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## The Defamation Act 2013: What exactly is 'a body that trades for profit'?

*David J Acheson*

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### *Introduction*

The Defamation Act 2013 ('the Act') represents the culmination of a long period of consultation and debate. During this period, concerns were raised by numerous parties about the use of libel laws by large corporations seeking to stifle criticism of their activities.<sup>1</sup> In fact, the 2009 report produced by the Libel Reform Campaign,<sup>2</sup> which was particularly influential in the early stages of this debate,<sup>3</sup> recommended completely removing the right to sue in defamation from large- and medium-sized companies.<sup>4</sup>

Initially, the Government of the time did not regard it as necessary to single out corporate bodies for different treatment,<sup>5</sup> and therefore the Defamation Bill as first put before Parliament contained no provisions relating specifically to corporate claimants.<sup>6</sup> Late in the Parliamentary process, however, an amendment targeting the issue was agreed to, and as a result section 1 of the final Act reads as follows:

- (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
- (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.<sup>7</sup>

As perhaps the most important provision of the Act, section 1 has already attracted significant scholarly attention, and much critical comment.<sup>8</sup> However, the scope of subsection (2) – that is, which potential claimants the requirement to prove 'serious financial loss' will apply to – has remained relatively unexplored.<sup>9</sup> The first case to examine the nature of the requirement introduced by section 1(2) throws little light on its scope: in *Brett Wilson LLP v Persons Unknown*, Warby J merely stated that the claimant was 'clearly a body that trades for profit'.<sup>10</sup> The purpose of this article is to clarify the phrase 'body that trades for profit', and to predict how the courts are likely to interpret it. Four particular types of non-human claimant are considered, namely charities, housing associations, trade associations, and holding corporations.

## **Disagreement**

There remains some confusion over the likely implications of Parliament's use in the Act of the phrase 'a body that trades for profit'. *Blackstone's Guide to the Defamation Act*, for example, argues that:

The requirement that the body must 'trade for profit' means that bodies such as charities, if they otherwise have a cause of action, are not required to demonstrate actual or likely serious financial loss.<sup>11</sup>

In contrast, the editors of *Gatley on Libel and Slander* suggest the following:

While a trading corporation is clearly a "body that trades for profit", the Act is not limited to such entities: any non-natural person that trades for profit whether that is their only or merely a minor part of their purpose, will be covered. Thus, charities may fall within the provision, in so far as they are involved in trade for profit, as may non-governmental organisations, trade unions and employers' associations...<sup>12</sup>

The position taken in *Gatley* appears to be in the minority. *Collins on Defamation*, for example, asserts that 'charitable and non-government organizations, including trade associations' will be exempt from the effect of section 1(2).<sup>13</sup> Thomas Rudkin, of the law firm Farrer & Co, describes the position in *Gatley* as 'debatable',<sup>14</sup> noting that 'One has to question whether any sort of charitable fundraising should correctly be regarded as being for the purpose of profit, in the truest sense of the word.'<sup>15</sup>

Nevertheless, concern about the wording of the subsection was also expressed at the legislative stage. In the House of Lords, Lord Phillips of Sudbury suggested that the application of the subsection might 'potentially [be] a *Pepper v Hart* occasion'<sup>16</sup> – in other words, that the phrase might be sufficiently ambiguous to allow the courts to look to Hansard as an aid to interpretation.<sup>17</sup> He therefore asked Lord McNally, the sponsor of the Bill in that House, to give an assurance that the phrase was 'specifically designed to exclude from its ambit the work of charities.'<sup>18</sup> The position of charities under the section will be assessed below.

The key concern of Lord Phillips, and of the editors of *Gatley*, appears to be that the phrase 'a body that trades for profit', taken in its literal meaning, does not make reference to the manner in which profit generated through trade is ultimately used by the body in question. Starting with a definition of 'profit' as 'making more from earnings than is spent in buying, operation, or production',<sup>19</sup> this interpretation would appear to cover any organisation that raises funds through trading activities, regardless of the ends to which those funds are to be put. As Lord Phillips put it, 'There are many areas

where charities carry on a trade, ... and it is, in one obvious and simple sense, for profit because it generates the wherewithal enabling them to run their [charitable concerns].<sup>20</sup>

The wording in the English Act can be contrasted with the roughly-equivalent Australian provision, introduced in the uniform defamation reforms of 2005-06, that restricts the right of any corporation to sue for defamation unless it falls under two categories of 'excluded corporation',<sup>21</sup> as follows:

A corporation is an excluded corporation if:

- (a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or
- (b) it employs fewer than 10 persons and is not related to another corporation.<sup>22</sup>

The wording in paragraph (a) is, on its face, clearer than that in section 1(2) of the 2013 Act for two reasons. Firstly, the explicit focus on the beneficiaries of any gain made by the body allows for a clearer distinction between trading companies and charities. Secondly, the nature of the objects of a corporation is generally a matter of verifiable fact, placing a minimal evidential burden on the parties before the court. For example, when the RSPCA brought a libel action in New South Wales, the court was able to rule that the charity had standing to sue with little more than a cursory examination of its Memorandum of Association.<sup>23</sup>

Nevertheless, the speculation in *Gatley* about the position of charities under the 2013 Act is mistaken, for a number of reasons. The section below outlines the interpretation of section 1(2) that, it is submitted, the courts are likely to adopt, and applies that interpretation to charities. The article then turns to examine the respective positions of housing associations, trade associations, and holding companies.

