

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's submission to the Joint Committee on the Draft Defamation Bill

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

1. The Draft Defamation Bill (“Draft Bill”) was published as part of a Ministry of Justice consultation in March 2011. It follows a long line of calls for reform and builds on the pivotal step taken in Lord Lester’s Private Member’s Bill tabled in the House of Lords last year.¹ The Draft Bill presents for the first time in more than a century an opportunity for open and robust debate both in Parliament and amongst wider social interest groups. There is clear evidence that the current legal framework for libel is unbalanced, tipping in favour of litigants with deep pockets at the expense of those who use the media to ensure that corporations, individuals and governments are held to account for their actions. Liberty believes that the chilling effect on those who speak out in the public interest must be redressed, and this Bill goes a long way to rebalancing free speech considerations with the important aspects of privacy that defamation law encompasses.

2. Liberty believes that for far too long the balancing of the right to reputation and the right to free speech has been tipped in favour of the former. Free speech has long been recognised as being crucial to the effective functioning of a democracy and is closely intertwined with notions of fairness, freedom and liberty of the individual. Effective and responsible government is based on the ability of citizens to freely exchange ideas, criticise policy and openly disagree with each other, and, often through reportage, hold government to account. Freedom of speech then is something that the UK as the world’s oldest democracy holds protectively. The ‘chilling effect’ of defamation law is, in this sense, somewhat of an historical anomaly. It is an anomaly we hope that this Draft Bill will address.

Outline of the Bill

3. Clause 1 of the Bill imposes a new substantial harm threshold before a defamation claim becomes actionable; clause 2 provides for a defence of responsible publication on a matter of public interest; clause 3 provides for a defence of truth; clause 4 outlines a defence of honest opinion; clause 5 outlines a new framework for parliamentary privilege; clause 6 allows for a single publication rule; clause 7 provides for jurisdiction in a UK court if it is the most appropriate place in which to bring an action in respect of an allegedly defamatory statement; and clause 8

¹ The Bill was read for a second time on 9th July 2010. <http://services.parliament.uk/bills/2010-11/defamationhl.html>

reverses the presumption of the right to trial by jury in defamation proceedings. The Committee is also consulting on a number of issues which although not included in the Draft Bill are open to consideration, including the role of protection for internet service providers, early dispute resolution measures for defamation litigation and the ability of corporations to found a defamation cause of action.

Achieving a better balance

4. The law of defamation, protecting a person's right to reputation, traces its history back to the 16th century.² For the past century, the law has developed in a piecemeal fashion, with numerous attempts to reform it. In addition to the progression of the common law, there have been significant changes to the law's social and broader legal context: the advent of human rights law and the rapid expansion of the internet.

5. The impetus for reform has been steadily building for several decades.³ From the early Porter Report in 1948⁴ to the Faulks Report in 1975,⁵ to the more immediate calls for reform from the United Nations Human Rights Committee in 2008,⁶ the Ministry of Justice (MOJ) Libel Working Group⁷ and the Culture, Media and Sport Select Committee in 2010.⁸ Last year English PEN, Index on Censorship and Sense About Science, which form the Libel Reform Campaign, collected 52,000 signatures in support of reform of libel law, and English PEN and Index on Censorship published a report examining the impact of the current law on free speech.⁹ Significantly, each

² The concept of defamation, rather than the tortious action, has even earlier roots, with malicious statements in court actionable from the 14th century. A general action on the case for defamatory words was permitted by common law judges in the first two decades of the 16th century. Legal historians discovered the first writ on the plea rolls in 1507, and the first judgment was issued in 1517. See "Chapter 25: Defamation" in Baker, JH (2002) *An Introduction to English Legal History* (4th Ed) (London: Butterworths Lexis Nexis).

³ For a summary of the early reviews see the Explanatory Memorandum for the Defamation Bill, *ibid*, at para's 11 to 44.

⁴ Report of the Committee on the Law of Defamation, chaired by Lord Porter, Cmd 7536/48 (1948).

⁵ Report of the Committee on Defamation, chaired by Mr Justice Faulks, Cmnd. 5909 (1975).

⁶ UN Human Rights Committee, Ninety-Third Session *Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/CO16 (30 July 2008).

