A Free and Open Society
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Summary

I disapprove of what you say, but I will defend to the death your right to say it.
Voltaire, Philosopher and Humanist

Liberal Democrats believe that freedom of expression is an essential foundation stone of a democratic society. The institutions that govern people's lives must be open to ideas and to criticism so that they can be properly held to account. This principle is as applicable to ideas and information that are shocking, disturbing or offensive as it is to those that are popular or inoffensive. An administration which conducts its business in secret and silences its critics renders itself unaccountable. Of course, freedom of expression and information must be subject to exceptions, but those exceptions should always be narrowly interpreted and the case for restriction must be overwhelmingly made.

Freedom of Speech and Freedom of Information

Britain is one of the most secretive societies in the Western world and recent legislation has only served to make matters worse. In the absence of constitutional safeguards guaranteeing freedom of expression and information, these freedoms often become subservient to other interests and arguments for privacy. Liberal Democrats are committed to creating constitutional guarantees of these freedoms.

A Bill of Rights is the cornerstone of a written constitution and is an essential guarantee of freedom of expression and information, as well as personal privacy. The European Convention on Human Rights guarantees both freedom of expression and personal privacy. Decisions made by the European Court of Human Rights have shown that the Convention provides a framework for sensible and workable decisions that can accommodate competing interests. As a first step, therefore, Liberal Democrats would immediately incorporate the European Convention on Human Rights into UK law, providing a constitutional framework within which the freedom of speech can be guaranteed. The European Convention is, however, a very conservative document which gives very wide discretions to governments. Over time, therefore, we are committed to the introduction of a specific UK Bill of Rights, as part of a UK written Constitution drawing on the European Convention and the UN Covenant, but going further than either in its definition and protection of rights.

A democratic system functions best when the public knows what its democratic representatives are doing. The public should, subject to exceptional limitations, have access to information held by public authorities at all levels. Liberal Democrats would therefore introduce a Freedom of Information Act, making openness rather than secrecy the norm.

Getting the Balance Right

The invasion of personal privacy by the media is quite rightly the cause of much public anxiety. The rights to freedom of expression and information have to be counter-balanced by a right to personal privacy.

While we are firmly convinced that the media should not unnecessarily intrude on personal privacy, however, we are concerned that any privacy law would would place unacceptable restrictions on freedom of information.. It would be hard to define the limits of a privacy law and would afford an opportunity for a few individuals to deter legitimate enquiries by the threat of legal action. However carefully defined, a privacy law would inevitably contain grey areas and the fear of infringing it would inhibit freedom of expression. The Liberal Democrats are therefore opposed the introduction of a privacy law.

Instead, we would introduce a carefully tailored civil offence of physical intrusion to prevent the harassment of individuals by the media and we would strengthen the industry's self-regulatory process. We would ensure that self-regulatory bodies include members of the public as well as media representatives, and we would encourage members of the public with grievances to make more use of the existing complaints procedures. We would consider ways in which individual journalists could be made to take more responsibility for the things they wrote.

Reforming the Law of Libel

A well drafted law of libel is also essential to prevent the abuse of the freedom of expression. It provides safeguards for individuals and organisations against the damage to their feelings and reputation which can arise from careless or malicious reporting. It encourages standards of fairness and accuracy in the media which are important components of democracy and accountability.

The present law of libel is, however, not well drafted: it results in unpredictable awards for libel. It means that many legitimate complaints go unheard; and it is too heavily tilted against freedom of expression. Liberal Democrats would:

- Extend legal aid to libel claims.

- Create a small claims service for libel.

- Create a new 'offer of amends' defence.

- Introduce a 'publication in good faith' defence in libel cases involving those seeking or holding public office.