### ***Interpretation of section 1(2)***

There are several persuasive authorities from areas of law other than defamation that could provide some insight into how the courts will interpret the phrase 'a body that trades for profit'. The most prominent of these is the judgment of the Court of Appeal in *Goodman v Dolphin Square Trust Ltd*,<sup>24</sup> a case concerning the defendant's eligibility for inclusion on the register of housing associations.<sup>25</sup> At the time, a housing association that was not a registered charity was required to meet certain conditions in order to be included on the register, including that it did not 'trade for profit'.<sup>26</sup>

Buckley LJ first noted that 'Any trader whose assets embarked in his trade are in consequence of his trading activities greater at the end of an accounting period than they were at its beginning has made a trading profit'.<sup>27</sup> This statement roughly accords with the interpretation of 'profit' given in *Gatley*.

However, Buckley LJ went on to state that 'It may nevertheless be true to say that the trader was not trading for profit during the period in question.'<sup>28</sup> In support of this contention, the judge relied on the case of *Metropolitan Water Board v Berton*,<sup>29</sup> in which the High Court drew a distinction between a body of persons trading for profit, and a body not trading for profit despite making a surplus from trading activities, 'inasmuch as they do not trade for the purpose of making a profit *which would be available for the purpose of division in the form of dividend*.'<sup>30</sup>

In *Goodman*, Buckley LJ developed this distinction as follows:

In my judgment the natural primary sense of the expression "trading for profit" is that it signifies the acts of a trader who carries on his trade with the object of making a profit which he can use and enjoy for his own purposes outside his trading activities. A person or body who carries on trading activities in circumstances in which he, or the members of the body, cannot at any stage enjoy the benefit of any profits accruing from the trading activities, but must retain or re-empty them in the business, does not in my judgment trade for profit, even though profits may arise from time to time from the trading activities.<sup>31</sup>

There is nothing objectionable in this interpretation of the phrase, and the courts would be entitled – and sensible – to adopt it in respect of section 1(2) of the 2013 Act. In fact, an understanding of 'profit' that is focused not on the generation of surplus, but on its distribution, is both widely accepted and logically necessary. Ultimately, no incorporated body trades for profit *for itself*.<sup>32</sup> corporations are social technologies developed in order to increase the efficiency of profit-making (or the pursuit of other objectives) for their human members.<sup>33</sup>

Definitions of the converse to a body trading for profit – a not-for-profit body – have similarly focused on the distribution of surplus. The term 'not for profit body' in the Legal Services Act 2007 is defined as any body that:

- (a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes, and
- (b) is prohibited from directly or indirectly distributing amongst its members any part of its assets (otherwise than for charitable or public purpose).<sup>34</sup>

Similarly, for income tax purposes, a 'not-for-profit company' is 'a company that does not carry on activities for the purpose of making profits for distribution to its members or others.'<sup>35</sup>

The courts have taken the same approach to assessing when a body is not trading for profit. In *Customs and Excise Commissioners v Bell Concord Educational Trust ('Bell Concord')*,<sup>36</sup> the Court of Appeal ruled

that the generation of a large surplus by a charity, intended to be invested back into its charitable objects, was 'otherwise than for profit' for the purpose of the Value Added Tax Act 1983. In support of this conclusion, Browne-Wilkinson VC cited Lord Denning's decision, in *National Deposit Friendly Society Trustees v Skegness Urban District Council* ('Skegness'),<sup>37</sup> that 'if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object – that is to say, if it is only a means whereby its main objects can be furthered or achieved – then it is not established or conducted for profit'.<sup>38</sup>

The decision in *Bell Concord* also presents an appealing possibility: that, as is the case in Australia, any dispute as to whether or not a claimant falls within the meaning of the expression 'a body that trades for profit' in the 2013 Act might be answered by reference to that claimant's objects, rather than its ongoing policies or activities. This, as noted by Browne-Wilkinson VC, provides a 'clear and unambiguous test',<sup>39</sup> and would limit the burden on the parties of providing evidence to enable the court to decide the issue. This possibility also receives support from Lord Denning's judgment in *Skegness*, which suggests that the words 'conducted for profit' should be taken to mean 'conducted for the purpose of making profit'.<sup>40</sup> In that case, Lord Denning made reference to the objects of the society in deciding that its activities were not conducted for the purpose of making profit.<sup>41</sup>

It is clear that both Parliament and the courts have consistently defined both for-profit and not-for-profit companies and activities with reference to the distribution of profit to private individuals. There is no reason that this should not be the case with regard to the Defamation Act 2013. The courts would be permitted to read the phrase 'a body that trades for profit' in section 1(2) of the 2013 Act as meaning 'a body that trades for *the purpose of making profit for distribution to its members*'. It is submitted that, as a result, a charitable organisation would not be considered a 'body that trades for profit' for the purposes of the Defamation Act 2013.

### **Charities<sup>42</sup>**

The first objection to an interpretation of 'a body that trades for profit' that might include charitable organisations is that such an interpretation effectively makes the words 'that trades for profit' redundant. If it is not precisely clear from Parliament's words which corporate bodies were to be included in the scope of the section, then it seems clear that charities were to be excluded. The reference to profit in section 1(2) implies that Parliament envisaged a category of corporate claimants that do not trade for profit, and it is difficult to imagine a type of company that fits into that category more convincingly than a charity.

