **Neither the Government’s draft Bill nor Lord Lester’s Bill imposes any requirement that the commentator need know the facts relied on to support the opinion. In line with our concern to improve clarity, we welcome this change, which removes an undesirable layer of complexity.** This is a significant change to the present common law. We see the attraction of the argument that people can only comment on facts they know. However, often those facts will not have been evident at the same time as the comment. Public interest issues can retain topicality for some time, making it more difficult to identify what facts were known when. People variously rely on skim reading, summaries by others, fleeting internet searches, and what they read and see in the media. There are also difficulties with the common situation where the media are reporting comments by others, whose knowledge of the background facts may be unknown, and where only the media are sued and the original commentator may not be prepared to assist. However, the removal of the knowledge test makes it doubly important that there is a requirement that the general nature of the facts underlying the comment is indicated in the publication. That requirement, and the honesty test, should provide sufficient protection. While there may be hard cases, we believe that this defence at the core of free speech will benefit from simplification. We also have in mind that generally defamatory opinions (which must be recognisable as such) are less destructive of reputation than defamatory allegations of fact;
- d) **The Bill should require the court, when deciding whether an honest person could have held the relevant opinion, to take into account any facts that existed at the time of publication which so undermine the facts relied on that they are no longer capable of supporting the opinion.** This appears to be a problem which neither the Government’s Bill nor Lord Lester’s Bill satisfactorily addresses. A person may honestly express a defamatory opinion on the basis of a fact which, though once true, has by the time of publication wholly lost its validity for reasons which may be unknown to the commentator—for example on the basis of a conviction later overturned on appeal. It seems to us that in such cases, which we accept will arise very rarely, the defence should not be available. This may require delicate drafting, but we believe the point should be addressed. Some consideration would have to be given to whether (and when) the invalidating facts became publicly available prior to the date of publication;¹¹⁶
- e) **The Bill should require the statement to be *recognisable* as an opinion, in line with Lord Lester’s Bill.** We consider it is essential that the defence only arises where the ordinary reader or viewer will recognise the statement as an opinion. This is especially important in relation to inferences of fact which the commentator may draw from other facts, which may be more damaging than mere value judgments.¹¹⁷ However they often form a crucial part of the debate on public interest issues. We believe that such opinions should qualify for the defence, provided they are clearly recognisable as only representing the author’s opinion; and

116 Further, we note that any publication relating to a matter of public interest that has been published by a person who was acting responsibly may benefit from the so-called Reynolds defence, as reformed by clause 2 of the draft Bill.

117 See the observations of Lord Phillips in *Spiller* at para 114.

- f) **The vague reference to “privilege” must be clarified to make it clear that this term is confined to the absolute or qualified privilege which presently attaches at common law or by statute to the fair and accurate reporting of various types of public proceedings or notices.** The Bill is unclear as it stands and is an invitation to further litigation as to what it means. More fundamentally it would, read literally, protect comments expressed on wholly false statements contained in private communications where publisher and recipient have a common law defence of qualified privilege based on a reciprocal duty and interest. We do not believe the MoJ intended this result.

Clause 5: Privilege

70. **Qualified privilege should be extended to fair and accurate reports of academic and scientific conferences and also to peer-reviewed articles appearing in journals.**

Clause 6: Single publication rule

71. **The single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year. It should be clarified that the simple act of making a paper-based publication available on the internet, or vice versa, does not in itself amount to republishing in a “materially different” manner.**

Clause 7: Action against a person not domiciled in the UK or a Member State etc

72. **The Bill should make clear that residents in England and Wales may sue in this jurisdiction in respect of publication abroad provided there has been serious and substantial harm suffered by them. In particular, this section should not be applicable to residents of England and Wales who wish to sue in respect of publication abroad where there is permission under the current law. The clause should be confined to foreign parties using English courts to resolve disputes where the principal damage has not been suffered here. In line with the Lord Lester Bill, the courts should be required, when determining this issue, to assess the harm caused in this country against that caused in other jurisdictions.**

Clause 8: Trial to be without a jury unless the court orders otherwise

73. **There should be added provisions setting out the circumstances in which a trial by jury may be ordered. These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake.**

3 Consultation issues

Early resolution and cost control

Introduction

74. As outlined in Chapter 1, the early resolution of libel claims is both desirable in itself, to limit any unjustified damage to reputation, and essential to the critical task of reducing the unreasonably high costs involved. Changes to legal procedures, whilst not a matter for the Bill itself, are nonetheless required to fulfil this task and are rightly a key part of the Government's consultation exercise. This section considers the limitations of existing procedures for early resolution, examines the Government's proposals in this respect, which we believe would go some way to addressing the problem, and proposes a new framework for the handling of defamation claims, based upon the presumption that other means of dispute resolution should ordinarily be attempted before going to court. Some of these changes may require amendments to the rules governing civil procedure (the Civil Procedure Rules).

The scale of the problem

75. The full costs of libel actions are not always disclosed, which makes it difficult to obtain reliable statistics. There are usually between two and three hundred cases started each year,¹¹⁸ of which only a handful ever reach a final trial at the High Court. Senior members of the judiciary emphasised that a high proportion of cases were already resolved at an early stage and did not appear to view early resolution as a priority.¹¹⁹ This perspective fails to recognise that even in cases which are resolved before they reach trial at the High Court, costs for a single party can amount to hundreds of thousands of pounds.¹²⁰ The Jackson Review estimated that damages awarded are unlikely to average even £40,000, so it is very unlikely that this sum would come close to covering the costs of most libel actions (other than those which are quickly disposed of by the offer of amends procedure). Subject to Conditional Fee Agreements (which we discuss separately¹²¹), taking legal action for libel is well beyond the means of most people, and successful claimants face the strong likelihood of being significantly out of pocket.¹²² Those who are unjustly threatened with legal proceedings often face the stark choice between offering an undeserved settlement and financial ruin. In these circumstances, it is understandable—but wholly unsatisfactory—that many potential claimants and defendants are unwilling to risk the cost of legal action in defence of their reputation or right to free speech.

118 Jackson Report, ch 32, para 2.11.

119 Q 615 [Mr Justice Tugendhat]

120 For example, Dr Simon Singh ran up costs of £250,000 in a case lasting 3 years which was settled (in his favour) before reaching full trial, Vol II, p403.

121 For most, legal action is only a realistic option because of the possibility of recovering all costs via Conditional Fee Agreements and After the Event Insurance, as discussed in paras 88–9.

122 Dr Simon Singh states that following his successful defence against the British Chiropractic Association, he found himself £100,000 out of pocket, Vol II, p393.

Limitations of existing means of reaching early settlement

76. There are a number of legal options designed to help those who believe they have been defamed to avoid expensive court action. Some of these appear to work more effectively than others, as indicated below.

- **Alternative dispute resolution.** The Pre-Action Protocol for Defamation, which sets out how both parties should conduct the initial stages of any case, encourages the parties to consider whether some form of alternative dispute resolution procedure would be more suitable than litigation. The Protocol is criticised by the Jackson Report for failing to ensure that a claimant specifies the nature of the complaint in sufficient detail, thereby undermining the chances of early resolution. The Protocol also requires the court to have regard to any failure to follow it when determining costs.¹²³ In practice, the Protocol is not always followed and failure to adhere to it is rarely, if ever, punished by adverse financial consequences.¹²⁴
- **Early determination of meaning.** A judge may make a determination of meaning at an initial hearing, which may lead to early resolution in many cases, but may only presently do so if trial by judge alone has been agreed or there is no realistic prospect of a trial by jury being ordered. This is often a difficult matter to assess at an early stage, which undermines the prospects for early resolution.¹²⁵
- **Offer of amends.** A defendant who has made an honest mistake or is unable or unwilling to defend a libel claim may make an offer of amends,¹²⁶ which requires publication of an apology and the payment of compensation and costs.¹²⁷ This procedure is frequently used and appears to work well.¹²⁸
- **Summary disposal procedure.** This is another statutory procedure¹²⁹ that allows a judge to dispose of a case when either party has no realistic chance of success. The judge can order the publication of a correction or apology and award damages of up to £10,000. In practice, this procedure is seldom used, possibly because other procedures are available.¹³⁰
- **Active case management.** Judges have wide powers to manage a case as it moves towards trial. They may limit disclosure, order the trial of some issues before others, and reduce the pleaded issues where that fits the overriding objective. Weak case management was a frequent complaint in the evidence we received, with a lack of determination on the part of judges (and often the parties) to seek swift resolution cited as a contributory factor. In view of the lack of action up to now, there seems to be scope for much more robust case management, although this will

123 Pre-Action Protocol for Defamation, para 3.7.

124 Early Resolution Procedure Group, *Media Disputes & Civil Litigation Costs*, December 2010, para 4.3.5.

125 See paras 22–25 for discussion of jury trials.

126 Under section 2 of the Defamation Act 1996.

127 Section 2(4)(c) refers to “compensation (if any)”, but in practice compensation is invariably paid.

128 Ministry of Justice, *Report of the Libel Working Group*, March 2010, p 35.

129 Under sections 8–12 of the Defamation Act 1996.

130 Cm 8020, para 133

undoubtedly be easier once jury trials are no longer a possibility in most cases.¹³¹ A pilot of new costs management procedures was established in 2009 and is now due to conclude in the autumn of 2011.