⁷ Ministry of Justice, *Report of the Libel Working Group* (23 March 2010), accessed at <http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>.

⁸ House of Commons Culture, Media and Sport Committee (24 February 2010) *Press Standards, Privacy and Libel* (Second Report of Session 2009-10, Vol. 1) (London: TSO).

⁹ See The Libel Reform Campaign (Index on Censorship, Sense About Science and English PEN), briefing on Lord Lester of Herne Hill's Private Member's Defamation Bill; and the

of the main political parties committed to review and reform of libel law in their election manifestos in early 2010.¹⁰ Most recently, in July of 2010 Lord Lester tabled a Private Members' Bill on Defamation in the House of Lords.¹¹

6. The importance of free speech cannot be underestimated. It is enshrined as the right to freedom of expression under the Human Rights Act 1998,¹² and Article 19 of the International Covenant on Civil and Political Rights.¹³ The right includes the right to freely hold opinions, and to receive and impart information. Given the “*duties and responsibilities*” which the right carries, it can be limited on enumerated grounds, including “*for the protection of the reputation or rights of others*”.¹⁴ The right to privacy is also protected by the HRA, and again this is a qualified right which allows for justified and lawful interference where the interfering measure is proportionate to a legitimate aim.¹⁵ The right to privacy has been held by both the Court of Human Rights and the UK Supreme Court to extend to a person’s reputation which “*forms part of his or her personal identity and psychological integrity*”.¹⁶

7. Where there is a conflict between the right to privacy and right to free expression, a Court is required to perform a balancing act which is built into the structure of the HRA framework:

Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. ...There is...no question of automatic priority. Nor is there a presumption in favour of one

English PEN and Index on Censorship (2009) *Free Speech is not for Sale: The Impact of English Libel Law on Freedom of Expression*. Both accessed at <http://www.libelreform.org/>.

¹⁰ See the Labour Party Manifesto at page 9:3, in which it pledged to bring forward new libel legislation “*(t)o encourage freedom of speech*” and “*protect the right of defendants to speak freely*”; the Conservative Party Manifesto at page 79, pledging to review and reform libel “*to protect freedom of speech, reduce costs and discourage libel tourism*”; the Liberal Democrat Manifesto at p 93, pledging to reform libel law to protect free speech, investigative journalism and academic writing, “*including by requiring corporations to show damage and prove malice or recklessness, and by providing a robust responsible journalism defence*”.

¹¹ <http://services.parliament.uk/bills/2010-11/defamationhl.html>.

¹² Article 10 of the European Court of Human Rights as incorporated by the Human Rights Act 1998.

¹³ Art 19(1) provides “Everyone shall have the right to hold opinions without interference” and 19(2) protects “the right to freedom of expression”. Art 19(3) provides that the exercise of these rights may be restricted only as necessary to protect the rights or reputations of others or for the protection of national security or of public order, or public health or morals.

¹⁴ Article 10(2).

¹⁵ Article 8 of the ECHR, as incorporated into UK law by the HRA.

¹⁶ Per Lord Rodger (with whom Lords Phillip P, Hope DP, Walker, Brown, Kerr and Baroness Hale agreed) in *Application by Guardian News and Media Ltd & Ors in Ahmed & Ors v HM Treasury* [2010] UKSC 1, at para 39, adopting jurisprudence of the European Court of Human Rights in *Pfeifer v Austria* (2007) 48 EHRR 175, 183 at para 35, followed in *Karako v Hungary* (Application no 39311/05) (28 April 2009).

*rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need.*¹⁷

Courts deciding a defamation case do not have the benefit of the balancing exercise inherent within the human rights legislative framework. Instead, the clear imbalance in the law of defamation which has led to the chilling effect on publication outlined above stems from out of date, complicated defences, inequality of arms issues and so on.