At almost every stage of the development of the Defamation Act, Parliamentary and Government reports stressed that any provision relating to corporate claimants would be intended primarily to address perceived problems with claims brought by large trading corporations. The Ministry of Justice noted in its consultation paper that 'the main concerns in this area relate to cases where a trading corporation... sues either an individual or a non-governmental organisation';<sup>43</sup> while the Joint Committee on the Draft Defamation Bill emphasised that its proposal on corporate claimants 'does not extend to charities or non-governmental organisations.'<sup>44</sup> The Government's response to that report stated that 'We share the Committee's view that the inequality of financial means that exists where a large corporation sues or threatens smaller companies, individuals or non-governmental organisations lies at the heart of current concerns.'<sup>45</sup> Similarly, the Department of Culture, Media and Sport Committee on Press Standards, Privacy and Libel, reporting in 2010, focused its recommendations in this area on combating 'potential abuses of libel laws by big corporations.'<sup>46</sup> In short, the focus of attention throughout the long process leading to the enactment of the Defamation Act 2013 was always on large businesses – often 'multinationals' are referred to<sup>47</sup> – and almost never on charities or other not-for-profit bodies.<sup>48</sup>

The sale of donated goods is not normally considered to be a 'trading' activity, because 'the sale proceeds are simply the realisation of the value of a gift.'<sup>49</sup> If the courts adopted this interpretation of 'trade' with respect to the 2013 Act, organisations raising funds solely through charity shops selling donated goods would not be considered to be 'trading for profit'.

Regardless of whether the activity through which funds are raised for a charity is considered to be 'trade', it is inherent in the definition of 'charity' that such an organisation is not a 'body that trades for profit'.

To be registered as a charity, an organisation must have purposes which are solely of a charitable character, and which confer a public benefit.<sup>50</sup> In order that the public benefit requirement is met, a purpose must not provide a private benefit, to the organisation's members or anyone else, that is more than incidental to the furtherance of that purpose.<sup>51</sup>

In the 1969 case *In re Resch's Will Trusts*,<sup>52</sup> the Privy Council noted that an organisation would not be charitable if it was 'carried on commercially, i.e. with a view to making profits for private individuals'.<sup>53</sup> Although a charity may engage in trade for the purpose of raising a surplus, the trustees of the charity have a duty to act for the furtherance of the charity's purposes, meaning that this 'profit' cannot be distributed to individuals that are not beneficiaries.<sup>54</sup> As a charity's objectives must be *exclusively* charitable, even an organisation that has charitable aims alongside a power to distribute dividends

cannot be a charity.<sup>55</sup> It follows that, under the interpretation of section 1(2) given above, a charity – properly registered – cannot be a ‘body that trades for profit’.

Further, section 37 of the Charities Act 2011 provides that: ‘An institution is, for all purposes other than rectification of the register, conclusively presumed to be or to have been a charity at any time when it is or was on the register.’<sup>56</sup> This must mean that a body registered with the Charity Commission is to be treated as a charity within the definition given by the Charities Act – that is, a body that cannot trade for profit.<sup>57</sup> This would prevent any registered charity from being subject to the serious financial loss test in section 1(2).<sup>58</sup>

Should the courts think it necessary to turn to Hansard as an aid to their interpretation of the 2013 Act, the conclusion reached would likely be the same.<sup>59</sup> Lord McNally, the sponsor of the Bill in the House of Lords, suggested that the expression ‘a body that trades for profit’ was a ‘much clearer and simpler definition’ than that used in the Lords’ previously proposed amendment,<sup>60</sup> which had referred to ‘a body corporate; other non-natural legal persons trading for profit; or trade associations representing organisations trading for profit’.<sup>61</sup> Lord McNally noted that ‘A vaguer formulation ... would have risked inadvertently catching other bodies, such as charities, which are not the subject of concern.’<sup>62</sup> These statements would provide strong evidence to demonstrate that the position of charity claimants was not part of the mischief which Parliament intended to address through section 1(2) of the 2013 Act.

For any readers concerned that the exclusion of charitable organisations from the ambit of section 1(2) might discourage investigation or criticism of charities or trustees that are perceived to be acting in unlawful or questionable ways, a number of brief points can be made. Firstly, given that charities must pursue their objects ‘for the public benefit’, any criticism of the actions of a charity would, at least prima facie, itself be in the public interest, and would attract the protection of the strengthened public interest defence in section 4 of the 2013 Act.<sup>63</sup> Secondly, investigations and reports of the Charity Commission are subject to qualified privilege,<sup>64</sup> meaning that statements of opinion based on (or supported by) assertions made by the Commission are similarly protected under the defence of honest opinion.<sup>65</sup> Thirdly, actions brought by the trustees of a charity (which appear to be more common than those brought by charitable organisations<sup>66</sup>) would require evidence that the statement complained of referred to, and caused serious harm to the reputation of, those trustees, rather than merely harming the charity itself.

This article now turns to the position of other types of potential corporate claimant: first – briefly – housing associations, then trade associations, and finally holding corporations.

### ***Housing associations***

The first High Court case that required interpretation of section 1 of the 2013 Act was *Cooke v MGN Ltd*.<sup>67</sup> In that action, the second claimant was Midland Heart Ltd, a not-for-profit housing association. Although there had apparently been some disagreement during pre-action correspondence, by the time of the trial the parties were agreed that section 1(2) was not applicable.<sup>68</sup> The court was not, therefore, asked to consider the issue.