- **Summary judgment and strike-out powers:** The courts have powers to dismiss a claim or a defence (or parts of either) in clear cases.

It was clear from the evidence we received that the way these procedures currently operate does not provide reasonable access to justice for all. There is agreement that significant reform of procedures is required in order to achieve this goal.

The Government's proposals

77. The Government's proposals on early resolution were informed by the report of the Early Resolution Procedure Group¹³² and the Jackson review of civil litigation costs. The proposals envisage all defamation cases being channelled through a new process which allows for key issues to be determined at an early a stage as possible. The key issues involved are: substantial harm; meaning (what the actual meaning is and whether this meaning is defamatory); and fact/opinion (whether the words in question are a statement of fact or an opinion—central to the honest opinion defence).¹³³ The Government consultation suggests that other issues might also be capable of determination at an early stage. These are:

- Public interest: whether or not the matter is one of public interest, which affects the defences available; and
- Privilege: whether the publication is protected by absolute or qualified privilege (at common law or by statute).

As indicated in paragraph 22, some of these issues may currently fall to be settled by a jury, so preventing early determination by a judge. **We agree with the Government's intention of promoting early resolution by allowing the judge to determine key issues in question at an initial hearing—within a few weeks, certainly not months—and believe that this will go a significant way towards improving the chances of early resolution.**

78. The Ministry of Justice acknowledges that its proposals have not yet been fully developed and translated into provisions in the draft Bill or potential changes to the Civil Procedure Rules. For example, it is prepared to “assess developments” relating to the use of alternative dispute resolution.¹³⁴ The Government seems to envisage a two-stage process involving an early oral hearing where the judge determines the substantial harm test. If passed, this is rapidly followed by an initial case management hearing to determine other key issues.¹³⁵ However, there will still be potentially large costs to both parties incurred in preparing for initial hearings on substantial harm and then the case management hearing.

131 Q 486 [McNally], Q 488 [Clarke], Q 532 [Scotland]; Jackson Report, ch 32, paras 6.3–4

132 This Group, comprising of senior practitioners in the field of media law, reported in December 2010. Its report is available at http://www.carter-ruck.com/Documents/Early_Resolution_Procedure_Group_Report.pdf

133 See Annex D of the Government's consultation document (Cm 8020) for further details of the proposals.

134 Letter to Committee from Lord McNally, dated 28 June 2011, Vol II, p423–4.

135 As above, p421–3.

This creates the opportunity for more wealthy parties to use rising costs as a weapon. **The changes to procedures proposed by the Government are largely a tightening up of existing mechanisms: they cannot be seen as radical and do not go far enough towards reducing costs to the extent that legal action will be realistically accessible to the ordinary citizen.**

A new approach

79. We want to see the development of a culture in which expensive legal action is the last rather than the first resort. We believe that a tougher approach is required to ensure that the potential for early resolution is properly explored in all cases. There should be straightforward alternative means of dispute resolution which form the starting point for any complainant, unless there are exceptional reasons for going directly to court. The advantages of using these alternatives to the court should be sufficient to ensure that a far smaller number of claims ever reach court in the first place, never mind proceed to full trial. The approach we outline below is based upon some elements of existing procedures, as improved by the Government's proposals, and some new ideas that have emerged from the evidence we have gathered. **We propose an approach which is based upon strict enforcement of the Pre-Action Protocol governing defamation proceedings, and has three elements: a presumption that mediation or neutral evaluation will be the norm; voluntary arbitration; and, if the claim has not been settled, court determination of key issues using improved procedures. We deal with each of these elements in turn.**

Initial stages of action: mediation or evaluation

80. In a great many cases, statements that are regarded as defamatory turn out to be based upon mistaken facts or assumptions, or are interpreted as having a different meaning to the one intended, or are meant as expressions of opinion but can arguably be interpreted as statements of fact. In such cases, a simple phone call can be enough to produce a suitable correction or clarification and the case goes no further. It should often be possible to formulate an apology, which, while not conceding the claimant's case as necessarily correct, withdraws the sting attributed by the claimant to the words. Often, the longer a complaint remains unresolved, the more likely it is that costs may become a stumbling block to settlement. These negotiated settlements are used all the time, along with other means of alternative dispute resolution. Many issues would be resolved if more newspapers devoted columns to the publication of corrections and apologies and more organisations made public apologies or retractions when they have made potentially libellous statements in error. The Press Complaints Commission mediates in some such cases of dispute but there are concerns that it is not as effective as it could be and does not cater for broadcasters and other platforms of publication.

81. The evidence we have received indicates that individuals and organisations, or their legal advisers, are not always willing to engage meaningfully in efforts to resolve disputes in this type of constructive and low key manner. We believe that some solicitors for both claimants and defendants are over-confrontational in correspondence at these crucial early stages. The threat of court action, however empty, is enough for many to give way, regardless of the merits of their case. Whereas newspapers editors might listen to reasoned requests from wealthy or litigious individuals, large companies and politicians, they are

perhaps less likely to engage so constructively to complaints from ordinary citizens. In many situations, a publisher may correctly identify the risks of court action as low and refuse to engage constructively to resolve a complaint in the knowledge that there is no requirement to do so. **To prevent this type of game-playing, the courts should ensure that any failure to comply with the terms of the Pre-Action Protocol could incur significant cost penalties.**

82. We believe that ordinarily the first step following the initial exchange of letters under the Pre-Action Protocol should (in the absence of an offer of amends) be mediation or assessment by a suitably qualified third party, known as “early neutral evaluation”.¹³⁶ Mediation could take place under the umbrella of existing bodies¹³⁷ or a designated service established by the Government. We do not wish to be too prescriptive but, in principle, **the mediation process must be swift, inexpensive and resistant to delaying tactics. To counter this latter possibility, any failure to engage constructively with the process should be punished if and when it comes to the awarding of costs. If there has been no mediation or neutral evaluation, the judge should have power to order it at the first hearing in the case.**

Arbitration

83. There will inevitably be some cases which do not prove possible to resolve by mediation or early neutral evaluation. Rather than such cases heading automatically to court, careful consideration should always be given to pursuing the option of voluntary independent arbitration. Arbitration can have a number of advantages over court proceedings. Arbitrations can be arranged and resolved more quickly than court proceedings. The parties can choose which issues to seek to refer to arbitration and have discrete issues determined in advance of mediation if they wish. In some cases, the resolution of one or two issues at the outset might help a mediation to resolve the whole case. Parties can also choose what the procedures are to be, for example, whether or not to have an oral hearing. The decisions of arbitrators are generally appealable only in very limited circumstances. It is up to the parties to agree on a choice of arbitrator—or an appropriate institution to appoint one, if this proves difficult. Generally, proceedings in arbitration are confidential, which is often useful in defamation cases, where the claimant in particular does not want the damage caused by the original publication exacerbated by further publicity. Finally, arbitration can save money, because although the parties have to pay the arbitrator’s fees, the parties can limit the expense of the arbitration by carefully defining particular issues to be referred or by adopting streamlined procedures. Arbitration can bring access to justice within the grasp of the ordinary citizen (especially important should Conditional Fee Agreements in their current form be abolished) and may be vastly cheaper than a single contested hearing in full legal proceedings.

84. We see value in there being a range of effective arbitration options available. We heard a suggestion from editors that newspapers would be open to a rapid and informal way of settling disputes involving arbitration.¹³⁸ They pointed out that newspapers, particularly

¹³⁶ Mediation involves a third party without knowledge of the subject matter to facilitate an agreement that must be reached between the parties; early neutral evaluation involves an expert third party (eg a judge or senior barrister), who can give an independent view of the merits of both sides’ case. This mechanism is already used in commercial and family law.

¹³⁷ Such as the Civil Mediation Council, for example.

¹³⁸ Q 240 [Rusbridger] [Johnston]

local ones, did not have the resources to defend expensive libel claims in the courts. There may be a case for a new voluntary forum or service being established and funded by the media. Such a forum would be more effective if it covered other communication platforms too. We heard some, though not universal, support for this idea.¹³⁹ **We encourage the Government to explore further the development of a voluntary, media-orientated forum for dispute resolution in the context of the current review of the regulatory regime governing the media.**¹⁴⁰

85. We recognise that it is an established right under the ECHR of any individual to seek redress in the courts and this must be preserved.¹⁴¹ It is possible, whilst respecting this right, to encourage settlement by alternative means which are more readily available to ordinary citizens. **Arbitration represents a cost-effective alternative to the courts, and helps to reduce the impact of any financial inequality between the parties. The financial and other incentives to use arbitration must be strengthened as far as possible.**

Proceedings reaching court

86. With an approach based upon on compulsory mediation or early neutral evaluation, with arbitration as a further option, we believe that even fewer cases would involve full court proceedings than do so presently. The removal of trial by jury, save for exceptional cases, combined with the early determination of key issues, will promote swifter resolution in court. Even these reforms will not necessarily prevent those cases going to trial from being prohibitively expensive. **To bring costs down further, more radical changes to the way in which our courts operate—not just in defamation cases—would need to be contemplated. Some suggestions include the application of maximum hourly rates, mandatory capping of recoverable costs, paper hearings with limits on written submissions and changes to the Conditional Fee Agreement regime.**¹⁴² Such issues extend well beyond our brief. Nevertheless, we recommend that the Government gives serious consideration to these and other measures, which are essential if court costs are to be attacked in a more radical and effective way. **In the meantime, we believe that more aggressive case management can help to minimise costs, if it is applied fairly and consistently. Courts should have the power to determine key issues which stand in the way of early determination.** As we mention in relation to the harm test, we recognise that, to some extent, the early determination of such issues may result in the “front-loading” of legal costs, but in our view the overall benefits of early resolution outweigh this potential downside.¹⁴³ **We recommend that the Ministry of Justice and the judiciary take measures to ensure that judges personally and consistently manage defamation cases in a robust manner that minimises delays and costs incurred by both parties.**

139 Q 189 [Rusbridger], Vol II, p202

140 The terms of reference of the Leveson inquiry, established in July 2011, include press behaviour and regulation.

141 Article 6 of the ECHR. The requirement for compulsory mediation does not breach this right because both parties still have the right not to settle and take the matter to court.

