**Submission to the Inquiry into press standards, privacy and libel by the Culture, Media and Sport Committee**

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1. ARTICLE 19, Global Campaign for Free Expression, is an international human rights NGO based in the UK which works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the *Universal Declaration of Human Rights*, which guarantees freedom of expression.

2. ARTICLE 19 has a long track record of working on defamation law reform in countries around the world, as well as of developing international standards in this area. Our July 2000 publication, *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*, has been endorsed by, among others, the UN Special Rapporteur on freedom of opinion and expression and is widely relied upon as a leading statement of appropriate defamation standards. We have engaged in defamation litigation before a number of national courts, as well as before the European Court of Human Rights and the Inter-American Court of Human Rights.

3. Our submission focuses on four key defamation issues, namely jurisdiction, standards, damages and costs. It looks at these issues from the particular perspective of NGOs which engage in public advocacy. These NGOs, as part of their core work, often engage in criticism, sometimes trenchant in nature, which renders them potentially subject to defamation liability. In the vast majority of cases, their criticism touches on matters of genuine public concern and, frequently, these NGOs are among a small number of social players who approach these issues from a true public interest perspective. Although advocacy NGOs should not be immune from being sued in defamation, it is of the greatest importance that they not be deterred from engaging in responsible advocacy out of fear of the consequences of defamation actions.

**Jurisdiction**

4. In the modern world, any statement published online can be accessed anywhere via the Internet. Many NGOs publish all of their reports and public statements online. This means that they may be held liable in any jurisdiction for their publications, depending on the applicable legal rules, as their material may be downloaded, and hence said to have an impact, everywhere. This, in turn, poses a risk of a 'lowest common denominator' approach to the freedom of expression of those who publish on the Internet, as plaintiffs forum shop or, to put it more colourfully, engage in libel tourism, seeking a jurisdiction which is likely to be more sympathetic to them and where they can exert some influence over the defendant.

5. The UK, and London in particular, is well-known internationally as a 'good' jurisdiction for defamation plaintiffs for a number of reasons, including relatively weak standards of protection for freedom of expression in the

context of defamation law. UK courts have in the past exercised jurisdiction in cases which had little connection to the UK. An example is the case of Berezovsky against *Forbes* magazine, where the House of Lords held that the UK was a suitable jurisdiction even though *Forbes*' circulation in the UK was only 2000 copies, compared to nearly 800,000 copies in the US and Canada. To prevent the UK being used as a venue for libel tourism, we recommend that rules be put in place which require a more substantial connection to the UK than is currently the case.

**Standards**

6. A key driver behind libel tourism is the desire of plaintiffs to find jurisdictions where their cases will have a greater chance of success. The fact that the UK is so popular with defamation plaintiffs points to the nature of the balance that UK courts have struck between freedom of expression and protection of reputation. US courts have in the past refused to enforce defamation judgments issued by UK courts on the basis that they were offensive to the First Amendment guarantees of free speech and the states of New York and Illinois have recently passed legislation to this effect.

7. In many jurisdictions, defamation defendants benefit from a strong good faith or reasonableness defence, whereby they do not incur liability if they acted in good faith or where they took reasonable steps to verify the accuracy of their statements. This takes different forms. In the US, public figure plaintiffs, defined broadly, have to prove that the defendant acted with actual knowledge of falsity or with reckless disregard for the truth. Similar standards apply in India and New Zealand. In Australia, there is a defence of reasonable publication for political debate, while in South Africa, a reasonableness defence also applies.

8. The UK has, over the last ten years, also moved to recognise a form of reasonableness defence, starting with the Reynolds case in 1999, and being further developed in the Jameel case in 2006. In practice, however, defamation law remains hostile to defendants in the UK relative to many other jurisdictions. We recommend that rules be put in place which are more protective of freedom of expression, particularly in cases involving. Although we are not calling for the "reckless disregard for the truth" standard which applies in the US, the rules should provide broad protection for statements on matters of public concern which are made in good faith and where, taking into account all of the circumstances, it was reasonable for the plaintiff to make.

**Damages**

9. A key problem with defamation cases in many jurisdictions, including in the UK, is their heavy focus on damages, instead of on remedies which more directly redress the harm done. Furthermore, although measures were put in place in the UK some years ago to limit defamation damages, they remain much higher than in most European jurisdictions (albeit not as high as in the US, where, however, it is much more difficult to win a defamation case). In particular, there remains a tendency to make awards which are at the higher

end of physical damage awards, even though the underlying social harm of being defamed can almost never properly be compared to losing an eye or a limb. Such potential damage awards are extremely threatening to NGOs, many of which are charities operating on small budgets and prohibited from turning a profit.

10. Within the European context, as in many other parts of the world, there is much greater reliance on non-pecuniary remedies for defamation and, in particular, a right of reply or correction. Indeed, the Council of Europe has adopted resolutions calling for the availability of such a remedy (see Resolution (74) 26 on The Right of Reply). We recommend that consideration be given to further reducing the level of awards in defamation cases and to placing more emphasis on non-pecuniary remedies. This might include taking into account any self-regulatory remedies which have been awarded (for example, as provided by the Press Complaints Commission), as well as the failure of the plaintiff to take advantage of such remedies.

**Costs**

11. Costs in defamation cases in the UK have now reached what may, without exaggeration, be called crisis proportions, particularly from the perspective of NGOs. Costs can be crippling, even if one is ultimately successful in winning a case. The pure 'harassment' value of defamation cases has been recognised in many countries, where rich and powerful individuals bring cases which have no chance of success, simply to deter potential critics.

12. Although some effort has been devoted in the UK to measures to reduce the costs of defamation actions, these have largely failed. Furthermore, conditional fee arrangements have substantially exacerbated the problem, driving overall costs up, providing various incentives to lawyers to promote defamation cases and, most obviously, encouraging plaintiffs to bring potentially dubious cases in the first place. We note that the viability of the current defamation law regime rests importantly on the vast majority of individuals being prepared to tolerate a good measure of even unfair criticism, and that if everyone with a decent prospect of winning were to bring a defamation case, freedom of expression would be in serious peril. We recommend that conditional fee arrangements either be prohibited altogether in the context of defamation actions or that stringent conditions be placed on them to prevent these negative effects, perhaps including rules on when they may be used and by what sorts of plaintiffs.

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