In *Goodman*, Buckley LJ had stated that 'a body which trades for profit is not a housing association'<sup>69</sup> (meaning, conversely, that a housing association – properly registered – is not a body that trades for profit). However, since that case, the law governing housing associations has changed, and they are no longer required to be not-for-profit organisations in order to register with the Homes and Communities Agency.<sup>70</sup>

It seems likely, therefore, that the position of housing associations under section 1(2) would need to be considered on a case-by-case basis. If the suggestion, based on *Bell Concord* and *Skegness*, made above – that the courts would be entitled to decide on this issue by referring to the claimant's governing documents – is accepted, then this is unlikely to present significant difficulties.

The parties in *Cooke* were correct in agreeing that Midland Heart should not be covered by the subsection. The association's rules state that it 'shall not trade for profit', and prevent it from distributing profits to shareholders.<sup>71</sup> Other housing associations may be in a different position, and the concession made by the defendant in *Cooke* might not be appropriate in a future case.

### ***Trade Associations***

The position of trade associations under section 1(2) of the 2013 Act is interesting for two reasons. On the one hand, it would appear that they are in a similar position to most housing associations, in that all surplus they receive is typically reinvested with the aim of furthering the interests of their members, rather than paid to members as a dividend. On the other, the lawsuit brought by the British Chiropractic Association ('BCA') against Simon Singh, which is 'widely regarded as one of the main drivers behind the Defamation Bill',<sup>72</sup> was a clear example of the kind of case that campaigners wanted to prevent from proceeding in the future. As a result, there was some debate about whether or not trade associations like the BCA should be subject to those restrictions applicable to commercial entities when bringing a defamation action.

Concerns were expressed during the reform debates about the potential for trading corporations to establish not-for-profit trade associations that could effectively sue on their behalf in order to

circumvent the requirement to demonstrate financial loss.<sup>73</sup> To prevent this eventuality, the Joint Committee on the Draft Defamation Bill recommended that ‘Trade associations that represent for-profit organisations should be covered by the new requirements that we propose.’<sup>74</sup> Similarly, an amendment tabled by Robert Flello MP at the Committee stage in the House of Commons extended the scope of its application to, among other bodies, ‘trade associations representing “for-profit” organisations’.<sup>75</sup> Similar wording was also adopted in a later amendment proposed by the House of Lords.<sup>76</sup>

It is significant that none of these recommendations or amendments were adopted by Parliament in the final Act. It may be that the courts could make reference to this fact if the need to determine whether or not a trade association ought to fall within the scope of section 1(2) arises in a future case.<sup>77</sup>

Some light may be thrown on the position of trade associations under section 1(2) by a recent case involving the British Association of Leisure Parks, Piers & Attractions, a body representing ‘members engaged in the business of amusement parks, piers and similar establishments’,<sup>78</sup> regarding its VAT liability. The association claimed eligibility for an exemption on the grounds that it was a ‘non-profit-making organisation’, ‘the primary purpose of which is to make representations to the Government on legislation and other public matters which affect the business or professional interest of its members.’<sup>79</sup> Although the association’s appeal was dismissed on the grounds that it did not meet the second requirement (the ‘primary purpose’ requirement), its status as a not-for-profit body was not in question.<sup>80</sup>

Trade associations established to represent the interests of individual professionals, rather than those of trading corporations, were less frequently mentioned during the reform debates. At one point, it was suggested by Simon Singh that a particular clause that had just been removed from the Defamation Bill would have ‘forced [the British Chiropractic Association] to show ... serious financial harm.’<sup>81</sup> However, whether or not that clause would have covered not-for-profit companies was a matter of some disagreement in Parliament.<sup>82</sup> The clause in question extended its application to:

- (a) a body corporate;
- (b) other non-natural legal persons trading for profit; or
- (c) trade associations representing organisations trading for profit.<sup>83</sup>

It is not necessary to indulge in a detailed analysis of this discarded clause, except to say that the British Chiropractic Association, as an incorporated body, would be subject to the clause under

paragraph (a), as long as the word 'other' in paragraph (b) was not understood to restrict the scope of paragraph (a) to corporations trading for profit.

Whether or not the BCA, or trade associations more generally, would fall under the ambit of section 1(2) of the final Defamation Act is a separate question. It is submitted that Simon Singh would not have been assisted by the section as enacted.

An interesting indication that this is the case can be gleaned from the words of Lord McNally in the final House of Lords debate on the Bill. Discussing, alongside the case of Simon Singh, that of Peter Wilmshurst – who was sued for defamation by a US trading company called NMT Medical – Lord McNally said:

They have been the cause célèbre about the deficiencies in our law. I have constantly said to my officials, "How will it be different after our Bill becomes an Act?" It will be different in both cases. People pursuing them would have to satisfy the serious harm test.<sup>84</sup>

Given that NMT Medical was a trading corporation that would certainly have been covered by the serious financial loss test, it is perhaps revealing that Lord McNally referred instead to the serious harm test – a test applicable to all defamation claimants. The implication might be that Lord McNally's 'officials' believed that, while NMT would be required to satisfy the serious financial loss test, the British Chiropractic Association would not.<sup>85</sup>

The BCA's Memorandum of Association requires that 'Any money or property may be applied only towards [its] objects', and prevents such money or property from being given to members.<sup>86</sup> On the basis of its constitution, therefore, the BCA would not be considered a 'body that trades for profit' under the interpretation adopted in *Goodman and Bell Concord*.