142 See para 88 and, for example, the consultation response of the Media Lawyers Association in relation to Civil Litigation Funding and Costs in England and Wales, together with *Re-framing Libel: A practitioners perspective*, by Hugh Tomlinson, paras 49–52 (available at <http://reframinglibel.com/2011/03/17/reframing-libel-a-practitioners-perspective/>).

143 Law Society, Vol III, p89

Specialist or county courts

87. Some witnesses argued that costs would be reduced if libel cases were generally dealt with by county courts rather than the High Court.¹⁴⁴ Others favoured the establishment of specialist libel courts or tribunals, in which specialist judges might be able to provide swifter justice.¹⁴⁵ We considered these options carefully. Our recommendations stem from our core principles of reducing costs and increasing accessibility. Once our proposals for clarifying and simplifying the law are implemented, with jury trials in libel cases a rarity, and streamlined procedures that encourage early resolution, we see no reason why many smaller defamation cases should not be heard in county courts. We accept that the most serious cases (and any defamation jury trials) will still merit being tried by specialist High Court judges in London. However, with some appropriate training, we see no reason why there could not be a county court judge designated to hear defamation cases in most major county court centres in the regions. The availability of county courts to hear defamation cases, particularly outside London, should increase accessibility for ordinary citizens and would, in many cases, reduce costs as well.¹⁴⁶ The Ministry of Justice should implement a pilot scheme to determine how this proposal might work in practice.

Reform of civil litigation costs and access to justice

88. The costs of pursuing and responding to libel claims will be affected by the implementation of broader reforms aimed at making the costs of civil litigation more proportionate, which follow a report from Lord Justice Jackson.¹⁴⁷ The proposals focus on the cost of Conditional Fee Agreements (CFAs) - often known as “no win, no fee” agreements. These CFAs were originally introduced in the 1990s in order to improve access to justice for those of ordinary means. Whilst they have achieved this,¹⁴⁸ a side-effect has been a substantial increase in costs, as CFAs may involve a “success fee” charged by the winning side’s lawyers of up to 100% of their costs, potentially doubling the costs of libel action for a losing party. In order to protect against the risk of incurring liability for the other side’s costs (if the case is lost), most parties on a CFA presently take out insurance, known as “after-the-event” or ATE insurance.¹⁴⁹ The premiums for this insurance are also liable to be charged to the losing party. The Jackson Report recommended that success fees and the cost of ATE insurance should no longer be recoverable from the losing party, while putting forward alternative proposals.

89. We are concerned that defamation law will become even less accessible to the ordinary citizen because the Government does not plan to apply to defamation all Lord Justice Jackson’s proposals that protect access to justice. For example, in respect of personal injury

144 Libel Reform Campaign, Vol II, p59 and p82

145 Q 424, Vol II, p374; Sarah Jones of the BBC cited the example of the Patent County Courts for the resolution of intellectual property disputes.

146 The availability of county courts for defamation cases would also mean that the applications on paper for take-down and leave-up orders considered at para 104 below could be made by claimants and defendants respectively to county courts in their region.

147 The Jackson Report, *Reforming Civil Litigation Funding and Costs in England and Wales*, was published in January 2010; the Government’s response was published in March 2011, Cm 8041.

148 The argument is made that CFAs have been exploited by those able to pay their costs, and encouraged the development of a “compensation culture”. See Jackson Report and Government Response, Cm 8041, March 2011, for a review of the arguments.

149 Dr Simon Singh, Appendix 1, Vol II, p397. The total costs incurred by the winning party are not always recovered.

claims, there will be a cap on the amount that can be charged by lawyers as a success fee of 25% of the damages awarded.¹⁵⁰ This cap does not apply to other civil claims, leaving the existing costs associated with 100% success fees in place. The Government's proposal to increase by 10% the level of general damages payable in civil cases is designed to go some way towards helping parties to pay for their own costs and to meet any success fee if they win. There is also the argument that parties are likely to take greater care over incurring costs when they are paying the costs themselves. However, we do not believe that the 10% increase in damages will be enough to make a difference, given that the average level of damages in defamation cases is no more than £40,000, and costs tend to be in measured in hundreds of thousands when a case goes to court. The mechanism recommended by Lord Justice Jackson to protect the less well-off—known as “Qualified One Way Costs Shifting” (QOCS)—will also not be available in defamation cases under the Government's proposals. This mechanism ensures that a claimant does not risk paying the costs of the defendant if the claim fails, unless they can afford to do so or have themselves acted unreasonably during proceedings.¹⁵¹ We consider that the application of this form of protection to defamation cases, as recommended by Lord Justice Jackson, may go some way to towards addressing the financial inequality that often exists. **It is outside our remit to explore the impact of the Government's separate proposals on civil litigation costs reform in detail. Nonetheless we are sufficiently concerned about them to ask the Government to reconsider the implementation of the Jackson Report in respect of defamation actions, with a view to protecting further the interests of those without substantial financial means.**

Conclusions on procedural reform

90. We do not believe that the proposals the Government has brought forward so far will, in themselves, deliver the improvements to libel proceedings so as to make them genuinely within the grasp of the ordinary citizen. We have set out a new, three-tiered approach, based upon our core principles, designed to give everyone a realistic chance to take action if they think they have been defamed and to resist proceedings if they believe they have a valid defence. Our proposed approach seeks to take libel disputes, for the most part, out of the courts and into rapid, inexpensive, alternative means of resolution. Access to the courts must be preserved, but as a last, not a first resort. There will be penalties for those indulging in legal game-playing and delaying tactics.

91. The Government will need to consult the judiciary on how best to implement these changes but it is ultimately up to Ministers to ensure that effective action is taken. While the drafting of the Civil Procedure Rules is the responsibility of the judiciary¹⁵² we note that the Lord Chancellor has power effectively to direct the Committee to make rules to achieve specified purposes.¹⁵³ **We recommend that the Ministry of Justice prepares a document setting out in detail the nature of the rule changes required to ensure that the Civil Procedure Rule Committee will implement the procedural changes we recommend in**

150 Other than those awarded for future care and loss. See Government Response, Cm 8041, para 8.

151 Unreasonably includes acting fraudulently and frivolously. See Government Response, Cm 8041, para 11.

152 Specifically, the Civil Procedure Rule Committee.

153 Under section 3A of the Civil Procedure Act 1997, inserted by the Constitutional Reform Act 2005, section 15(1) and Sch 4, para 266.

this section of our Report. This document should be published at the same time as the Bill.¹⁵⁴

Publication on the internet

Introduction

92. The internet has fundamentally changed the way that we communicate. It has created a new online world in which anyone can legitimately share information, engage in debate and express their views. But, at its worst, it has also created a platform on which people can break the law and cause harm, including by making defamatory statements. Our law of defamation has not been reviewed since the internet came into widespread use. This has led to the Ministry of Justice consulting on whether the law needs to be changed or clarified in the way that it applies in this setting.

93. We have heard that practical difficulties mean relatively little, if anything, can be done to regulate the worldwide web in the absence of international agreement.¹⁵⁵ **We acknowledge the challenges that any national legislature faces when acting alone in relation to a global issue but do not regard these as an excuse for inaction.** Our inquiry has revealed broad agreement that the law of defamation should in principle apply to publications on the internet in the same way that it does to other more traditional forms of media. We agree that the internet cannot be exempt from the law of the land, and that the rule of law should apply to the fullest extent possible online. We nonetheless recognise that the law needs to take account of various distinct challenges that arise.¹⁵⁶ It is these issues we have sought to address, mainly by making new proposals covering two areas. **Specifically, we propose:**

- a) **A new notice and take-down procedure to cover defamation in the online environment; and**
- b) **Measures to encourage a change in culture in the way we view anonymous material that is user-generated, including via social media.**

94. We start this section by briefly considering two aspects of the draft Bill that should help to address defamation on the internet, namely the substantial harm test and the single publication rule.

The substantial harm test and the internet

95. When people are harmed by a defamatory statement it makes no difference to them whether it happened online or offline. Ultimately, defamation should be treated as defamation, irrespective of the setting. Nonetheless, many derogatory and mocking statements on blogs and social networking sites may be read casually, remain fleeting in their impact and be given limited credence by readers when compared, for example, to

¹⁵⁴ It could take the form of a draft notice to be given by the Lord Chancellor to the Civil Procedure Rule Committee.