8. Liberty believes that the balance currently tips too far in favour of the protection of reputation at the expense of freedom of speech. Reform of defamation law is required to rebalance the scales of justice – not to place primacy on the freedom of expression at the expense of the right to privacy, but to ensure that free speech is not unnecessarily or disproportionately infringed, particularly for those who wish to publish in the public interest. Reputation is inherently connected to the human rights values of dignity and privacy and as such deserves protection. Indeed this is recognised by the Article 10 right to free expression which provides that exercise of the right necessarily imposes “*duties and responsibilities*”.¹⁸ Organisations must all be held to account for the things they say and claims made if, in particular circumstances, the words can be considered defamatory. The way the current law is structured however - outdated and with uncertain defences - means that the threat of libel is enough to force the withdrawal of publications resulting in the stifling of free speech. Our main hope then for this Bill is that it will provide the certainty which is currently lacking, reduce costs and redress this imbalance which has for so long been part of English law.

Clause 1: a test of substantial harm

9. The Draft Bill proposes a new threshold for an actionable claim in defamation. Currently a defamation claim does not need to show proof of actual damage before it will be heard by a court and harm is assumed.¹⁹ Under clause 1 of the Bill, a

¹⁷ Per Lord Hoffman in *Campbell v MGN Ltd* [2004] UKHL 22, at para 55.

¹⁸ Article 10(2) of the *European Convention on Human Rights* as incorporated into domestic law by the *Human Rights Act 1998*.

¹⁹ See paragraphs 1 to 6 of the Ministry of Justice *Draft Defamation Bill Consultation Paper* (CP3/11).

statement will not be defamatory unless its publication has caused or is likely to cause substantial harm to the claimant's reputation.²⁰

10. Lord Lester's Private Member's Bill proposes that the court must strike out an action unless the claimant shows that the publication causes or is likely to cause substantial harm to the claimant's reputation, unless in exceptional circumstances it is in the interests of justice to hear the claim.²¹ The clause in Lord Lester's Bill would be additional to the power to the general power of a court to strike out a claim. Under the Civil Procedure Rules a court may strike out a statement of claim if it discloses no reasonable grounds for bringing or defending the claim, that the statement is an abuse of process or is otherwise likely to obstruct the just disposal of proceedings, on procedural grounds following a failure to comply with a rule, practice direction or court order.²² The Draft Defamation Bill does not similarly impose an additional strike out power in its provisions; the Ministry of Justice was of the view that it is better to leave it to the courts to exercise its discretion to strike out or give summary judgment in relation to an application which may fail to show substantive harm rather than legislating to make it mandatory to strike out in certain circumstances.²³

11. Liberty welcomes the new threshold test in the Draft Bill. We believe that the first hurdle in a claim for libel should require substantial harm to be shown in order to deter spurious or speculative claims, and to stop knee jerk threats of libel at the point of publication regardless of the actual impact on a person. We would extend our support to increasing that threshold, such as by including a requirement that a case proceed only where there be a prospect of vindication, and that vindication if achieved by litigation would be proportionate to the costs of the trial, as enunciated in *Dow Jones & Co In v Jameel*.²⁴

12. Additionally, we do think it important that there be a strike out procedure as proposed by Lord Lester's Bill, in the event that the claim does not pass the initial clause 1 threshold. We also favour Lord Lester's preserve for judicial discretion in

²⁰ Clause 1 of the Draft Defamation Bill.

²¹ Clause 12 of Lord Lester's Private Members Defamation Bill. Under subsection 12(3) in determining whether there is or is likely to be substantial harm the court must have regard to all the circumstances of the case. Under 12(4) a claim may be struck out by the court of its own motion or on an application by any party to the action.

²² See Rule 3.4(2).

²³ See the Consultation Paper at para 5.

²⁴ [2005] EWCA Civ 75, per Lord Justice Phillips (as he then was), at para 69.

allowing for, in exceptional cases, claims to proceed on the basis that it is necessary in the public interest for a claim to proceed, in the rare case where the harm may, for whatever reason, be difficult to demonstrate but there is a public interest that the litigation go ahead. We imagine this will be a rare case.