It is possible that a defendant in a libel action might seek to draw a distinction between trade associations and housing associations or charities, on the basis that trade associations are not required to act (or generally do not act) for the public benefit. In the case of the BCA, although all of its surplus income must be reinvested into its objectives, those objectives essentially aim to promote the professional viability of its members,<sup>87</sup> and the profitability of the chiropractic profession more generally. Thus, while it is unable to distribute dividends directly to its members, its distribution of surplus nonetheless provides a benefit – primarily financial – to those members. This is in contrast to housing associations, whose expenditure benefits their members in the sphere of their home life, and to charities, whose expenditure must further charitable purposes.

However, this argument has been rejected in the context of tax law: in a recent case involving the Professional Golfers' Association ('the PGA'), a First-Tier Tax Tribunal decided that the PGA's activities were 'otherwise than for profit' for the purposes of section 344 of the Income Tax (Earnings and Pensions) Act 2003.<sup>88</sup> In making that decision, the Tribunal made several interesting points. Firstly, they saw 'no difficulty with the fact that the Appellant [the PGA] is empowered to do (and does) things which could be regarded as "commercial" in nature for the purpose of generating income.'<sup>89</sup> They also considered that 'The fact that it generates significant income from its assets ... or from its provision of services ... does not, to our mind, automatically mean that its activities as a whole should be regarded as being carried on "for profit".'<sup>90</sup> For present purposes, however, the most important point made by the Tribunal was that, although the PGA's activities ultimately benefited its members 'in the form of more income (or profit) ... from their own activities', this fact did not prevent the association's activities from being 'otherwise than for profit'.<sup>91</sup> A similar approach has also been taken in the context of charity law.<sup>92</sup>

As a result, a trade association that was prevented from making direct payments to its members would not be subject to the serious financial loss test in section 1(2) of the Defamation Act 2013. This line of reasoning would also appear to exclude trade unions from the requirement.<sup>93</sup>

### ***Holding corporations***

Holding corporations are in an interesting position, both with regard to their standing as potential claimants in defamation law generally and with regard to their status under section 1(2). For the purposes of this article, 'holding corporation' or 'holding company' should be taken to mean a company that does not itself engage in trade, but that owns or controls one or more trading subsidiaries.

A clear distinction has developed in libel law between trading companies and non-trading companies. The standing of a corporate claimant depends on whether the publication complained of has damaged it 'with regard to any trading or business reputation' in the jurisdiction,<sup>94</sup> and it appears that a company that does not trade can nevertheless sue for defamation if, for example, its management of trading subsidiaries is impeached.<sup>95</sup> In the well-known *McLibel* case, the Court of Appeal held that, in order to have standing to sue in libel, 'The corporation does not have to trade within the jurisdiction provided that it has a reputation within the jurisdiction.'<sup>96</sup>

However, the High Court has recently noted that the law in this area 'may be in a state of development'.<sup>97</sup> The 2013 Act adds further to this development – in *ReachLocal UK Ltd v Bennett*, Judge Richard Parkes QC suggested that, but for the judgment in default already obtained by the

holding company claimant, 'there might be an uphill argument to persuade a court that the [section 1] threshold had been crossed.'<sup>98</sup>

In that decision, the judge appeared to assume that section 1(2) was applicable to a holding corporation claimant.<sup>99</sup> If that is the case, then it may be that the construction of the section as a whole will effectively make it impossible for such a body to successfully sue. Because the 'serious financial loss' test in subsection (2) is framed as an additional element of the 'serious harm' test in subsection (1), rather than as a separate test,<sup>100</sup> a corporate claimant must establish not only that it has suffered serious financial loss as a consequence of the statement complained of, but that the loss in question was a result of serious harm to *its* reputation, rather than, for example, harm to the reputation of its subsidiaries.<sup>101</sup> This would seem to be an almost insurmountable evidential hurdle for a company whose revenue comes primarily from a trading subsidiary.

If section 1(2) is applicable to holding corporations – that is, if they are considered to be bodies 'that trade for profit' – then it will likely mean the effective end of the right to sue for those companies. The problem for the courts is the pre-existing case law distinguishing between 'trading' and 'non-trading' companies. It is difficult to see how the courts could hold that a non-trading corporation was nevertheless a 'body that trades for profit'.

One option might be to widen the interpretation of 'trade' in this context to mean business activity more generally. If this approach were taken, then any body established to make a profit would be subject to the requirement in section 1(2).<sup>102</sup> This would seem to be the most effective way of giving effect to the intention of Parliament. However, Parliament must be presumed to have known of the distinction between trade and business, and between trading and non-trading companies, in drafting the Defamation Act.<sup>103</sup> It is therefore unlikely that this option would be open to the courts.

The more realistic prospect is that the courts will accept that holding corporations are not subject to sub-section (2), but that the 'serious harm' test in sub-section (1) will nevertheless prove a difficult hurdle for such companies to overcome. It may also be that the developing jurisprudence on the standing of holding corporations as defamation claimants prevents these claims from proceeding at all, in all but the most deserving of cases.

A related question arises with regard to companies that have been established with the intention of trading, but that have not yet, at the time of publication, conducted any trade. It is probable that such a company would fail to sustain a defamation claim, either on the basis that it had no business reputation in the jurisdiction,<sup>104</sup> or on the basis that the statement complained of could not have been understood to have referred to it.<sup>105</sup> Again, although it would seem unlikely that a company that had

never traded could be considered a 'body that trades for profit', other elements of the law are sufficient to prevent this from being a problem for the courts.

### **Conclusion**

It has been demonstrated above that the phrase 'a body that trades for profit' in section 1 of the Defamation Act 2013 should be construed as applying only to those bodies that generate profit for the benefit of private individuals. As a result, charities are necessarily excluded from the ambit of the section (and those charities that are registered with the Charity Commission are likely to be conclusively presumed to be excluded). It is promising that, despite the apparent ambiguity of sub-section (2), it appears to cover those bodies with which Parliament were especially concerned, and to exclude from its scope those bodies that most groups wished to be excluded during the drafting of the Act.