¹⁵⁵ Q 130 and Q 132 [Christie-Miller]; Professor Ian Walden, Vol II, p314.

¹⁵⁶ Q 508 [McNally and Clarke]; Q 512 [Hunt]; Professor Ian Walden, Vol II, p312.

material published by reputable media organisations.¹⁵⁷ Further, in many online situations the victim may be in a position to reply rapidly by rejecting the criticism that is made, and the publisher may also promptly withdraw, amend or apologise for what was said. We intend these kind of considerations to be given due weight when determining whether online material has caused serious and substantial harm. There is already some judicial support for this approach.¹⁵⁸ If this test is to serve its intended purpose then it must be applied rigorously in relation to casual internet publications.

The single publication rule and the internet

96. A defamation claim must be brought within one year of the relevant material being published to prevent the publisher facing open-ended liability for what was said in the past.¹⁵⁹ This straightforward and widely accepted principle does not operate effectively in practice due to what is known as the multiple publication rule, as explained in paragraph 55. In the online setting, it means that every time an article is viewed it is treated as a fresh publication with its own one year limitation period. In effect, it exposes a publisher of archived online articles to indefinite libel claims. We have already expressed our support for the proposed single publication rule and recommended that it be extended.¹⁶⁰ This should provide valuable additional protection to online publishers.

Social networking, online hosts and service providers

97. A specific issue that arose time and again during our inquiry was the legal liability of internet hosts and service providers for defamatory material that is posted by online users. There has been a substantial growth in user-generated material, which ranges from posts on social media sites like Facebook and Mumsnet to blogs and micro blogs such as Twitter, and user reviews on sites such as Amazon and TripAdvisor. These new platforms have, in effect, turned everyone into a potential publisher and massively enhanced the ability of people to express their own views, well considered or not.

98. Under the current law, online forums and hosts (who are commonly referred to as “secondary publishers” in this setting) are liable for statements made by their users (who are the authors or “primary publishers”) where they fail to take down material once they know that it may contain a defamatory allegation.¹⁶¹ Specifically, if the host or forum leaves the material online after receiving a complaint then they risk being treated as a primary publisher of the defamatory statement. They then become an attractive target for the person who was defamed due to their ability to pay substantial damages. More specifically, service providers and forums have told us that in many cases it is impossible for them to

157 This approach is reflected in a recent court decision in which it was suggested that live online discussions should be treated more like slander, or spoken defamation: *Smith v ADVFN Plc* [2008] EWHC 1797 (QB). This would mean that live online discussions should only be actionable where—in line with slander following the introduction of section 2 of the Defamation Act 1996—the words suggest the commission of a criminal offence or are likely to disparage the subject in any office, profession, trade or business.

158 *Smith v ADVFN plc* [2008] EWHC 1797 (QB); [2008] All ER (D) 335 (Jul), per Eady J.

159 Limitation Act 1980, section 4A.

160 See paras 58–9.

161 This is because the defences that are available to “secondary publishers” under section 1 of the Defamation Act 1996 and the Electronic Communications Regulations do not apply once the secondary publisher has (actual) knowledge of the defamatory material.

know whether the material is libellous given their limited knowledge of the background.¹⁶² This further encourages service providers and online forums to avoid legal liability by removing material whenever a complaint is received, leading to many entirely legitimate comments being removed.

99. A further difficulty is that once a host or site owner employs moderators¹⁶³ or a monitoring system of any kind including a flag and report system, they are at risk of losing their defence if the moderation process leads to knowledge of, and therefore liability for, material which is defamatory.¹⁶⁴ As the law stands, far from encouraging service providers to foster legitimate debate in a responsible manner and removing the most extreme material, it encourages them to ignore any dubious material but then to remove it without question following a complaint. This is contrary to the public interest and an unacceptable state of affairs. The law should set out clearly the responsibilities of service providers and encourage them to moderate public debate in line with defamation law.

100. With this in mind, **we recommend that the Government takes action by:**

- **Ensuring that people who are defamed online, whether or not they know the identity of the author, have a quick and inexpensive way to protect their reputation, in line with our core principles of reducing costs and improving accessibility;**
- **Reducing the pressure on hosts and service providers to take down material whenever it is challenged as being defamatory, in line with our core principle of protecting freedom of speech; and**
- **Encouraging site owners to moderate content that is written by its users, in line with our core principle that freedom of speech should be exercised with due regard to the protection of reputation.**

A notice and take-down procedure

101. We propose a new notice and take-down procedure, as indicated in paragraph 93, designed to provide everyone with easy access to the rapid resolution of disputes about online material. It will also help promote a culture which downgrades the credibility of anonymous online material, as discussed below.

102. We are concerned to address some of the problems facing innocent victims of defamatory material on the internet. In particular, a defamatory allegation can spread around the world far more quickly than the victim can react. Posts and blogs are also often written anonymously by users who adopt a generic username and/or email address, or make use of encryption software to mask their identity. Anonymity may encourage free speech but it also discourages responsibility, as people feel free to make abusive or untrue comments without fear of any comeback. We heard a mixed range of views about the feasibility of identifying users by seeking a court order against the host or internet service

¹⁶² Internet Service Providers' Association, Vol II, p305.

¹⁶³ A moderator works for the site to ensure that contributors operate within the site's guidelines and may, for example, remove inappropriate posts.

¹⁶⁴ Q 185 [Brett]; Q 405 [Jones]; Dr Ben Goldacre, Vol II, p380.

provider and then investigating the person’s “electronic fingerprint” to reveal who and where they are.¹⁶⁵ It is clear that even where this process leads to the defamer’s identity being known, it is not quick, cheap, or guaranteed in its outcome.

103. The challenges facing regulation of the internet contribute to what some people have described as a new “Wild West”, in which law enforcement is failing to keep pace with technology. Issues of this kind will not be solved overnight. There is, and will be, cultural change as we adapt to the use of new communication technologies. The law needs to respond to this. The precise direction of this social change is unpredictable but we believe it is possible, and desirable, to influence its development, in part through legislative reform. Specifically we expect, and wish to promote, a cultural shift towards a general recognition that unidentified postings are not to be treated as true, reliable or trustworthy. The desired outcome to be achieved—albeit not immediately—should be that they are ignored or not regarded as credible unless the author is willing to justify or defend what they have written by disclosing his or her identity.¹⁶⁶

Identifiable material

104. **Contributions published on the internet can be divided into those that are identifiable, in terms of authorship, and those that are unidentified, as described above. In respect of identified contributions, we recommend the introduction of a regime based upon the following key provisions:**

- a) **Where a complaint is received about allegedly defamatory material that is written by an identifiable author, the host or service provider must publish promptly a notice of complaint alongside that material. If the host or provider does not do so, it can only rely on the standard defences available to a primary publisher, if sued for defamation.¹⁶⁷ The notice reduces the sting of the alleged libel but protects free speech by not requiring the host or service provider to remove what has been said; and**
- b) **If the complainant wishes, the complainant may apply to a court for a take-down order.¹⁶⁸ The host or service provider should inform the author about the application and both sides should be able to submit brief paper-based submissions. A judge will then read the submissions and make a decision promptly.¹⁶⁹ Any order for take-down must then be implemented by the host or service provider immediately, or they risk facing a defamation claim as the publisher of the relevant**

165 Mark Stephens suggested that the “electronic fingerprint” of a publisher who makes defamatory allegations online can be tracked, but Jeremy Clark-Williams (Q 133) doubted whether this offers a reliable and accessible way of identifying the publisher.

166 Similarly, journalists may use social networking sites to obtain information but they would not expect unsourced messages to be reliable sources of accurate information for the purposes of broadcast or publishing. See, for example, “Enfield. Not what you’d think if you relied on Twitter”, *The Times*, 9 August 2011.

167 The notice would be short and must explain that the material has been challenged but need not include detail. This approach protects the reputation of the complainant and warns readers that repetition may be defamatory, but avoids the expense and delay of court proceedings. We would expect the host or provider to publish clear instructions for people who want to obtain a defamation notice and to provide this service without charge.

168 This is broadly in line with the approach that is adopted in Spain.

169 The High Court does not have the resources to hear a large volume of take-down applications and it would not, in any event, be a sensible use of a senior judge’s time. In line with our proposals on early resolution, take-down applications should be decided by a specialist judge in the county court.

statement. The timescale would be short and the costs for the complainant would be modest.

Unidentified material

105. In order to promote the cultural change we have outlined above, **we recommend that any material written by an unidentified person should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves, in which case a notice of complaint should be attached. If the internet service provider believes that there are significant reasons of public interest that justify publishing the unidentified material—for example, if a whistle-blower is the source—it should have the right to apply to a judge for an exemption from the take-down procedure and secure a “leave-up” order.**¹⁷⁰ We do not believe that the host or service provider should be liable for anonymous material provided it has complied with the above requirements. If a person who has been defamed can go on to establish the identity of the author (with the help of the courts, online host or service providers) then they may take action against the author in order to pursue a legal remedy for the harm that they have suffered. Where this is not possible, we believe that the law should provide that ordinarily internet material from unidentified sources may not be relied upon by a defendant or claimant in defamation proceedings. Any host or service provider who refuses to take-down anonymous material should be treated as its publisher and face the risk of libel proceedings, subject to the standard defences and our proposals relating to leave up orders. It is for the Government to make clear in the Bill any exceptional circumstances in which unidentified material should have evidential value for the purposes of defamation proceedings. We do not pretend that we are advancing an ideal solution, still less an instant one, but promoting cultural change is an achievable goal that will minimise the damage inflicted by the mischievous and the malicious. Our aspiration is that, over time, people will pay less attention to and take less notice of material which is anonymous.