A Free and Open Society

I disapprove of what you say, but I will defend to the death your right to say it.
Voltaire, Philosopher and Humanist

1.0.1 Liberal Democrats believe that freedom of expression is an essential foundation stone of a democratic society. The institutions that govern people's lives must be open to ideas and to criticism so that they can be properly held to account. This principle is as applicable to ideas and information that are shocking, disturbing or offensive as it is to those that are popular or inoffensive. An administration which conducts its business in secret and silences its critics renders itself unaccountable. Of course, freedom of expression and information must be subject to exceptions, but those exceptions should always be narrowly interpreted and the case for restriction must be overwhelmingly made.

1.0.2 Hence, the media must be free to publish, and the public entitled to receive, information and opinions. At present, there is no formal acknowledgement of either right in the United Kingdom. We believe that freedom of expression and information should be constitutionally guaranteed, for without such a guarantee there is no standard against which to set potentially restrictive measures and there will remain scope for abuse.

1.0.3 Recent events show that free speech in the UK cannot be taken for granted. The courts were prepared to prevent newspapers from publishing extracts from '*Spycatcher*' in this country (at the Government's request) even when it was freely available elsewhere; the contracts of NHS Trust employees now routinely include 'gagging' clauses; British libel laws are widely regarded as unduly restrictive; the reporting of court proceedings is increasingly being restricted and the confidentiality of journalists' sources eroded.

1.0.4 Freedom of information in the UK still means freedom to receive such information as government thinks fit. A culture of secrecy prevails in which ministers and civil servants instinctively prefer to restrict information. Although there have been some reforms in recent years - such as the introduction of parliamentary select committees - these have often proved disappointing in practice. This Government has appointed a minister for open government and created citizens' charters but to no visible effect. Secrecy in government is as deeply ingrained in the United Kingdom as it ever was. Evidence to the Scott inquiry has demonstrated a striking disregard of the public's right to know, a right that is given only very limited recognition by the British courts. Secrecy undermines our democratic processes and reduces the quality of governmental performance. If information central to decision-making is not open to challenge, vested interests take hold and corruption, incompetence and waste will thrive.

Freedom of expression is the foundation stone of a democratic society

1.0.5 Yet, there must also be limits on the right to freedom of expression and information, although the case of such limits is often overstated. For instance, in the public sphere the government must be able to keep secret information - relating to defence capability, intelligence information and so on - which might endanger the nation's security were it to become known to a potential enemy. Free speech without checks can inhibit an individuals right to a fair trial, or to protect their invention and business, or can lead to abuses in terms of invasions of personal privacy. The media have at times in recent years abused their freedom of speech and have only narrowly escaped the imposition of tougher laws. Restrictions should exist, however, only when they are necessary to protect validly competing public interests.

This paper is about balancing the rights to freedom of expression and information against the competing demand for confidentiality in certain circumstances. It acknowledges the primacy of freedom of information and expression and guarantees:

- The right of the media to publish and of the public to receive information and opinions, with only narrow exceptions;

- A public and enforceable right of access to government information;

- A private right to be protected against unwarranted intrusions on personal privacy by the media and the state; and

- A private right of access to personal information held about us by public bodies.

To these ends, this paper proposes:

- The incorporation of the European Convention on Human Rights into English law.

- The introduction of a Freedom of Information Act.

- Reform of the law of libel to make it less inhibiting to freedom of speech while extending the scope of legal aid to include libel claims.

- Action to make stronger and more effective the self-regulation of the media.

- The introduction of a criminal offence of physical intrusion but opposition to a privacy law.

Freedom of Speech and Freedom of Information

2.0.1 Britain is one of the most secretive societies in the Western world and recent legislation has only served to make matters worse. In the absence of constitutional safeguards guaranteeing freedom of expression and information, these freedoms often become subservient to other interests and arguments for privacy. Liberal Democrats are committed to creating constitutional guarantees of these freedoms in the form of a Bill of Rights and a Freedom of Information Act.