The potential for any dispute as to the applicability of the serious financial loss test to be resolved with reference to the claimant's constitutional documents is also to be welcomed. This will relieve the burden of evidence on parties to a corporate claim in defamation during the preliminary stages of the litigation.

More worrying is the likelihood that holding corporations will not fall within the ambit of section 1(2). It seems, however, that claims by these bodies are becoming less likely to succeed, and at any rate the 'serious harm' test in sub-section (1) will probably continue this trend.

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<sup>1</sup> For example, the Ministry of Justice noted that around two-thirds of the 129 responses to its consultation paper on the Draft Defamation Bill 'argued for further provisions to address inequality of arms issues by restricting corporations' ability to bring a claim.': Ministry of Justice, *Draft Defamation Bill: Summary of Responses to Consultation* (CP(R) 3/11, 2011) 7. The Joint Committee also expressed concerns: Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill: Report* (2010-12, HL 203, HC 930-I) paras 108-18; together with other groups such as the Libel Reform Campaign: Index on Censorship and English PEN, *Free Speech is Not For Sale* (2009) 10.

<sup>2</sup> Index on Censorship and English PEN, *Free Speech is Not For Sale* (2009).

<sup>3</sup> For example, it was described by the Ministry of Justice as one of 'three main reports' on defamation, alongside one Parliamentary report and one Governmental report: Ministry of Justice, *Draft Defamation Bill: Consultation* (Cm 8020, 2011) 5.

<sup>4</sup> *Free Speech is Not For Sale* (n 2) 10.

<sup>5</sup> eg Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) para 91.

<sup>6</sup> Defamation HC Bill (2012-13) [5]. As late as eight days before the Bill received Royal Assent, the Government in the House of Commons had disagreed with an amendment targeting corporate claimants, explaining that 'it

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is unnecessary and inappropriate for the Bill to make special provision restricting the bringing of defamation claims by non-natural legal persons.’: Defamation HL Bill (2012-13) 96: Commons Disagreements and Reasons (17 April 2013).

<sup>7</sup> Defamation Act 2013, s 1.

<sup>8</sup> Notable examples include Eric Descheemaeker, ‘Three Errors in the Defamation Act 2013’ (2015) 6 JETL 24; Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: the Defamation Act 2013’ (2014) 77(1) MLR 87. In addition, a number of books contain substantial commentary, including: James Price and Felicity McMahon, *Blackstone’s Guide to the Defamation Act 2013* (1<sup>st</sup> edn, OUP 2013); Matthew Collins, *Collins on Defamation* (1<sup>st</sup> edn, OUP 2014); and Alastair Mullis, Richard Parkes and Godwin Busuttil (eds), *Gatley on Libel and Slander* (12<sup>th</sup> edn, Sweet & Maxwell 2013).

<sup>9</sup> For example, Peter Coe explores the nature of ‘serious financial loss’ in considerable depth, but pays little attention to the phrase ‘body that trades for profit’, in Peter Coe, ‘The Value of Corporate Reputation and the Defamation Act 2013: A Brave New World or a Road to Ruin?’ (2013) 18(4) Communications Law 113.

<sup>10</sup> *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB) [26].

<sup>11</sup> James Price and Felicity McMahon, *Blackstone’s Guide to the Defamation Act 2013* (1<sup>st</sup> edn, OUP 2013) 21.

<sup>12</sup> Alastair Mullis, Richard Parkes and Godwin Busuttil (eds), *Gatley on Libel and Slander* (12<sup>th</sup> edn, Sweet & Maxwell 2013) para 2.8 (citations removed).

<sup>13</sup> Matthew Collins, *Collins on Defamation* (1<sup>st</sup> edn, OUP 2014) para 7.42.

<sup>14</sup> Thomas Rudkin, ‘Things Get Serious: Defining Defamation’ (2014) Ent L R 201, 202.

<sup>15</sup> *ibid.*

<sup>16</sup> HL Deb 23 April 2013, vol 244, col 1376.

<sup>17</sup> Under the rule in *Pepper v Hart*, only statements made by the sponsor of the Bill in question are admissible: *Pepper v Hart* [1993] AC 593 (HL) 635 (Lord Browne-Wilkinson). The potential for the rule to be invoked in interpreting s 1(2) will be addressed below (n 59).

<sup>18</sup> HL Deb (n 16) col 1376.

<sup>19</sup> *Collins on Defamation* (n 13) para 7.36, citing *Oxford Dictionaries Pro* (2010).

<sup>20</sup> HL Deb (n 16) col 1376.

<sup>21</sup> Defamation Act 2005 (NSW) s 9(1).

<sup>22</sup> *ibid.*, s 9(2).

<sup>23</sup> *Royal Society for the Prevention of Cruelty to Animals New South Wales v Davies* [2011] NSWSC 1445, [2]-[5].

<sup>24</sup> (1979) 38 P & C R 257 (CA).

<sup>25</sup> The position of housing associations with regard to the Defamation Act 2013 is discussed below (text to fns 67-71).

<sup>26</sup> Housing Act 1974, s 13(2).

<sup>27</sup> *Goodman* (n 24) 265.

<sup>28</sup> *ibid.*

<sup>29</sup> [1921] 1 Ch 299.

