**GLOBAL WITNESS RESPONSE TO THE GOVERNMENT CONSULTATION ON THE LEVESON INQUIRY AND ITS IMPLEMENTATION**

Global Witness is an independent, not-for-profit organisation that works with partners around the world to fight for justice. Global Witness exposes the hidden links between demand for natural resources, corruption, armed conflict and environmental destruction. It carries out hard-hitting investigations, exposes abuses and campaigns for change. It is unsurprising that wealthy and powerful individuals whose conduct has been exposed or is under investigation sometimes seek to use legal proceedings in an attempt to silence Global Witness, to suppress its findings or impede its investigations. Examples of this include the unsuccessful injunction application by Denis Christel Sassou Nguesso in 2007[1], and the unsuccessful data protection claim by Beny Steinmetz and others in 2014[2].

Global Witness has serious concerns about the bringing into force of Section 40 of the Crime and Courts Act and believes that it would have a major chilling effect on its own work, on the free speech of other not-for-profit organisations who publish news related material (such as English Pen and Index on Censorship), and on the willingness of mainstream media organisations to cover and publicise the important reports and findings made by such organisations. If Section 40 is brought into force organisations like Global Witness may be treated as "relevant publishers" since they publish news-related materials through a non-charitable arm. They would face draconian costs consequences when sued unless they join an unsuitable press regulator designed for the mainstream media, or the prospect of multiple expensive arbitrations if they do join the press regulator. In either case individuals exposed or under investigation by Global Witness would be in a far stronger position to use legal proceedings (either litigation or multiple arbitrations) to attempt to interfere with its important work. In this way Section 40 would have a highly undesirable impact on those groups that publish material that exposes corruption and advocates for the poorest and most vulnerable in society. The debate about Section 40 has focussed on the newspaper industry and fails to recognise the impact on publishing NGOs like Global Witness.

Global Witness welcomes the opportunity to participate in this consultation and to draw attention to the potential impact on publishers in the not-for-profit sector of the commencement of Section 40 of the Act.

[1] See *Long Beach Ltd and Nguesso v Global Witness Ltd* [2007] EWHC 1980 (QB) where Stanley Burton J, dismissing the application for an injunction, said: "Once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny."
[2] *Steinmetz v Global Witness Ltd* [2014] EWHC 1168 (ch).

Global Witness response to the government consultation on the Leveson inquiry

Global Witness is not proposing to respond here to the government's question 4 about Leveson 2.

Question 1: Which of the following statements do you agree with?

(a) Government should not commences any of Section 40 now, but keep it under review and on the statute book;
(b) Government should fully commence Section 40 now;
(c) Government should ask Parliament to repeal all of Section 40 now;
(d) if government does not fully commence Section 40 now; government should partially commence Section 40, and keep under review those elements that apply to publishers outside a recognised regulator;
(e) if government does not fully commence Section 40 now, government should partially commence Section 40, and ask Parliament to repeal those elements that apply to publishers outside a recognised regulator.

Global Witness supports option (c), that government should ask Parliament to repeal all of Section 40 now.

The options other than repeal of Section 40 perpetuate uncertainty, inconsistency and lack of clarity in the law. Uncertainty as to potential legal exposure is widely recognised to have a chilling effect on investigative journalism.

Section 40 threatens non-profit publishers and civil society with costs consequences that are disproportionate and excessive, will inhibit important investigations and reporting that are in the public interest and so will deprive the public of news and information about wrongdoing. This runs counter to Article 10 of the European Convention on Human Rights (ECtHR), the right to freedom of expression, and may also interfere with Article 6 rights to a fair trial.

Section 40 introduces costs penalties for any non-exempt publishers that fail or choose not to join a state-approved recognised press regulator. IMPRESS[3] has now received this recognition.