2.1 Creating a Bill of Rights

2.1.1 A Bill of Rights is the cornerstone of a written constitution and is an essential guarantee of freedom of expression and information, as well as personal privacy. The purpose of a Bill of Rights is to protect citizens against the abuse of power, to keep the political process open and contestable, and to make rights transparent. It is one of the checks and balances found in the constitutions of most modern democracies.

2.1.2 The United Kingdom is alone among Commonwealth nations in not having a charter of enforceable fundamental rights and freedoms in the form of a Bill of Rights. The United Kingdom did sign the European Convention on Human Rights in 1950, but neither Labour nor Conservative governments have incorporated the convention into United Kingdom law. This means that British citizens cannot enforce the European Convention in the British courts.

2.1.3 The European Convention on Human Rights guarantees both freedom of expression and personal privacy. Decisions made by the European Court of Human Rights have shown that the Convention provides a framework for sensible and workable decisions that can accommodate competing interests. The European Court of Human Rights has, come to the rescue of free speech in a number of British cases. Its ruling in the Sunday Times Thalidomide case, for example, resulted in welcome changes to the law of contempt of court. As a first step, therefore, Liberal Democrats would immediately incorporate the European Convention on Human Rights into UK law, providing a constitutional framework within which the freedom of speech can be guaranteed.

Britain is one of the most secretive societies in the Western world - democracy functions best when the public knows what the government is doing

2.1.4 The European Convention is, however, a very conservative document which gives very wide discretions to governments. For example, the right of free expression in article 10 of the European Convention is qualified by the clause; *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a free society”*. Over time, therefore, we are committed to the introduction of a specific UK Bill of Rights, as part of a UK written Constitution drawing on the European Convention and the UN Covenant, but going further than either in its definition and protection of rights (see Federal White Paper 6, *Here We Stand, 1993).*

2.2 Freedom of Information

2.2.1 A democratic system functions best when the public knows what its democratic representatives are doing. The public should, subject to exceptional limitations, have access to information held by public authorities at all levels. Liberal Democrats would introduce a Freedom of Information Act to:

- Create a public right of access to government and other official information, covering documents which contain both factual information and policy advice;
- Create an individual right of access to information held by public authorities about that individual, and protect that information against misuse;
- Protect official information to the extent necessary in the public interest and to safeguard personal privacy;
- Establish procedures to achieve these purposes; and
- Greatly narrow the scope of the criminal law as set out in the 1989 Official Secrets Act, and introduce a public interest defence.

2.2.2 The Freedom of Information Act should confer a general right of access, except for a small number of narrowly-defined areas where it can be demonstrated that it is overwhelmingly in the public interest that confidentiality should be maintained - including, for example, cases where disclosure would seriously impair defence, security or international relations, hinder the solution of crime or impede law enforcement, allow an unfair advantage to competitors of a company or business concerned, or constitute an unwarranted invasion of an individual's privacy.

2.2.3 Only disclosure of information likely to put seriously at risk the nation's most fundamental interests or endanger the safety of the subject would be subject to the criminal law. The Act would contain a public interest defence; thus an individual charged with unauthorised disclosure would be able to offer a defence that disclosure was justified because the information related to matters such as abuse of official status, crime, fraud, neglect of official duty or some other form of serious misconduct, or that the information was already publicly available either in the UK or abroad.

2.2.4 At the present time there exist absurdly lengthy restrictions on the availability of information regarded as secret. (Documents relating to the treatment of the Suffragettes for example are still under lock and key.) We would reduce the time during which information could be kept secret, so that even Cabinet papers would normally become available for consideration within five years. The onus would be on government to justify secrecy, instead of on the public to justify access.

2.2.5 In a wider context, our objective is to shatter the culture of secrecy which has grown up in Britain. We would encourage transparency in business, in charities and in public services. We recognise the range and extent of this task but would seek to set an example through our action in government, as we have done by opening local government in recent years. These proposals are considered in more detail in Federal White Paper 6, *Here We Stand, 1993*.