<sup>30</sup> *ibid.* 305 (Peterson J) (emphasis added).

<sup>31</sup> *Goodman* (n 24) 265.

<sup>32</sup> Apart from earnings retained to finance investment.

<sup>33</sup> eg Benjamin K Sovacool, ‘Broken by Design: The Corporation as a Failed Technology’ (2010) 15(1) Science, Technology & Society 1.

<sup>34</sup> Legal Services Act 2007, s 207(1).

<sup>35</sup> Income Tax (Earnings and Pensions) Act 2003, s 241A(5)(b).

<sup>36</sup> [1990] 1 QB 1040 (CA).

<sup>37</sup> [1959] AC 293 (HL).

<sup>38</sup> *ibid.* 319-20, cited in *Bell Concord* (n 36) 1046-47.

<sup>39</sup> *Bell Concord* (n 36) 1045. See also *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44, [2007] 1 AC 359 [125] (Lord Scott), suggesting that it may be appropriate in some cases to refer to a corporate defamation claimant’s constitutional documents.

<sup>40</sup> *Skegness* (n 37) 319.

<sup>41</sup> *ibid.* 320.

<sup>42</sup> Many thanks to Caroline Cox at the University of Portsmouth for her assistance with and advice on this section.

<sup>43</sup> Ministry of Justice, *Consultation* (n 3) para 138.

<sup>44</sup> Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill: Report* (2010-12, HL 203, HC 930-I) para 118.

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- <sup>45</sup> Ministry of Justice, *Government's Response* (n 5) para 90.
- <sup>46</sup> House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Second Report* (HC 2009-10, 362-I) para 178.
- <sup>47</sup> Joint Committee, *Report* (n 44) para 110.
- <sup>48</sup> Perhaps the only exception is the evidence given to the CMS Committee by the Centre for Social Cohesion, which provided details of a libel threat against the CSC by the charity Interpal. The evidence described that threat and its effects as 'an unacceptable restriction on freedom of speech': House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel: Second Report (Oral and written evidence)* (HC 2009-10, 362-II) Ev 460-61.
- <sup>49</sup> HM Revenue & Customs, *Charities: Detailed Guidance Notes. Annex IV: Trading and Business Activities – Basic Principles* (2015) para 17 at <<https://www.gov.uk/government/publications/charities-detailed-guidance-notes/annex-iv-trading-and-business-activities-basic-principles>> accessed 29 September 2015.
- <sup>50</sup> Charities Act 2011, ss 1-4.
- <sup>51</sup> *Inland Revenue Commissioners v Yorkshire Agricultural Society* [1928] 1 KB 611 (CA) 631. The word 'incidental' is from *Inland Revenue Commissioners v City of Glasgow Police Athletic Association* [1953] AC 380 (HL) 402 (Lord Reid).
- <sup>52</sup> [1969] 1 AC 514 (PC).
- <sup>53</sup> *ibid* 540 (Lord Wilberforce).
- <sup>54</sup> *The Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC) ('ISC') [194]. Trustees of a charity that is also a company have further duties under the Companies Act 2006, ss 170-77. Charitable Incorporated Organisations must use their funds in furtherance of their purposes: Charities Act 2011, s 217(1); s 221(1).
- <sup>55</sup> *ISC* (n 54) [192].
- <sup>56</sup> Charities Act 2011, s 37.
- <sup>57</sup> A similar situation existed in *Goodman* with respect to the register of housing associations. The Court of Appeal held that the courts did not have jurisdiction to decide whether or not a body was eligible for inclusion on the register: *Goodman* (n 24) 264 (Buckley LJ), 267-69 (Shaw LJ).
- <sup>58</sup> As the charitable status of a body 'depends on what it was established to do not on what it does' (*ISC* (n 54) [191] (Warren J)), a possibility exists that, if the courts were to decide that a body's position under s 1(2) of the 2013 Act ought to be determined by its activities rather than its objects, s 37 of the Charities Act 2011 would not conclusively determine the outcome of the inquiry, because a charity established in a way that prevented it from trading for profit may still be carried on in such a way if the trustees act *ultra vires*.
- <sup>59</sup> It seems unlikely that the courts will take this approach, given that Warby J has refused to do so with respect to s 1(1) of the Act: *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB) [55].
- <sup>60</sup> HL Deb (n 16) col 1366.
- <sup>61</sup> Lords Amendments to the Defamation Bill, 25 February 2013, Amendment 2 (paragraph letters omitted).
- <sup>62</sup> HL Deb (n 16) col 1366.
- <sup>63</sup> Defamation Act 2013, s 4.
- <sup>64</sup> *Seray-Wurie v Charity Commission of England and Wales* [2008] EWHC 870 (QB).
- <sup>65</sup> Defamation Act 2013, s 3.
- <sup>66</sup> eg *Seray-Wurie* (n 64); *Hewitt v Grunwald* [2004] EWHC 2959 (QB); *Hewitt v Express Newspapers* (QB, 22 July 2010).
- <sup>67</sup> *Cooke v MGN Ltd* [2014] EWHC 2831 (QB), [2015] 1 WLR 895.
- <sup>68</sup> *ibid* [29].
- <sup>69</sup> *Goodman* (n 24) 265.
- <sup>70</sup> Housing and Regeneration Act 2008, s 79.
- <sup>71</sup> *Midland Heart Ltd*, Rules (2011) paras A3-A4. Thanks to Midland Heart for providing a copy of this document.
- <sup>72</sup> Eric Descheemaeker, 'Three Errors in the Defamation Act 2013' (2015) 6 JETL 24, 30.
- <sup>73</sup> eg Joint Committee, *Report* (n 44) para 118. These concerns appear to be misplaced, given that any such body would have to show that the publication complained of referred to it, and caused serious harm to its reputation. It appears that it is not possible to bring a representative action under CPR Part 19.6 in defamation: *Law Society v Kordowski* [2011] EWHC 3185 (QB), [2011] Info T L R 221 [165], [168].
- <sup>74</sup> Joint Committee, *Report* (n 44) para 118. The proposals referred to were a requirement on corporate claimants to prove 'substantial financial loss' (para 114), and a permission stage for corporate claimants (para 116).
- <sup>75</sup> Defamation Bill Deb 26 June 2012, col 181.