[3] IMPRESS describes itself as a "press regulator" ('IMPRESS is the first truly independent press regulator in the UK' and concerned with 'press regulation') but in fact it includes a much wider range of publishers, not just traditional "press" http://www.impress.press/

The costs penalties apply even when the publisher has acted and published entirely lawfully and in the public interest. Section 40 requires that costs orders must be made against relevant publishers which are not members of a recognised regulator - IMPRESS - except when the court is satisfied that the issues at hand could not have been resolved by the regulator's arbitration scheme (had the publisher been a member), or it is "just and equitable" to make a different award of costs.

The definition of "relevant publishers" could be interpreted so as to include the majority of non-profit organisations (including charities) that publish reports, where the publication is not through a charitable entity. Global Witness, like many similar organisations, publishes news-related campaigning material through a non-charitable arm and although not the primary target of Section 40 are likely to face arguments that they are caught by its provisions.

The threat of costs consequences, even in a legal case where the publisher is successful, would have a serious inhibiting effect on any publisher, but especially on non-profit and civil society organisations that do not have the resources to risk the prospect of litigation.

The proposed Section 40 effectively forces a publisher to join the recognised regulator, IMPRESS, by creating a legal penalty of an unfair costs award if they do not join it. IMPRESS, which is substantially funded by Max Mosley, has a system of rules and regulations that are likely to go beyond the conduct required of publishers by law. Global Witness and other non-profit organisations adhere to high standards in their journalistic work, and it is objectionable in principle and runs contrary to the rule of law that defendants who have acted lawfully can be punished in this way . These provisions would therefore fail the tests of necessity and proportionality.

Global Witness is not a member of IMPRESS and does not wish to be forced into membership particularly given that its formation was designed to deal with perceived problems of the traditional press and it is not designed to deal with not-for-profits engaged in publishing. Compliance with IMPRESS's rules – especially arbitration costs – is inappropriate and potentially costly for non-profit organisations. Section 40 is drafted in order to pressurise publishers into joining IMPRESS, but if they do join they still face costs consequences which would have a particularly harsh effect on non-profit organisations that rely on fundraising. Win or lose, the publisher who is a member of IMPRESS must pay the fees of the arbitration, up to £3,500. Multiple claimants could financially ruin small non-profits by each one forcing the publisher into arbitration. There is a very real risk of such

multiple arbitrations where a report by an organisation such as Global Witness exposes, for example, widespread corruption across a sector or industry.

As it is, Section 40 of the Act goes against existing judicial practice where the losing party pays costs. It not only requires that a defendant publisher pays the costs of someone who successfully sues it, but also establishes as a default position that the defendant publisher pays the costs of a claimant who loses his or her case against the publisher.

Mark Stephens, a media lawyer and member of Global Witness's board commented that, "The effect of this law is that a Somalian warlord could sue Oxfam for an entirely truthful report, and Oxfam would still have to pay the warlord's defamation legal costs when he lost. We should be ashamed of a law this bonkers, batty and bizarre." [4]

Given that legal costs in libel and privacy cases can amount to tens or hundreds of thousands of pounds, the pressure on non-profit organisations to back down, even when information is true, will be immense. They may be forced to refrain from publishing controversial information about exploitation and wrongdoing, or be forced to retract, apologise and pay damages, even where the contents are true and in the public interest. This will clearly have a chilling effect on free speech.

Sub clause Section 40(2)(b) states that, where "it is just and equitable in all the circumstances of the case to make a different award of costs or make no award of costs" a different order of costs may be made. However, this is an entirely discretionary and uncertain provision and is silent on the question of the public interest. The uncertainty and lack of clarity in this discretion, and therefore in knowing the likely outcome of litigation, itself adds to the chilling effect. The default position remains that, even if the publisher proves the truth of its publication, or otherwise proves that it is lawful to publish the material, if it is not a member of IMPRESS the court must order it to pay the losing party's costs as well as its own.

Inconsistencies and lack of clarity

The inconsistencies and lack of clarity in the related sections of the Act provide further reason for repeal of Section 40.