A new court-based procedure

13. The Draft Bill is accompanied by a new draft procedure for defamation cases. The MoJ proposes a High Court defamation litigation procedure, which would provide for key issues to be decided at a preliminary court-based hearing early on in the claim. Key issues to be decided at that time include whether there is substantial harm (under proposed clause 1, above); what the actual meaning is of the words subject to the complaint and whether that meaning is defamatory; and whether those words are a statement of fact or opinion. Other issues which could be decided at that early hearing include whether the publication is in relation to a matter of public interest; whether publication can be defended on the basis of qualified privilege in Schedule 1 of the *Defamation Act 1996*; and the consideration of costs budgeting in appropriate cases. A judge will also have to decide at the early stage whether the case, if it does proceed, is suitable for jury or judge-only trial.²⁵ An appeal on any of these issues would lie to the Court of Appeal.²⁶

14. Considering one of the central concerns of defamation defendants, who are frequently forced to capitulate to claimants with more resources, is the often drawn out procedure for defamation trials, this new procedure is a welcome one. Liberty also encourages for the use of mediation, and we suggest that this be a mandatory part of this new procedure.²⁷ However, we do not support the concept of a specialist libel tribunal. Apart from being somewhat unrealistic in an era when court services are being drastically cut in the public spending budget, we do not see that it would lead to significant reduction of costs, and indeed may add another layer of costly appeals. Nor do we think there is evidence that there is a lack of specific judicial expertise to deal with defamation claims in the court that necessitates a specialist legal forum in which to bring libel actions.

²⁵ The reversal of the presumption for jury trial, to which Liberty objects, is discussed below.

²⁶ See Annex D of the Consultation Paper, at page 90.

²⁷ The Ministry of Justice has not included a formal requirement for mediation in their draft procedure, but notes “*this would be available as an option for the parties to use if they wished to agree a settlement in the light of the court’s preliminary findings*”. See Ministry of Justice Consultation Paper, at page 91.

The public interest defence

15. The Draft Defamation Bill incorporates three defences: (a) responsible publication on matters of public interest; (b) honest opinion; and (c) truth. Liberty is broadly happy with the formulation of the latter two defences in the Draft Defamation Bill. We address our comments specifically here to the first defence, responsible publication on matters of public interest.²⁸

16. The public interest defence is a new statutory defence based on the test developed in *Reynolds v Times Newspapers*.²⁹ Broadly, the defence allows for a full defence where the defendant can show that ‘the statement complained of is, or forms part of, a statement on a matter of public interest, and that he or she acted responsibly in publishing the statement.’³⁰ In determining if the defendant acted responsibly the court may have regard to a non-exhaustive list of factors including

- the nature of the publication and its context;
- the seriousness of any imputation about the claimant conveyed by the statement;
- the extent to which the subject matter is in the public interest;
- the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;
- whether the defendant sought to claimant’s views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;
- whether any steps were taken to verify the accuracy of the statement;
- the timing of the publication and whether it was in the public interest to urgently publish the statement;
- the tone of statement and whether it draws on suspicions, opinions, proven facts, etc.³¹

Further, a defendant will be treated as having acted responsibly if it can be shown the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person.³²

²⁸ Clause 2 of the Draft Defamation Bill.

²⁹ [1999] 4 All ER 609.

³⁰ Proposed clause 2(1) of the Draft Defamation Bill.

³¹ Proposed clause 2(2).

³² Proposed clause 2(3).

17. Lord Lester’s Bill also includes a public interest defence, which is substantially the same as the above draft clause but which also allows for a few additional elements.³³ Importantly, Lord Lester’s Bill provides that in determining whether the defendant acted responsibly in making the publication the court may have regard to all the circumstances of the case.³⁴ The latter we believe ought to be incorporated in the Bill as the context of publication can be so important – whether a statement is made in a satirical publication, a broadsheet newspaper, a report by an NGO or on an online blog, will be relevant to the consideration of responsible publication. Lord Lester’s provision provides for an important element of judicial discretion to remain in the responsible publication consideration.

18. As discussed above, one of Liberty’s primary concerns is the chilling effect on free speech on matters in the public interest, which the common law, on the basis of well-established evidence, has failed to adequately protect. The chilling effect spreads from the court room right back to decisions made not to publish on threat of libel action. Accordingly we believe that the defence ought to be available not only to journalists, but to all organisations and individuals who are actively publishing in the public interest. We understand that there have been suggestions to have a more radical public interest defence, such as making it presumptively available to any author who believes his or her opinion or inference is in the public interest. Liberty cautions against wholesale any removal of the ‘responsible publication’ element of the public interest defence. While we believe the defence ought to be as robust as possible, we also believe that the imposition of duties and responsibilities which accompanies the right to freedom of expression in Article 10 necessitates retaining the element of responsibility and a responsibility ‘test’ is a sound way to ensure that.