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<sup>76</sup> HL Amendment 2 (n 61).

<sup>77</sup> See, eg, *R v Secretary of State for Transport, ex parte Factortame Ltd* [1990] 2 AC 85 (HL) 147-150, referring to recommendations of the Law Commission not adopted by Parliament.

<sup>78</sup> *The British Association of Leisure Parks, Piers & Attractions Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 662 (TC) [9] ('BALPPA').

<sup>79</sup> Value Added Tax Act 1994, sch 9 pt II Group 9, cited by *ibid* [4].

<sup>80</sup> BALPPA (n 78) [46]-[47].

<sup>81</sup> Simon Singh, 'Why Libel Reform is Needed to Stop Companies Bullying Their Critics' *The Guardian* (London, 17 April 2013) <[www.theguardian.com/commentisfree/2013/apr/17/libel-reform-big-companies-bullying-critics](http://www.theguardian.com/commentisfree/2013/apr/17/libel-reform-big-companies-bullying-critics)> accessed 29 September 2015.

<sup>82</sup> HC Deb 16 Apr 2013, vol 561, cols 280-82.

<sup>83</sup> HL Amendment 2 (n 61).

<sup>84</sup> HL Deb (n 16) col 1380.

<sup>85</sup> It is recognised that the serious financial loss test is an aspect of the serious harm test, rather than a separate test, but it still seems odd that the more onerous requirement was not mentioned by Lord McNally.

<sup>86</sup> British Chiropractic Association, Memorandum and Articles of Association (2006) Clause 5, available at <<https://beta.companieshouse.gov.uk/company/01781531/filing-history>> accessed 29 September 2015.

<sup>87</sup> Although the BCA's Memorandum of Association states that it is established 'with a view to the benefit of the community at large': *ibid*, Clause 3.

<sup>88</sup> *The Professional Golfers' Association Ltd v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 605 (TC) ('PGA').

<sup>89</sup> PGA (n 88) [90]. Interestingly, in this case, HMRC treated the PGA as if it had no power to distribute its assets to its members as dividends, despite the fact that the Association was not prohibited from doing so. The Tribunal noted that 'The existence of this power might have been a significant factor in our decision': [16].

<sup>90</sup> *ibid* [90].

<sup>91</sup> *ibid* [91].

<sup>92</sup> eg *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1969] 1 Ch 73 (CA) 92-93 (Sachs LJ).

<sup>93</sup> There exists some minor disagreement about the standing of trade unions to sue in defamation: see *Gatley* (n 12) para 8.24.

<sup>94</sup> *Multigroup Bulgaria Holding AD v Oxford Analytica Ltd* [2001] EMLR 28 (QB) ('*Multigroup Bulgaria*') [42] (Eady J).

<sup>95</sup> *ibid* [31].

<sup>96</sup> *McDonald's Corporation v Steel & Morris* (CA, 31 March 1999) (Pill LJ).

<sup>97</sup> *Euromoney Institutional Investor plc v Aviation News Ltd* [2013] EWHC 1505 (QB) [71] (Tugendhat J).

<sup>98</sup> [2014] EWHC 3405 (QB) [34].

<sup>99</sup> *ibid*.

<sup>100</sup> Defamation Act 2013, ss 1(2): 'harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.' The 'it' in this clause must refer to the harm to reputation caused or likely to be caused by the statement complained of.

<sup>101</sup> This point seems to have been recognised in *Descheemaeker* (n 72) 28-30. It may also have been understood by Judge Richard Parkes QC in *ReachLocal* (n 98), although this is unclear. Most other literature suggests that s 1 requires a corporate claimant to demonstrate serious financial loss resulting from the defamatory statement: eg *Gatley* (n 12) para 2.8; cited with approval in *Cartus Corporation v Siddell* [2014] EWHC 2266 (QB) [32] (Nicol J). The test of causation identified in this article was applied to the assessment of damages in *ReachLocal* (n 98) [42]-[47]; the fact that under s 1 it is pertinent to liability as well as quantum is potentially important.

<sup>102</sup> *Smith v Anderson* (1880) 15 Ch D 247 (CA) 260 (Lord Jessel MR): 'You cannot acquire gains by means of a company except by carrying on some business or other, and I have no doubt if anyone formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained.'

<sup>103</sup> For example, see *R v G* [2003] UKHL 50, [2004] 1 AC 314, [46] (Lord Steyn): 'In enacting legislation, Parliament must be presumed to have been aware of the relevant pre-existing law.'

<sup>104</sup> eg *Multigroup Bulgaria* (n 94) [42].

<sup>105</sup> eg *Atlantis World Group of Companies NV v Gruppo Editoriale L'Espresso SpA* [2008] EWHC 1323 (QB), [2009] EMLR 15 [20]-[21].