[4] http://www.thetimes.co.uk/edition/comment/one-step-forward-s28fx26bh

Schedule 15 to the Crime and Courts Act 2013 excludes a 'public body or charity that publishes news-related material in connection with the carrying out of its functions.' However, this limited exclusion does not protect NGOs and civil society groups from the serious consequences of Section 40. English PEN said in their November 2014 report, Who Joins the Regulator[5], there is 'widespread inconsistency across the media landscape regarding which publications are exempt and which qualify for regulation'. They say 'campaigning organisations' were expected to be excluded but the terms of the legislation were 'poorly defined, leading to uncertainty for publishers and the risk of a chill on free speech does not protect charities whose news-related publishing function falls outside of the scope of their charitable purposes'.

Like many other campaigning organisations, Global Witness's investigations and publishing activities are carried out through a non-charitable entity so its news-related publishing would not be covered by the Schedule 15 exclusion. So organisations like Global Witness could face punitive legal costs, as set out in Section 40, as they are not members of the recognised regulator, IMPRESS.

Global Witness's investigations are an essential element of public interest journalism and it plays an important public watchdog role. NGOs and campaigning groups are often able to devote time and resources to detailed, in-depth investigations in the public interest. They are an increasingly important source of news and information at a time when newspapers are struggling to survive.

Even if non-profit organisations that engage in journalism were excluded from the costs provisions of Section 40, the effect of Section 40 on newspapers and the mainstream press would discourage them from publishing Global Witness's investigative reports to their wider audiences. This inhibits the Article 10 free expressions rights not just of campaigning publishers like Global Witness and of the mainstream press but also seriously deprives the public of the right to receive information.

Section 40 would also impact on the interrelationship of citizen bloggers, NGOs and online/print newspapers where there is increasing co-operation between them. It fails to address the realities of publication in the modern context of collaborative journalism, and global online publishing.

IMPRESS's system of arbitration is open to exploitation by powerful vested interests who are highly motivated to protect their reputation. Even if not-for-profit entities become members of IMPRESS,

[5] English PEN – Who joins the regulator? 5th November 2014 https://www.englishpen.org/wp-content/uploads/2014/11/Who_joins_the_regulator_5_Nov_2014_English_PEN1.pdf

they are vulnerable in relation to costs of arbitration, especially in circumstances where they publish reports that could be challenged by multiple parties, as is often the case for Global Witness in its detailed investigations. The IMPRESS arbitration scheme[6] commences when a complainant can show that real harm has been caused to them by the publisher. If so it states: 'No award of costs shall be made against the Claimant under any circumstances. The fees of the arbitrator, which shall be paid by the publisher, shall be set at no more than £3,500 unless the publisher agrees to the payment of a higher fee.'

There is no exemption to these rules for not-for-profit publishers which means, before IMPRESS makes an adjudication on issues of public interest or the provisions of Section 1 of the Defamation Act 2013 are invoked, the regulated publisher would be faced with a bill of up to £3,500 (per complainant) cost of the arbitration. This is deeply concerning for organisations covering, for instance, wide-scale financial corruption by multiple parties, where multiple claimants could use or threaten arbitration in order to force a retraction or other form of settlement. For example an NGO that joined IMPRESS that published news evolving from the Panama Papers could be bankrupted just by the volume and accumulated costs of the arbitration it faced. IMPRESS is not designed to regulate not-for-profits and the use of Section 40 in order to leverage not-for-profit publishers into joining IMPRESS, or to punish those who do not (by way of punitive litigation costs orders) is not appropriate.

The government chose not to exclude all not-for-profit organisations, think tanks, or other campaign groups from its requirement to be subscribed to a recognised regulator[7]. It is unclear why this is the case, as there is no recommendation in the Leveson Report that advocates this approach nor that the press regulatory structure should impact on the far-reaching work of not-for-profit publishers in the fields of human rights and civil liberties activists or environmental campaigners.

Even if non-profit organisations were excluded through Section 15, this would not meet our concerns as Section 40 would still mean that information published by civil society organisations would be less likely to reach the wider public, as non-exempt mainstream news publishers would be put off because of the threat of costs penalties. The range of individuals and groups who will not be covered by the Schedule 15 exclusions, the negative effect on collaborative journalism, and the inadequacy of IMPRESS's arbitration scheme for not-for-profits are important reasons for civil society to advocate for the repeal of Section 40.