Jury trials

19. Under the current law a claim in defamation is a civil claim which is able to be tried with a jury under section 69 of the *Senior Courts Act 1981* and section 66(3) of the *County Courts Act 1984*. The sections provide that if a party to a libel or slander proceeding so requests it, the court is obliged to order a trial by jury, unless it can be shown that the case would require “*any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury*”. Accordingly there is, with this limited exception, a presumption in favour

³³ Clause 1 of Lord Lester’s Defamation Bill.

³⁴ Clause 1(3) of Lord Lester’s Defamation Bill.

of jury trial where it is so requested by a party to the proceedings. The Draft Defamation Bill proposes to remove this presumption, thereby overturning an important feature of defamation proceedings.

20. Clause 8 of the Draft Defamation Bill proposes that actions in libel and slander will not be heard by a jury in any case unless the court orders otherwise. Lord Lester's Private Member's Defamation Bill similarly reversed the presumption of jury trial in defamation proceedings.³⁵ Additionally, however, Lord Lester qualifies the reversal by stating that the court may order a trial by jury on application by any party if satisfied "*it is in the interests of justice to do so*".³⁶ In so deciding it is proposed that the judge has regard to all the circumstances of the case, including, but not limited to, a number of factors including whether there is a public interest in the action, the identity of any parties to the action, the extent to which early resolution is likely to facilitate settlement of the action, etc.³⁷ The Draft Defamation Bill chose not to include such a list, but that appears to be open to consultation.³⁸ The Ministry of Justice is also consulting on whether certain functions in defamation proceedings in relation to determining meaning ought to be removed from juries altogether and be determined by a judge alone at the early stages.³⁹

21. Liberty believes that juries have a particularly important function in defamation proceedings. A judge will determine primarily whether the words complained of are capable of bearing a particular meaning or meanings alleged in the statement of claim; it is for the jury to then determine what the actual meaning of the words is in the particular context of the words spoken and whether that meaning was defamatory in the way outlined in the statement of claim.⁴⁰ A jury must determine the meaning to be attributed on the basis of an objective test, that is, on the basis of what the 'reasonable reader' would understand the meaning of the words to be.⁴¹ The jury has a number of other functions, for example in the context of the justification and honest opinion defence, and in determining the assessment of damages (as directed by the judge). As liability in defamation ultimately depends on the perception of the ordinary

³⁵ Clause 14.

³⁶ Clause 15(1), (2).

³⁷ Clause 15(3).

³⁸ Draft Defamation Bill Consultation paper, at para 97.

³⁹ *Ibid*, at para 98, 99.

⁴⁰ As outlined by Hirst LJ in *Mapp v News Group Newspapers Ltd* [1998] QB 520. See also *Carter-Ruck on Libel and Privacy* (Sixth Ed) (2010) (London: LexisNexis), at 4.27.

⁴¹ See *Carter-Ruck on Libel and Privacy*, *ibid*, at 4.29.

person, it is important that the jury continues to be the rule rather than the exception in statutory provisions. Indeed as noted by the Ministry of Justice,

a number of lawyers working in the field have argued that it is important for the principle to be upheld that a jury of one's peers should be able to decide issues relating to reputation, and that this is vital for maintaining public confidence in the outcome of cases.⁴²

22. Liberty appreciates the motivation to reduce costs in jury trials and action reform that addresses the current inequality of arms problem in defamation proceedings. However we believe that the presumptive right to a jury trial is an unnecessary casualty in the overall context of this reform. The right to protect one's reputation is an important right which will, where necessary, involve court action, and litigation inevitably involves costs. It is important that the law is rebalanced to stop the chilling effect caused by threats of libel action, but rebalance will not mean an end to litigation and should not mean eradicating the important constitutional right to jury trials in defamation cases.⁴³ Indeed there is already a safeguard written into the section 69 test, which will allow for refusal of an application for a jury trial in circumstances where investigation will not be convenient to be heard by jury. In exercising judicial discretion under section 69 the courts have articulated a number of relevant principles to be taken into account, which includes a number of factors such as the additional length of a jury trial compared to judge only trial, the additional cost of trial by jury etc.⁴⁴ This we believe to be a sufficient safeguard against avoidable trial expense, while still preserving this important function of defamation law.