106. This two-stage procedure should apply equally to online sites that are moderated and those that are not. This is necessary to correct the existing disincentive to online hosts to moderate sites.¹⁷¹ To achieve this, the Government will need to reform the Defamation Act 1996 to the effect that secondary publishers—such as internet hosts or service providers—shall not be treated as becoming liable for allegedly defamatory statements solely by virtue of having moderated the material or the site more generally. Liability should be determined by the way in which the host or service provider responds to a request for a defamation notice or a take-down order.

107. **The Government needs to frame a coherent response to the challenge of enforcing the law in an online environment where it is likely to remain possible to publish unidentified postings without leaving a trace. As part of doing so, the Ministry of Justice should publish easily accessible guidance dealing with complaints about online material. We recommend that the Government takes the necessary steps to implement the approach we outline.**

¹⁷⁰ The procedure for such an application would be paper-based and similar to that for an application for a take-down order.

¹⁷¹ As set out in para 99.

Corporations

108. The Ministry of Justice is consulting on the right of corporations¹⁷² to sue for defamation. At present, a corporation can bring a legal claim where a defamatory statement is said to harm its trading or business reputation.¹⁷³ The MoJ and several of our witnesses emphasised that corporations can suffer serious injury when they are defamed and, some witnesses stated that as a result corporations should continue to be protected by the law without new restrictions being introduced.¹⁷⁴ In the worst case, for example, a false report that a corporation is exploiting child labour, recklessly harming the environment, or carelessly producing products that are unsafe, can weaken or even destroy the business. This can lead to redundancies and financial losses for anyone who trades with, or invests in, that corporation, while leaving less choice for consumers.¹⁷⁵ Moreover the resulting financial loss is not recoverable by individual employees or directors, even if they are also defamed.

109. In contrast, we heard recurring evidence from other witnesses, including legal representatives and non-governmental organisations that publishers are routinely and unfairly threatened with libel proceedings by corporations who do not want negative reviews or sensitive information to enter the public domain.¹⁷⁶ We have heard that this leads to publishers modifying, withdrawing, or altogether avoiding publication, which harms their freedom of speech and wider public debate.¹⁷⁷ This chilling effect is caused mainly by the high cost of defending a libel claim against a well-resourced corporation that is using expensive lawyers to pursue every available method to silence the critical publisher.¹⁷⁸ In this respect, it is the inequality of financial means between the corporation and the publisher that is at the heart of the problem.

110. There is enormous variety in the size, available resources and influence of corporations. Many multinationals and large corporations now exercise significant power and influence within society. They will routinely employ public relations advisors and often have access to the media and expensive legal teams to challenge criticism. This allows corporations to defend themselves by attacking others. It is vitally important to the public interest that their actions should be open to scrutiny and debate, particularly to uncover suspected or actual wrongdoing and abuse of power. On the other hand, many smaller corporations will not have substantial resources to defend or promote themselves, and may rely heavily on the strength of their commercial reputation to continue trading. Irrespective of their size and available resources, all corporations are different from individuals in that they do not have feelings. The courts already take this into account

172 Our discussion of corporations in this section includes all types of non-natural legal person (e.g. limited liability partnerships, public and private companies), except where we make it clear that our recommendations are more narrowly targeted.

173 *Jameel v Dow Jones* [2005] EWCA Civ 75; [2005] QB 946; Note: a public authority that is trading as a corporation is subject to the rule in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011 and may, in consequence, be unable to bring a libel claim.

174 Q 536 [Straw]; Q 536 [Falconer]; Q 537 [Scotland]; Q 317 [Mackay].

175 See Lord Bingham in *Jameel*, above, at paras 20, 23–25.

176 Q 97 [Stephens]; Dr Wilmshurst, Vol III, p 21 and his article, *The effects of the libel laws on science—a personal experience*, *Radical Statistics*, Issue 104, p13–23; *Which?*, Vol II, p246–247; *Mumsnet*, Vol II, p263–264 and p267–268.

177 See the examples cited by the Libel Reform Campaign, Vol II, p83–84.

178 See, for example, the evidence of Dr Wilmshurst, Vol III, p21 and his article, *The effects of the libel laws on science—a personal experience*, p 13–23.

when assessing damages to be awarded to corporations, yet it does not follow that corporations should in other respects have the *same* rights as individuals to sue for defamation.¹⁷⁹

111. A number of witnesses called for a ban on defamation claims by corporations. Others advocated the Australian approach under which statutory corporations employing ten or more people cannot sue in defamation, instead being left with alternative remedies such as malicious falsehood.¹⁸⁰ The Australian prohibition does not apply to corporations which do not trade for profit, including charities and non-governmental organisations. The ban is proving effective at reducing the “chilling effect” by enabling publishers, including the media, to report more freely on the activities of corporations, although to what extent it has encouraged irresponsible publications is difficult to assess.¹⁸¹ It would be helpful if the Ministry of Justice, and in due course Parliament, took time to study the perceived advantages of the Australian approach. Nonetheless, it is clear that there are objections to this option. We are concerned that there will be circumstances where even a large corporation should be entitled to seek redress in the courts for what is otherwise irreparable and unjustified commercial damage to its reputation with serious financial consequences. In any event the attempt to exclude large corporations by reference to criteria based solely on the size of their workforce is arbitrary and liable to lead to anomalous consequences.¹⁸² It would seem undesirable to create a situation in which a family company with a low turnover employing ten people or more cannot bring a libel claim, while a highly profitable company employing nine staff is faced with no such restriction. Lord Lester concluded that a fair dividing line cannot be drawn because any type of ban on corporate libel claims will either be under or over-inclusive.¹⁸³

112. Furthermore, the Ministry of Justice has stated that a ban in line with the Australian approach would be at risk of being incompatible with the European Convention on Human Rights.¹⁸⁴ The main concern is that corporations would not be left with adequate redress for the harm that is caused to their commercial reputation.¹⁸⁵ It has been widely doubted whether malicious falsehood provides sufficient protection given the difficulty of proving malice, which is tantamount to alleging dishonesty.¹⁸⁶ It is equally apparent that neither the MoJ nor Lord Lester views the ability of directors to bring libel claims in their own name as sufficient. An individual director or chief executive may have a right to sue

179 See *Jameel*, above, at para 20.

180 Malicious falsehood requires the claimant company to prove that the relevant statement was false, harmful and motivated by malice.

181 We are grateful to have received evidence on the implementation of the Australian law from the Law Council of Australia, Business Law Section, Media and Communications Committee, Vol III, p171.

182 In particular, there may not be a link between the commercial power of a corporation and the number of people it employs. A limit by turnover would be no better. There are also difficulties in determining how such rules should be applied to holding or subsidiary and associated companies (some of which may employ persons overseas) with scope for abuse and expensive and time consuming legal argument.

183 Vol II, p21

184 Letter to the Committee from Lord McNally, Vol II, p430–435.

185 As above.

186 Q 600 [Tomlinson]; Q 600 [Tweed]; Q 151 [Christie-Miller]; Lord Lester, Vol II, p25; Australian Media and Communications Committee, p15; Lord McNally, Vol II, p435. The tort of malicious falsehood does provide a potentially valuable ground for obtaining an injunction, where the statement is demonstrably false and where any repetition after notification of the claim would necessarily be malicious. However, it will be difficult in many cases to prove that the original publication was malicious. We note that some witnesses were persuaded that malicious falsehood provides an adequate alternative remedy: see, for example. Q 97 [Stephens]; Libel Reform Campaign, Vol II, p84; Q 404 [Jones].

for libel where they are identified as being responsible for the activity that is criticised, but that individual would not be entitled to claim for the corporation's loss. Our attention was drawn to existing competition and fair trading laws but, even if these provisions might provide a viable alternative in some situations, they do not readily protect the reputation of a corporation that is defamed by someone who is not a business rival.

113. A number of witnesses favoured an alternative approach, under which corporations could seek a declaration of falsity from the court in relation to a libellous statement but could not obtain damages.¹⁸⁷ This proposal is attractive insofar as it would help to vindicate a corporation's reputation where it is harmed by a false allegation but there are serious potential disadvantages with this approach. For instance, it would not prevent corporations using the threat of litigation to silence publishers, since the chilling expense of a libel claim would be replaced by the chilling expense of fighting a declaration, which would often be similarly costly and complex to resolve. Furthermore, a declaration would not compensate a corporation that suffers serious financial loss in consequence of a defamatory statement, and introduce a new type of remedy which is not presently available to individuals. We have already explained our reasons for rejecting a wider scale introduction of declarations of falsity for individuals at paragraph 36, including on grounds of cost.