[6] http://impress-press.php5.hostingweb.co.uk/downloads/file/impress-ciarb-arbitration-scheme(2).pdf
[7] https://www.englishpen.org/campaigns/who-joins-the-regulator/

Question 2: Do you have evidence in support of your view?

Global Witness has campaigned for over 22 years against human rights and environmental abuse and corruption throughout the world. In 2014 its founder Charmian Gooch was awarded TED prize, recognising the importance of Global Witness's work. It was nominated for a Nobel peace prize for its work on blood diamonds. Global Witness uses journalism to advance its work: its investigations, publications, journalists and editorial structures all mean it could be a "relevant publisher" in the context of Section 40. Global Witness has frequently been subjected to legal threats and claims by powerful individuals and companies, including African dictators and wealthy multinational corporations. Its publications have been cited in government debate and used in evidence Court proceedings internationally including, for example, the trial of Charles Taylor, former Liberian President, on crimes against humanity and the trial of Dutch arms dealer Guus Koewenhoven.

In one example[8] given in evidence to a parliamentary select committee on press standards, privacy and libel in 2008, Global Witness detailed how it had published the credit card records of a company of Denis Christel Sassou Nguesso, the son of the president of Congo Brazzaville, that suggested he was personally profiting from sales of state oil and had been using state money to fund his lavish lifestyle. Sassou Nguesso applied for an injunction against Global Witness in the High Court in London in an attempt to suppress the information. GW won the case. Mr Justice Stanley Burnton said in rejecting Sassou Ngeusso's claim: 'Once there is good reason to doubt the propriety of the financial affairs of a public official, there is a public interest in those affairs being open to public scrutiny.'

Global Witness noted in its evidence to parliament: "Regardless of the UK judge's ruling in favour of Global Witness' right to publish this information in that case, and the awarding of costs to us, the practical implication is that we incurred £50,000 in legal costs that have not been recovered as the applicant has not paid them. It is worth noting that these costs accrued over just six working days, between 6th -13th July 2007, the time that elapsed between the original serving of a court order and the end of the Court hearings themselves. Had Global Witness lost the case we would have incurred costs of around £100,000 which, for a non-profit organisation, could be crippling."

[8] http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcumeds/memo/press/ucps1302.htm

With the costs provisions envisaged in Section 40, Global Witness could have been liable for all the costs of the action. This is despite the fact that the judge found that they were clearly acting in the public interest. [9]

Global Witness and similar organisations will need to decide whether they could afford to continue their work, knowing that any legal case – now more likely as the claimant would have nothing to lose - could result in crippling legal costs, with the organisation forced to pay the costs of the very people trying to silence its public interest work. The cost to any publisher, commercial or not-for-profit, would be enormous and a significant deterrent to publishing award-winning campaigning journalism that is clearly of a matter of the utmost public interest.

The Right to a Fair Trial

Section 40 restricts rights to a fair trial as well to freedom of expression. The relevant publisher is faced with two options. Either it joins IMPRESS and complies with its arbitration scheme [10] where arbitration is final and binding. Alternatively the publisher does not join IMPRESS, in which case it faces punitive litigation costs awards, win or lose, which make access to the court unaffordable in practice for smaller and medium sized 'relevant publishers'.

Arbitration is akin to a private court, and using it precludes the parties going to court (except on limited grounds). Forced arbitration is likely to breach Article 6 of the ECHR (the right to a fair trial). A system of private arbitration lacks conformity with the principle of open justice. This is a particular threat in cases raising issues of corruption, human rights and environmental abuses.

The default position for relevant publishers, which are not members of a recognised regulator, and which are taken to court, is that they will have to pay the claimant's costs as well as their own, irrespective of whether they win or lose. This raises the possibility of a publisher doing nothing wrong, acting entirely within the bounds of the law, and being severely financially punished.