23. As well as the practical importance of juries outlined above, there are reasons of principle underlying why a jury trial is a fundamental part of defamation proceedings. As noted by the Master of the Rolls Lord Neuberger in a defamation case just last year, considering a judge's decision on appeal to order a judge only trial:

⁴² Draft Defamation Bill Consultation paper, at para 95.

⁴³ As noted by the Master of the Rolls, Lord Neuberger, in *Fiddes v Channel Four Television Corporation & Ors* [2010] EWCA Civ 730, at para 9.

⁴⁴ As articulated by Lord Bingham LCJ in *Aitken* [1997] EMLR 415 at 421 to 422; cited and expanded in a number of cases, see for example the judgement of Lord Neuberger in *Fiddes*, *ibid*, at para 15 onwards.

*Jury trial will almost always take longer, and cost more, than trial by judge alone. The extra time taken, and the extra costs involved, in a jury trial may often be a useful sort of quantitative cross-check of what might otherwise be a purely qualitative assessment of the extra inconvenience of a jury trial. ...However, it would be dangerous if those two factors were given much independent weight, as it would risk undermining the important right to a jury trial which s 69(2) gives – to Defendants as well as to Claimants – in libel actions.*⁴⁵

Further, while the proposal in the Draft Defamation Bill is for a reversal of the presumption, rather than the excluding juries absolutely, it is the very fact of presumption *in favour* of jury trial which underlies its importance, even though section 69 means it is not an absolute right. As noted by Lord Neuberger, a jury's

*constitutional significance is perhaps emphasised by the fact that there is a right to a jury trial unless both the...s 69 questions are satisfied, and the fact that, even in a case where the court is satisfied that those...questions are satisfied, there will still be a jury trial unless the judge, in his reasonable discretion, otherwise decides.*⁴⁶

24. The Coalition Programme for Government was unequivocal: *"We will protect historic freedoms through defence of trial by jury."*⁴⁷ This commitment to reverse a damaging trend perpetuated by the former Government was extremely welcome. Indeed a legislative proposal to reverse the removal of jury trial in complex fraud cases is already making its way through Parliament in the Protection of Freedoms Bill.⁴⁸ Accordingly to simultaneously undermine the right to jury trial in yet another area would be a backwards step. As explained above, Liberty welcomes changes which will increase the threshold for bringing an actionable claim, and improving and strengthening defences. In the context of these improvements we believe there will

⁴⁵ *Fiddes v Channel Four Television Corporation & Ors* [2010] EWCA Civ 730: at para 18.

⁴⁶ Lord Neuberger in *Fiddes*, *ibid*, at para 9.

⁴⁷ Coalition Programme for Government 2010, at page 11. Accessed at http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition_programme_for_government.pdf.

⁴⁸ Clause 99 of the Bill proposes to repeal s 43 of the *Criminal Justice Act 2003*; see Liberty's Second Reading Briefing on the Protection of Freedoms Bill in the House of Commons (February 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-the-protection-of-freedoms-bill-feb-201.pdf>.

be sufficient rebalancing without the need to excise the important constitutional right to jury trial.

Online publication

25. Liberty believes that there ought to be provision in the Draft Bill to deal with the issue of responsibility for online publication. We do not believe that online media can continue to be treated as a niche area, particularly given the line between mainstream and online media is becoming increasingly blurred. Indeed, as events in recent weeks have shown, a cast-iron distinction between tweeting and broadcast can no longer be maintained. Accordingly Liberty would not support a procedure which creates exceptions for particular types of publication, rather we would prefer a special procedure which appreciates the particular nature of those types of publications and which takes into account the particular context of online publication. We support the approach advocated by the Libel Reform Campaign for a court-based procedure.