114. Lord Lester's Defamation Bill tackled the inequality of financial means between corporations and lesser-resourced publishers by requiring all corporations to prove "substantial financial loss" or the likelihood of such loss as part of bringing a libel claim.¹⁸⁸ This approach was supported by numerous witnesses for the reason that it would help to prevent abuse of a corporation's financial strength but without removing an effective remedy for serious and unjustifiable harm to its commercial reputation.¹⁸⁹ The Ministry of Justice has stated that this type of restriction is far more likely to be compatible with the European Convention of Human Rights than a total ban, though it may potentially lead to a front-loading of costs by requiring the evidence of harm to be addressed at the outset.¹⁹⁰ We acknowledge this concern but note that proof of harm is a matter which will always arise at an early stage in libel claims once the Bill's substantial harm test is introduced. The potential for an increase in costs at the outset is outweighed by the advantage of halting claims where there is no sufficient damage. **It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss. However, we do not believe that corporations should lose the right to sue for defamation altogether.** While this would considerably strengthen the position of publishers, it would fail to take adequate account of the harm that a serious and irresponsible libel can cause to a corporation's business. Where a libel leads to serious loss, there is no adequate alternative remedy to a libel claim. Yet we do not agree with the Ministry of Justice that corporations should continue to have an unrestricted right to sue publishers. There is merit in continuing to explore the Australian approach but on balance, **we favour the approach which limits libel claims to situations where the corporation can prove the likelihood of "substantial financial loss".** This approach will provide

187 See, for example, Libel Reform Campaign, Vol II, p84.

188 Clause 11

189 See, for example, Liberty, Vol II, p236–238 and Which?, Vol II, p247.

190 Vol II, p436–438; see also *Jameel*, above, at para 26.

greater protection to freedom of speech but will not, in our view, remove necessary protection for the reputation of corporations.

115. We acknowledge concerns that corporations may find it difficult to prove *actual* financial loss.¹⁹¹ Such a narrow test would risk creating injustice for corporations that have suffered a serious libel without experiencing immediately identifiable financial harm. For this reason we endorse Lord Lester’s proposal to permit corporations to rely upon *likely* financial loss. We believe that in a serious case proof of a *likelihood* of financial loss will often be a matter of legitimate inference from the nature of the allegation and the extent of publication. **We make the following additional observations:**

- **The test of “substantial financial loss” should focus on whether there has been, or is likely to be, a substantial loss of custom directly caused by defamatory statements.** This is because the impact of a defamatory statement reaches its most serious, and hardest to mitigate, where it leads to a material reduction in customer numbers and turnover more generally;
- **In our view, neither mere injury to goodwill nor any expense incurred in mitigation of damage to reputation should enable a corporation to bring a libel claim.** The concept of goodwill is too vague and any corporation can decide to create its own mitigation costs, for instance by spending money on advertising to counter the impact of an allegedly defamatory statement. Taking these matters into account would make the test ineffectual;
- **A corporation should not be entitled to rely on a fall in its share price to justify bringing a libel claim** since this loss is suffered by its shareholders rather than the corporation itself. This appears to be settled law already; and
- **Where a trading corporation can prove a general downturn in business as a consequence of a libel, even if it cannot prove the loss of specific customers or contracts, this will suffice as a form of actual loss (albeit unquantified).**

116. There is one additional and significant restriction on corporate libel claims that we endorse: **corporations should be required to obtain the permission of the court before bringing a libel claim.** This would encourage robust and decisive action by the courts to prevent trivial and abusive litigation from being commenced at all, let alone continued for years. In deciding whether to grant permission, the court would examine whether the corporation can demonstrate an arguable case that it has suffered substantial financial harm. It could also take into account alternative means of redress available to the corporation; the size of the body and area of operation; and the proportionality of allowing the corporation to bring a claim by reference to the likely costs of the proceedings alongside the level of harm suffered by the corporation. This additional hurdle would also help to weaken the impact of what has become a widespread tactic aimed at strong-arming publishers into withdrawing publication, namely hiring expensive lawyers to send aggressive letters threatening libel proceedings imminently. Publishers who know that the corporation must face judicial scrutiny before bringing a claim may feel better protected against empty threats and more able to defend their position.

¹⁹¹ Lord McNally, Vol II, p438; Q 151 [Christie-Miller]; Law Society, Vol III, p99.

117. We have already set out our views on the importance of reducing costs in libel proceedings, including through an early resolution procedure, at paragraphs 79–86. It is important to re-emphasise, however, that **the Ministry of Justice and the courts must be determined and creative in preventing corporations from using the high cost of libel claims to force publishers into submission. The requirement for a corporation to obtain prior permission before bringing a libel claim provides the perfect opportunity to control the corporation’s recoverable legal costs before they get out of hand, whether through cost capping or otherwise. Judges must redouble efforts to make the most of their case management powers by reducing the inequality of wealth that can exist between corporations and publishers.**

118. The reasoning behind our proposals on corporations applies equally to other types of non-natural legal person that trade for profit, such as Limited Liability Partnerships. In effect, there is no practical distinction between them. However, the same cannot be said about not-for-profit corporations, such as charities and non-governmental organisations. For instance, there are many non-governmental organisations that could suffer reputational damage from a defamatory attack on the credibility of their work, but this will not necessarily have a financial impact on their resources and future capability. Similarly, we do not anticipate that a charity would commit resources to bringing a libel claim unless its failure to do so was likely to impact on its fundraising. As such, charities may be better able than non-governmental organisations to prove substantial financial loss, but we do not anticipate them being able or willing to exploit the inequality of wealth that underlies our recommendations on corporations more generally. For these reasons, **our proposal to introduce a test of “substantial financial loss” applies only to corporations or other non-natural legal persons that are trading for profit; it does not extend to charities or non-governmental organisations.** This must not, however, open the door to abuse by enabling profit-led corporations to launch trade associations for the purpose of bringing claims that, in effect, protect their commercial interests. **Trade associations that represent for-profit organisations should be covered by the new requirements that we propose.**

Formal Minutes

Extract from the House of Lords Minutes of Proceedings on 23 March 2011

Draft Defamation Bill Lord Strathclyde moved that it is expedient that a joint committee of Lords and Commons be appointed to consider and report on the draft Defamation Bill presented to both Houses on 15 March (Cm 8020) and that the committee should report on the draft Bill by 19 July 2011. The motion was agreed to and a message was sent to the Commons.

Extract from the Votes and Proceedings of the House of Commons of 24 March 2011

Draft Defamation Bill (Joint Committee)—*Resolved*, That this House concurs with the Lords Message of 23 March, that it is expedient that a Joint Committee of Lords and Commons be appointed to consider the draft Defamation Bill presented to both Houses on 15 March (Cm 8020).

Ordered, That a Select Committee of six Members be appointed to join with the Committee appointed by the Lords to consider the draft Defamation Bill (Cm 8020).

That the Committee should report on the draft Bill by Tuesday 19 July 2011.

That the Committee shall have power—

- (i) to send for persons, papers and records;
- (ii) to sit notwithstanding any adjournment of the House;
- (iii) to report from time to time;
- (iv) to appoint specialist advisers; and
- (v) to adjourn from place to place within the United Kingdom.

That Sir Peter Bottomley, Rehman Chishti, Chris Evans, Dr Julian Huppert, Mr David Lammy and Stephen Phillips be members of the Committee.—(Bill Wiggin.)

Extract from the House of Lords Minutes of Proceedings on 31 March 2011

Draft Defamation Bill The Chairman of Committees moved that the Commons message of 28 March be considered; that a Committee of six Lords be appointed to join with the Committee appointed by the Commons to consider and report on the draft Defamation Bill presented to both Houses on 15 March (Cm 8020); and that the Committee should report on the draft Bill by 19 July 2011;

That, as proposed by the Committee of Selection, the following members be appointed to the Committee:

Lord Bew	Lord Marks of Henley-on-Thames
Lord Grade of Yarmouth	Lord Mawhinney
Baroness Hayter of Kentish Town	Lord Morris of Aberavon

That the Committee have power to agree with the Committee appointed by the Commons in the appointment of a Chairman;

That the Committee have power to send for persons, papers and records;

That the Committee have power to appoint specialist advisers;

That the Committee have leave to report from time to time;

That the Committee have power to adjourn from place to place within the United Kingdom;

That the reports of the Committee from time to time shall be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee shall, if the Committee so wishes, be published; and

That the Committee meet with the Committee appointed by the Commons on Monday 4 April at 4.00pm in Committee Room 6.

The motion was agreed to.

Extract from the House of Lords Minutes of Proceedings of 23 May 2011

Draft Defamation Bill—Lord Strathclyde moved that, notwithstanding the Resolution of this House of 23 March, it be an instruction to the Joint Committee on the Draft Defamation Bill that it should report on the draft Bill by 31 October 2011. The motion was agreed to.

Extract from the Votes and Proceedings of the House of Commons of 24 May 2011

Draft Defamation Bill (Joint Committee)—*Resolved*, That this House concurs with the Lords Message of 23 May that, notwithstanding the resolution of this House of 24 March, it be an instruction to the Joint Committee on the Draft Defamation Bill that it should report on the draft Bill by 31 October.—(Mr Goodwill.)