[9] The judgement – 15th August 2007(from British and Irish Legal Information Institute website) http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2007/1980.html&query=(HQ07X02371)

[10] http://www.impress.press/regulation/arbitration.html

This seems to go significantly further than the Leveson report recommendation on cost, which was that 'The Civil Procedure Rules should be amended to require the court, when considering the appropriate order for costs at the conclusion of proceedings, to take into account the availability of an arbitral system set up by an independent regulator itself recognised by law.'[11]

The purpose of Leveson's recommendation was 'to provide an important incentive for every publisher to join the new system and encourage those who complain that their rights have been infringed to use it as a speedy, effective and comparatively inexpensive method of resolving disputes'. [12] The system envisaged if Section 40 is commenced goes beyond this and effectively forces publishers to accept IMPRESS's arbitration scheme.

The ECtHR has said in respect of Article 6 that 'It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court … and that he or she is able to enjoy equality of arms with the opposing side'[13]. Section 40 of the Act will prevent small and medium sized publishers from effectively defending their rights under Articles 6 and 10.

Question 3: To What extent will commencement incentivise publishers to join a recognised self-regulator? Please supply evidence.

It appears unlikely that mainstream news media publishers will join IMPRESS. Many are already members of IPSO and have rejected regulation by a state-approved regulator. Section 40 is not likely to be an incentive for non-profit organisations like Global Witness to join, given its unrepresentative nature and the unusual way that it is funded – effectively by a single private individual, Max Mosley. It is objectionable in principle to be forced by the punitive costs provisions of Section 40 to join a state-backed regulator.

[11] The Leveson Inquiry – An inquiry into the culture, practices and ethics of the press Executive Summary and Recommendations – Recommendation 73 p.42
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229039/0779.pdf

[12] The Leveson Report, Part J Chapter 3 Para 6.9 http://leveson.robertsharp.co.uk/J/chapter3/

[13] p.59, Steel and Morris v UK (Application no. 68416/01), judgment of 15 February 2005, ECtHR

Question 4: Global Witness's submission only concerns Section 40 and does not address this question.

Conclusion

The impact on campaigning non-profit publishers cannot be overstated: it would make it costly and almost impossible to carry out hard hitting investigative journalism. If Section 40 is commenced, Global Witness and other campaigning publishers could find themselves paying costs to powerful vested interests in legal actions, even if the journalism is accurate, responsible and in the public interest. Newspapers in turn will be less willing to take the risk to report upon controversial investigations by campaigning groups. The public will be deprived of the opportunity to receive information about issues of high public concern.

Repeal of Section 40 is the best and necessary outcome of the consultation not just for third sector organisations but for all that are concerned about the serious threat to freedom of expression.

Global Witness
January 2017

**Appendix 1. Section 40: Awards of costs**

(1) This section applies where—
(a) a relevant claim is made against a person ("the defendant"),
(b) the defendant was a relevant publisher at the material time, and
(c) the claim is related to the publication of news-related material.

(2) If the defendant was a member of an approved regulator at the time when the claim was commenced (or was unable to be a member at that time for reasons beyond the defendant's control or it would have been unreasonable in the circumstances for the defendant to have been a member at that time), the court must not award costs against the defendant unless satisfied that—
(a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator, or
(b) it is just and equitable in all the circumstances of the case to award costs against the defendant.

(3) If the defendant was not a member of an approved regulator at the time when the claim was commenced (but would have been able to be a member at that time and it would have been reasonable in the circumstances for the defendant to have been a member at that time), the court must award costs against the defendant unless satisfied that—
(a) the issues raised by the claim could not have been resolved by using an arbitration scheme of the approved regulator (had the defendant been a member), or
(b) it is just and equitable in all the circumstances of the case to make a different award of costs or make no award of costs.

(4) The Secretary of State must take steps to put in place arrangements for protecting the position in costs of parties to relevant claims who have entered into agreements under section 58 of the Courts and Legal Services Act 1990.

(5) This section is not to be read as limiting any power to make rules of court.

(6) This section does not apply until such time as a body is first recognised as an approved regulator.