Position of corporations & public authorities to bring an action in defamation

26. Under current law a corporation is able to bring defamation proceedings on the basis of presumed hurt to trading or business reputation. While we believe corporations ought to have some means of legitimately protecting their reputation, there is clear inequality of arms when it comes to deep pocketed corporations suing for defamatory damage where the defendant is an NGO or an individual financially unable to engage in a David and Goliath battle. As noted by the Committee on Culture, Media and Sport

It is clear that a mismatch of resources in a libel action, for example between a large corporation for which money may be no object and a small newspaper or NGO, has already led to a stifling effect on freedom of expression.⁴⁹

The Committee recommended that a new category of “corporate defamation” requiring a corporation to prove actual damage to its business before an action could be brought.⁵⁰ This is the approach adopted by Lord Lester’s Bill, which requires proof

⁴⁹ House of Commons Culture, Media and Sport Committee, Second Report of Session 2009-10, *ibid*, at para 177.

⁵⁰ *Ibid*, at para 178.

of substantial financial loss to the body corporate before a claim in defamation can be held to be actionable.⁵¹ The Committee also envisaged alternative means by which corporations can seek redress, from non-legal avenues including publicity campaigns to counter falsehoods and unfounded criticism,⁵² to the tort of malicious falsehood, requiring proof of damage maliciously or recklessly caused.⁵³ The Draft Defamation Bill, however, does not contain a provision relating to the ability of corporations to bring an action in defamation. The Ministry has concluded that in light of the new procedure it proposes, and other provisions in the draft Bill, in context of the separate proposals being made in relation to civil costs, there is no need for a specific provision to address inequality of arms issues.⁵⁴

27. Liberty believes that the Bill ought to address the ability of corporations to fund long, drawn out defences couched in the uncertainty of legal proceedings, which clearly outweighs the limited funds of small public interest organisations. We do not think it sufficient to rely, as the Ministry of Justice does, on the introduction of a new non-statutory procedure and the new threshold substantial harm test. While we do not propose an approach which would exclude the right of a corporation to sue altogether, we believe that the scope for defamation actions by large corporations needs to be significantly curtailed.

28. In *Steel and Morris v United Kingdom*⁵⁵ the European Court of Human Rights, in determining that the ability of a corporation to sue in defamation does not breach the right to free expression, stated that the status of the applicant in this case as a large multinational company should not “*in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made*”.⁵⁶ However, questions remain as to whether a corporation is entitled to protection within the scope of the human right to privacy.⁵⁷ It is clear that a company cannot suffer injury to feelings, but rather “*can only be injured in its pocket*”, which can be loss of income or injury to its

⁵¹ Clause 11.

⁵² House of Commons Culture, Media and Sport Committee, Second Report of Session 2009-10, *ibid*, at para 176.

⁵³ *Ibid*, at para 178.

⁵⁴ Whether there is a need for further provisions to address situations where an inequality of arms between the parties is subject to consultation. See Q38 in the Consultation Paper, *ibid*, at page 54.

⁵⁵ (2005) 18 BHRC 545, [2005] EMLR 314.

⁵⁶ *Ibid*, at para 94.

⁵⁷ As protected by Article 8 of the *European Convention on Human Rights*, as incorporated into domestic law by the *Human Rights Act 1998*.

goodwill.⁵⁸ It is therefore doubtful that a corporation could use human rights to obtain redress in the way that individuals can. Regardless, the human rights framework and indeed the very nature of human rights would necessitate the subordination of a company's rights to those of an individual. Further, the right to privacy is a right which can be limited provided the interference can be justified for legitimate purpose. Whether that limitation be along the lines of that envisaged in Lord Lester's Bill, or an exclusion of the right to bring an action in favour of a claim in malicious falsehood, the public interest vested in having corporations monitored and held to account by NGOs, for example, outweighs any possible infringement on a corporation's 'right' to reputation and the limitation is justified.

29. On the basis of this jurisprudence we believe that the right of a corporation to sue in defamation ought to be limited, on the face of the statute, to situations where it can show substantial pecuniary loss from a defamatory publication or statement which has been made with malice.

Sophie Farthing

⁵⁸ Per Lord Reid in *Lewis v Daily Telegraph* [1964] AC 234, at 262.