Monday 4 April 2011

Members present:

Lord Bew	Rehman Chishti MP
Lord Grade of Yarmouth	Christopher Evans MP
Baroness Hayter of Kentish Town	Dr Julian Huppert MP
Lord Mawhinney	Rt Hon David Lammy MP
	Stephen Phillips MP

Members' interests: The full lists of Members' interests as recorded in the Commons Register of Members' Interest and the Lords Register of Interests are noted. Declared interests are appended to the report.

It is moved that Lord Mawhinney do take the Chair.—(*Rt Hon David Lammy MP*).

The same is agreed to.

The Orders of Reference are read.

The Joint Committee deliberate.

The Call for Evidence is agreed to.

Ordered, That the Joint Committee be adjourned to Wednesday 27 April at 9.15am.

Wednesday 27 April 2011

Members Present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Rehman Chishti MP
Baroness Hayter of Kentish Town	Christopher Evans MP
Lord Marks of Henley-on-Thames	Dr Julian Huppert MP
	Rt Hon David Lammy MP
	Stephen Phillips MP

The Joint Committee deliberate.

Ordered, That Andrew Caldecott QC be appointed as Specialist Adviser.

Ordered, that written evidence received by the Committee be published on the Committee's website.

The following witness is examined:

Lord Lester of Herne Hill QC.

Ordered, That the Joint Committee be adjourned to Wednesday 4 May at 9.15am.

Wednesday 4 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Marks of Henley-on-Thames	Rehman Chishti MP
Lord Morris of Aberavon	Dr Julian Huppert MP
	Rt Hon David Lammy MP

The Joint Committee deliberate.

The following witnesses are examined:

Jonathan Heaward, Jo Glanville, Evan Harris and Tracey Brown, Libel Reform Campaign; and Professor Mullis and Dr Scott.

Ordered, That the Joint Committee be adjourned to Monday 9 May at 4.00pm.

Monday 9 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Baroness Hayter of Kentish Town	Christopher Evans MP
Lord Marks of Henley-on-Thames	Dr Julian Huppert MP
Lord Morris of Aberavon	Rt Hon David Lammy MP
	Stephen Phillips MP

The Joint Committee deliberate.

The following witnesses are examined:

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 Head of Legal at the Daily Mirror; Nigel Tait, Partner, Carter-Ruck, Rod Christie-Miller, Chief Executive and Partner, Schillings Solicitors; and Jeremy Clarke-Williams, Head of the Media Libel and Privacy Department at Russell, Jones and Walker Solicitors and Duncan Lamont, Head of Media at Charles Russell LLP.

Ordered, That the Joint Committee be adjourned to Wednesday 11 May at 9.15am.

Wednesday 11 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Dr Julian Huppert MP
Lord Grade of Yarmouth	Rehman Chishti MP
Baroness Hayter of Kentish Town	
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witnesses are examined:

Alan Rusbridger, Editor of The Guardian, Philip Johnson, Assistant Editor of The Daily Telegraph and Alastair Brett, former Head of the Legal Department at The Times and Managing Director of Early Resolution.

Ordered, That the Joint Committee be adjourned to Monday 16 May at 4.00pm.

Monday 16 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Rehman Chishti MP
Baroness Hayter of Kentish Town	Chris Evans MP
Lord Marks of Henley-on-Thames	Dr Julian Huppert MP
Lord Morris of Aberavon	David Lammy MP
	Stephen Phillips MP

The Joint Committee deliberate.

Resolved, That the Joint Committee request an extension to its deadline.

Ordered, That the Joint Committee be adjourned to Wednesday 18 May at 9.15am.

Wednesday 18 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Rehman Chishti MP
Baroness Hayter of Kentish Town	Dr Julian Huppert MP
Lord Marks of Henley-on-Thames	David Lammy MP
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witnesses are examined:

Sophie Farthing, Policy Officer, Liberty, David Marshall, Senior In-House Lawyer, Which?, Charmian Gooch, Director, Global Witness and Rowan Davies, Campaigns Organiser, Mumsnet; and the Rt Hon Lord Wakeham DL and the Rt Hon Lord Mackay of Clashfern.

Ordered, That the Joint Committee be adjourned to Monday 23 May at 4.00pm.

Monday 23 May 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Chris Evans MP
Lord Marks of Henley-on-Thames	Dr Julian Huppert MP
Lord Morris of Aberavon	David Lammy MP
	Stephen Phillips MP

The Joint Committee deliberate.

The following witnesses are examined:

Nicolas Lansman, Secretary General and Mark Gracey, Chair of Content Liability Group, Internet Service Providers Association, Emma Ascroft, Head of Public and Social Policy at Yahoo! UK and Ireland and Professor Ian Walden, Head of the Institute of Computer and Communications Law in the Centre for Commercial Law Studies at Queen Mary University, London; and Tim Godfray, Chief Executive, Booksellers Association, Vicky Harris, Senior Legal Counsel, Thomson Reuters, representing the Publishers Association and Professor Chris Frost, Chair of the Ethics Council, National Union of Journalists.

The Joint Committee further deliberate.

Ordered, That the Joint Committee be adjourned to Monday 13 June at 4.00pm.

Monday 13 June 2011

Members present:

Sir Peter Bottomley MP, in the Chair

Baroness Hayter of Kentish Town	Chris Evans MP
Lord Marks of Henley-on-Thames	Dr Julian Huppert MP
	David Lammy MP
	Stephen Phillips MP

The Joint Committee deliberate.

The following witnesses are examined:

Tom Bower, author and Sarah Jones, Head of Litigation, BBC; and Dr Philip Campbell, Editor-in-Chief, Nature, Dr Simon Singh MBE, author, journalist and TV producer, Dr Fiona Godlee, Editor-in-Chief, British Medical Journal, and Dr Ben Goldacre, author, broadcaster, medical doctor and academic.

Ordered, That the Joint Committee be adjourned to Wednesday 15 June at 9.15am.

Wednesday 15 June 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Rehman Chishti MP
Baroness Hayter of Kentish Town	Stephen Phillips MP
Lord Marks of Henley-on-Thames	
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witnesses are examined:

Rt Hon. Kenneth Clarke QC MP, Lord Chancellor and Secretary of State, Ministry of Justice, Rt Hon Jeremy Hunt MP, Secretary of State for Culture, Media and Sport and Rt Hon Lord McNally, Minister of State, Ministry of Justice.

Ordered, That the Joint Committee be adjourned to Monday 20 June at 4.00pm.

Monday 20 June 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Marks of Henley-on-Thames	Rehman Chishti MP
Lord Morris of Aberavon	Dr Julian Huppert MP

The Joint Committee deliberate.

The following witnesses are examined:

Rt Hon Lord Falconer of Thoroton QC, Former Lord Chancellor and Secretary of State for Justice, Rt Hon Baroness Scotland of Asthal QC, Former Attorney General and Rt Hon Jack Straw MP, Former Lord Chancellor and Secretary of State for Justice.

Ordered, That the Joint Committee be adjourned to Wednesday 22 June at 9.15am.

Wednesday 22 June 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	David Lammy MP
Baroness Hayter of Kentish Town	Stephen Phillips MP
Lord Marks of Henley-on-Thames	
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witnesses are examined:

Desmond Browne QC, Joint Head of Chambers, 5 Raymond Buildings, Adrienne Page, Joint Head of Chambers, 5 Raymond Buildings, Hugh Tomlinson QC, Matrix Chambers and Paul Tweed, Senior Partner, Johnsons Solicitors.

Ordered, That the Joint Committee be adjourned to Wednesday 29 June at 9.15am.

Wednesday 29 June 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Baroness Hayter of Kentish Town	Chris Evans MP
Lord Morris of Aberavon	Dr Julian Huppert MP
	David Lammy MP

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 6 July at 8.30am.

Wednesday 6 July 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Rehman Chishti MP
Lord Grade of Yarmouth	Dr Julian Huppert MP
Baroness Hayter of Kentish Town	David Lammy MP
Lord Marks of Henley-on-Thames	Stephen Phillips MP
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witnesses are examined:

Rt Hon The Lord Neuberger of Abbotsbury PC MR, The Master of the Rolls and The Hon Mr Justice Tugendhat Kt, Head of the Queen's Bench jury and non-jury lists; and Sir Charles Gray Kt, Chairman, Early Resolution Group, Sir Stephen Sedley, Chair of the Alternative Libel Group and former Lord Justice of Appeal, and Rt Hon Lord Woolf of Barnes PC, former Lord Chief Justice of England and Wales.

The Joint Committee further deliberate.

Ordered, That the Joint Committee be adjourned to Monday 11 July at 4.00pm.

Monday 11 July 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Rehman Chishti MP
Lord Grade of Yarmouth	Chris Evans MP
Baroness Hayter of Kentish Town	Dr Julian Huppert MP
Lord Marks of Henley-on-Thames	Stephen Phillips MP
Lord Morris of Aberavon	

The Joint Committee deliberate.

The following witness is examined:

Ian Hislop, Editor, Private Eye.

Ordered, That the Joint Committee be adjourned to Monday 18 July at 4.00pm.

Monday 18 July 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Lord Grade of Yarmouth	Chris Evans MP
Baroness Hayter of Kentish Town	David Lammy MP
Lord Marks of Henley-on-Thames	Stephen Phillips MP

The Joint Committee deliberate.