2.3 Breach of Confidence and Journalists' Sources

2.3.1 Liberal Democrats believe that the law of prior restraint - by which a party can prevent the publication of information on the basis that it may result from a breach of confidence - represents an intolerable restriction on freedom of information. In '*Spycatcher*' case, the European Court of Human Rights identified the same problem, and recognised the need to avoid prior restraint except in very rare cases. We would change the law so as to require the plaintiff who is seeking - by alleging breach of confidence - to prevent publication of information, to show a strong case on the merits; and not, as at present, merely an arguable case.

2.3.2 In a series of cases (one of which, involving the trainee journalist Bill Godwin, is on its way to the European Court of Human Rights), the courts have shown that the protection against disclosure of sources afforded to journalists is very weak. As a result, information that is of genuine public interest may well never be brought into the public domain. Liberal Democrats propose that section 10 of the Contempt of Court Act 1981 which covers the journalists' sources should be reformed so as to restore the protection it was originally intended to bestow. Specifically, an employer's desire to sue a whistleblower would not be a ground for ordering a reporter to identify his source.

Getting the Balance Right

3.0.1 Recent public concern with the media has tended to focus on tabloid excesses, lapses of taste and invasions of privacy. A number of infamous incidents have prompted calls for legislative control or a privacy law: the snatched photos of actor Gordon Kaye in his hospital bed, of a topless Duchess of York, and of Princess Diana in the gym; and the publication of private conversations between the Prince of Wales and Camilla Parker-Bowles. There is widespread unease over falling standards in the press (although the tabloids continue to be well read). A lot of press and television coverage is insensitive, lurid and sensational. The cliché that *"you shouldn't believe what you read in the papers"* is gaining currency.

The abuses of the media provide an excuse to those who seek to curb freedom of speech and reinforce our secret society

3.0.2 These serious abuses often constitute an attack on the civil rights of the people involved. They provide an excuse to those who seek to curb freedom of speech and reinforce the wall of secrecy which surrounds our national institutions and our political leaders. Measures must be introduced, as a matter of urgency, to raise standards, to prevent harassment by the media and to protect against invasions of privacy. Calls for privacy legislation need to be answered. We need, however, to proceed with caution; those most in favour of muffling the press are often those who are seeking to keep from the public information which they have the right to know. This chapter seeks to strike the right balance between protecting personal privacy and preserving rights to freedom of expression and information.

3.1 Safeguarding Privacy in a Free Society

3.1.1 The invasion of personal privacy by the media is the cause of much anxiety. A number of headline cases involving MPs and members of the royal family have highlighted the issue and the sales of tabloid newspapers clearly show a large public appetite for stories about people's private lives. It is important, however, to bear in mind the nature and extent of the problem. Privacy complaints formed only 7% of all complaints to the Press Complaints Commission in 1993. Many of those stories are published with the co-operation of the individuals concerned, who frequently receive substantial sums for their revelations. While we are firmly convinced that the media should not unnecessarily intrude on personal privacy, we are concerned that any new law containing a general right of privacy would have unintended side-effects, which would place unacceptable restrictions on freedom of information.

3.1.2 *First, it would be hard to define the limits of a law.* It is generally accepted that some invasions of privacy are necessary or desirable in the public interest. To take an imaginary example, it would be absurd to suppress the news that the Home Secretary had taken cocaine on the grounds that he had done so at a private party. But what if his conduct at the party had been of a non-criminal nature: collapsing from drink or harassing a female guest? What if a newspaper simply wished to report the details of an overheard conversation? What if the party guest was not the Home Secretary but a local teacher or the girlfriend of a film star?

3.1.3 *Second, we believe that a privacy law would also afford an opportunity for a few individuals to deter legitimate enquiries by the threat of legal action.* However carefully defined, a privacy law would inevitably contain

grey areas and the fear of infringing it would inhibit freedom of expression. For example, the routine use by Robert Maxwell of the threat of libel action to silence his critics may well have prevented an earlier exposure of his business dealings. A privacy law would thus discourage the kind of open society we would value.