The following witnesses are examined:

Edward Garnier QC MP, Solicitor General; and Paul Dacre, Editor, Daily Mail and Matthew Parris, journalist, The Times.

The Joint Committee further deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 14 September at 9.15am.

Wednesday 14 September 2011

Members present:

Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Baroness Hayter of Kentish Town	Chris Evans MP
Lord Marks of Henley-on-Thames	David Lammy MP
Lord Morris of Aberavon	Dr Julian Huppert MP

A draft Report is presented by the Chairman.

The Joint Committee deliberate.

Ordered, That the Joint Committee be adjourned to Wednesday 12 October at 9.15am.

Wednesday 12 October 2011

Members present:

Rt Hon Lord Mawhinney, in the Chair

Lord Bew	Sir Peter Bottomley MP
Baroness Hayter of Kentish Town	Dr Julian Huppert MP
Lord Marks of Henley-on-Thames	Stephen Phillips
Lord Morris of Aberavon	

A revised draft Report is presented by the Chairman.

The Joint Committee deliberate.

Paragraphs 1 to 24 are agreed to.

It is moved by Sir Peter Bottomley in paragraph 25 to leave out “These circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake.”

The Committee divides.

Content, 1

Not Content, 8

Sir Peter Bottomley

Lord Bew

Lord Grade of Yarmouth

Baroness Hayter of Kentish Town

Dr Julian Huppert

Lord Marks of Henley-on-Thames

Lord Mawhinney

Lord Morris of Aberavon

Stephen Phillips

The amendment is disagreed to accordingly.

Paragraph 25 is agreed to.

Paragraphs 26 to 118 are agreed to.

The Summary is agreed to.

The Appendices to the Report are agreed to.

Ordered, That the Summary of Conclusions and Recommendations be printed at the beginning of the Report.

The Committee agrees that the draft Report, be the Report of the Joint Committee.

Ordered, That certain papers be appended to the Minutes of Evidence.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No 134 of the House of Commons.

Ordered, That the Joint Committee be now adjourned.

Appendix: Declaration of Interests

Declaration of Interests

The following interests were declared:

Lord Bew declared an interest as incoming Chairman of the Anglo-Israel Association and with regard to his involvement in a legal issue with one of his history books in the Republic of Ireland.

Sir Peter Bottomley MP declared an interest as someone who has taken action for defamation or libel against one television company and four newspapers.

Rehman Chishti MP declared an interest as Deputy Chairman of the Saudi Arabia All-Party Parliamentary Group.

Lord Grade of Yarmouth declared an interest as a Commissioner at the Press Complaints Commission.

Baroness Hayter of Kentish Town declared an interest as the paid Chair of the Legal Services Consumer Panel until the end of July 2011.

Dr Julian Huppert MP declared an interest as an Officer of the All-Party Parliamentary Libel Reform Group and as an Associate of Sense about Science and the Libel Reform Campaign.

David Lammy MP declared an interest as someone who had previously worked with the *Times* newspaper's defamation team.

Lord Marks of Henley-on-Thames declared an interest as a barrister who has from time to time undertaken defamation cases and as someone who has given informal advice without charge in relation to defamation and malicious falsehood.

Stephen Phillips MP declared an interest as a Queen's Counsel in private practice but never undertaking a case involving the law of defamation.

Andrew Caldecott QC, Specialist Adviser, declared an interest as a Queen's Counsel who had appeared for many claimants and media organisations as a barrister and was likely to continue to do so—in the defamation field. He declared an involvement in the following litigation, to which reference was directly or indirectly made in the course of oral evidence:

Rath v Guardian
 Reynolds v Times Newspapers
 Spiller v Joseph
 Tesla v BBC
 El Naschie v Nature

He also declared an interest as a Member of the Early Resolution Group Committee and a prospective member of the panel of arbitrators.

A full list of Members' interests can be found at the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/> and in the Register of Commons interests: <http://www.publications.parliament.uk/pa/cm/cmregmem/contents.htm>

Witnesses and Associated Written Evidence

(published in Volume II on the Committee's website
<http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/publications/>)

Wednesday 27 April 2011

Lord Lester of Herne Hill

Wednesday 4 May 2011

Jonathan Heawood, Jo Glanville, Dr Evan Harris and **Tracey Brown**, Libel Reform Campaign
Professor Alistair Mullis, Professor and Head of the Law School, UAW, **Dr Andrew Scott**, LSE

Monday 9 May 2011

Keith Mathieson, Partner, Reynolds Porter Chamberlain LLP, **Mark Stephens**, Partner, Finers Stephens Innocent, **Marcus Partington**, Chair, Media Lawyers Association and **David Price**, David Price Solicitors & Advocates

Nigel Tait, Partner, Carter-Ruck, **Rod Christie-Miller**, Chief Executive and Partner, Schillings Solicitors, **Jeremy Clarke-Williams**, Head of the Media Libel and Privacy Department at Russell, Jones and Walker Solicitors, **Duncan Lamont**, Head of Media at Charles Russell LLP

Wednesday 11 May 2011

Alan Rusbridger, Editor, the Guardian, **Philip Johnston**, Assistant Editor, the Daily Telegraph, and **Alastair Brett**, Former Legal Director of the Times

Wednesday 18 May 2011

Sophie Farthing, Policy Officer, Liberty, **David Marshall**, Senior In-House Lawyer, Which?, **Charmian Gooch**, Director, Global Witness, **Rowan Davies**, Campaigns Organiser, Mumsnet,

Rt Hon the Lord Mackay of Clashfern KT, Former Lord High Chancellor, and **Rt Hon the Lord Wakeham DL**, Former Chairman, Press Complaints Commission

Monday 23 May 2011

Nicholas Lansman, Secretary General, Internet Service Providers Association, **Mark Gracey**, Chair of ISPA's Content Liability Subgroup, Internet Service Providers Association, **Emma Ashcroft**, Director of Public Policy, Yahoo, **Dr Ian Walden**, Professor of Information and Communications Law and Head of the Institute of Computer and Communications Law in the Centre for Commercial Law Studies, Queen Mary University of London,

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 Journalist's Ethics Council, National Union of Journalists

Monday 13 June 2011

Sarah Jones, Head of Litigation, BBC, **Tom Bower**, Author

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

Wednesday 15 June 2011

Rt Hon Kenneth Clarke MP QC, Lord Chancellor and Secretary of State for Justice, **Rt Hon Jeremy Hunt MP**, Secretary of State for Culture, Olympics, Media and Sport, and **Rt Hon Lord McNally**, Minister of State, Ministry of Justice

Monday 20 June 2011

Rt Hon Baroness Scotland of Asthal QC, Former Attorney General, **Rt Hon Lord Falconer of Thoroton PC QC**, Former Lord Chancellor and Secretary of State for Justice, and **Rt Hon Jack Straw MP**, Former Lord Chancellor and Secretary of State for Justice

Wednesday 22 June 2011

Desmond Browne QC, and **Adrienne Page QC**, Joint Heads of Chambers, 5RB, **Hugh Tomlinson QC**, Matrix Chambers, and **Paul Tweed**, Senior Partner, Johnsons Solicitors

Wednesday 6 July 2011

Rt Hon The Lord Neuberger of Abbotsbury PC MR, The Master of the Rolls, **The Hon Mr Justice Tugendhat Kt**, Head of the Queen's Bench jury and non-jury Lists

Sir Charles Gray Kt, Chairman, Early Resolution Group, **Sir Stephen Sedley**, Chair of the Alternative Libel Group and former Lord Justice of Appeal, and **The Rt Hon Lord Woolf of Barnes PC**, Former Lord Chief Justice of England and Wales

Monday 11 July 2011

Ian Hislop, Editor, Private Eye

Monday 18 July 2011

Edward Garnier QC MP, Solicitor General

Paul Dacre, Editor-in-Chief, Associated Newspapers, and **Matthew Parris**, Journalist, The Times

List of written evidence

(published in Volume III on the Committee's website
<http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/publications/>)

- 1 British Medical Association
- 2 Mr T Ewing
- 3 Dr Peter Wilmshurst
- 4 The Society of Authors
- 5 Media Law Resource Center
- 6 Canadian Lawyers Association
- 7 Professor Stephen Curry
- 8 Jonathan Seagrave
- 9 JUSTICE
- 10 The Law Society
- 11 Skeptics in the Pub
- 12 Professor Max Headley
- 13 Professor David Colquhoun
- 14 James Price QC
- 15 Nightingale Collaboration
- 16 The Campaign for Press and Broadcasting Freedom
- 17 Professor Sir Leszek Borysiewicz, Vice Chancellor of Cambridge
- 18 Brian Deer
- 19 David Powell
- 20 Professor Fancisco Lacerda
- 21 Law Reform Committee
- 22 Dr Andrew Lewis
- 23 Alex Hilton
- 24 John Gray
- 25 Media and Communications Committee of the Business Law Section of the Law Council of Australia
- 26 Ministry of Justice
- 27 Mark Warby QC
- 28 Tim Crook
- 29 The Pirate Party UK
- 30 Full Fact
- 31 Robert Dougans
- 32 Jeff Williams
- 33 Hardeep Singh
- 34 Robert Whitfield
- 35 Federation of Small Businesses
- 36 The Law Society