3.1.4 *Liberal Democrats therefore oppose the introduction of a privacy law.* We recognise that this would leave some individuals affected by press intrusion without a simple legal remedy. We think, however, that the disadvantage to them is likely to be less than the disadvantages flowing from the inhibitions which a privacy law would place on free speech. To protect such individuals, we would:

- Introduce a carefully tailored civil offence of physical intrusion, to prevent the harassment of individuals by the media. It is right that peeping toms and aggressive doorstepping and telephone harassment by the media should be regulated by the law. By providing a civil remedy to such offences we aim to provide a swift recourse to justice and recompense.

- Strengthen the industry's self-regulatory process.

- Continue to leave the courts to deal with invasions of personal privacy on a case-by-case, as they are better able to develop the law on a flexible basis.

3.1.5 Many of the recent cases which have rightly outraged the public have involved photographs of public figures on private property, taken by so-called 'paparazzi'. It cannot be right that an individual, however famous or important, cannot go about their legitimate business in their own home without fear of being photographed. We would therefore make it an offence under the law described above to publish without permission a photograph secretly taken of a person on private property. Under such a law it would be a defence to show that the publication of that photograph was genuinely in the public interest.

3.2 Dealing with Grievances against the Media

3.2.1 In cases where members of the public have grievances against the media - be they in relation to invasion of privacy, taste or decency - there are few clear rights and wrongs. Value judgments have to be made and it is therefore best that these are made by ' a jury of one's peers' rather than by the courts. Hence, we favour the strengthening of the current self-regulatory bodies, rather than the creation of new legal remedies. We therefore support the work of the Press Complaints and the Broadcasting Complaints Commissions. That such bodies are currently regarded as ineffectual may be less a reflection on them, than on the unwillingness of some sections of the media to observe their codes of practice.

We would strengthen the hand of the self-regulatory bodies and introduce a civil offence of harassment by media

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To strengthen the self-regulatory process we would:

- Ensure that self-regulatory bodies include members of the public as well as media representatives

- Encourage members of the public with grievances to make more use of the existing complaints procedures.

- Consider ways in which individual journalists can be encouraged to take more responsibility for the things they write

3.2.2 The current system of self-regulation places the emphasis on editors and proprietors, rather than on individual journalists accepting personal responsibility for what they have written. We believe that in the longer term, journalism should move towards the status of a quasi-profession, with journalists encouraged to acquire professional qualifications (perhaps linked to NVQs) and being subject to

disciplinary procedures by their peers. In the short term, the best way to improve confidence in the self-regulatory bodies is for the media to show greater adherence to their rules and to their adjudications.

Reforming the Law of Libel

4.0.1 A well drafted law of libel is essential to prevent the abuse of the freedom of expression. It provides safeguards for individuals and organisations against the damage to their feelings and reputation which can arise from careless or malicious reporting. It encourages standards of fairness and accuracy in the media which are important components of democracy and accountability.

4.0.2 The present law of libel is, however, not well drafted and as a consequence fails to achieve these objectives. The same libel law found restrictive by the media is unhelpful to the public. The media often stifles information or comments under the threat of expensive and time-consuming litigation. Individuals, when mistreated by the media, seem to face an unequal struggle to put matters right.

4.0.3 The problem with the current libel laws are that:

- Juries are unpredictable in their awards.
- Many people with legitimate complaints against the media are constrained by the expense of going to law.
- The law is still too heavily tilted against freedom of expression and in favour of the excessively litigious plaintiff.

4.1 Making Libel Awards More Predictable

4.1.1 Juries find it difficult to assess appropriate levels of damages in libel cases. Celebrities are apt to receive premiums, and aggravating circumstances (such as failure to provide rights to reply, invasions of privacy) are severely punished. Awards are often out of proportion to those in other civil cases such as personal injury. A good law places well-defined limits on the expectations of each party so that differences can be resolved without recourse to the law and its attendant expenses and delays.

4.1.2 The problem of jury awards has been addressed by the courts in a number of cases. Most recently, the Court of Appeal - in Esther Rantzen's case against *The People* newspaper - has issued welcome and much needed guidance to ensure that juries in libel cases receive suitable directions from judges before making awards. Juries will be invited to consider the purchasing power of any award they make. They will be asked to ensure that their award is proportionate to the damage the plaintiff has suffered and is a sum which it is *necessary* to award them to provide proper compensation and to reestablish their reputation. They will, furthermore, be given details of any previous comparable awards made by the appeal court.

4.1.3 Liberal Democrats are hopeful that the Court of Appeal's ruling in the Rantzen case will have a dampening effect on jury awards and will lead to greater consistency and a better sense of proportion. Unusual awards will no doubt continue to arise, but we think this is a matter better dealt with by the courts than by statutory reforms.

4.2 Making Libel Actions Affordable

4.2.1 The cost of bringing a libel action is a great disincentive to those individuals who believe themselves to have been libelled. The unavailability of legal aid for libel undoubtedly precludes some people from pursuing actions but the number is probably not large since most people do not and never will qualify for legal aid. Furthermore, the size of the costs that might be awarded against a complainant should the action fail represent too great a risk for all but the wealthiest individuals or corporation.

4.2.2 To rectify these problems we would:

- Extend legal aid to libel claims.
- Create a small claims service for libel.
- Create a new 'offer of amends' defence.

4.2.3 The unavailability of legal aid for libel is an anomaly which is sometimes justified by the need to avoid a proliferation of trivial claims. This argument is unconvincing, patronising and wrong. The case for legal aid - that individuals should not be precluded from the exercise of their legal rights by lack of means - applies equally to libel as to other action. While it is right for those allocating legal aid to consider the merits of particular cases, it is wrong that an entire area of law should be closed off to the poor, not least when it concerns the fundamentals of free speech. We would therefore extend the availability of legal aid to include libel actions.

A bad law of libel can have a serious chilling effect on freedom of speech

4.2.4 The extension of legal aid would not, however, make the law more accessible to the great mass of people neither poor enough to benefit from legal aid nor rich enough to finance their own libel actions. To protect these people, we would introduce a small claims service for libel claims. The difficulty with assigning *all* libel cases to a small claims service is that their less formal approach may not always be appropriate to the varied circumstances of disputes between individuals and the media.

4.2.5 To overcome these difficulties we would give a plaintiff prepared to limit his or her claim for damages to the level of the small claims courts' jurisdiction the right to go a small claims service (without a jury), regardless of the view of the defendant. Additionally, we would allow both parties to opt to have their case dealt with by a lower court, if agreement could be reached to this effect.

4.2.6 In 1992, a committee under the chairmanship of Lord Justice Neill made a number of recommendations for changes to the law of libel. Its recommendations included the extension of the statutory defence of privilege and the creation of a new 'offer of amends' defence, for cases where the defendant admitted liability. We would introduce such a defence, with the aim of preventing complainants from pursuing cases through the courts, when adequate redress has already been offered.

4.3 A New Defence of Publication in Good Faith

4.3.1 In the absence of any effective defence of publication in good faith or unintentional defamation, media defendants are obliged not merely to publish the truth but to be able to prove, in accordance with the strict rules of evidence, that what they publish is true. In many cases, this works for the public good, since there is no public interest served by the dissemination of unsubstantiated rumour and gossip. In other cases, however, the law may operate against the public interest: because it is often difficult to defend a libel action and the consequences of losing are so serious, editors are sometimes unwilling to take the necessary risks of publishing and, as a result, important stories are suppressed.

4.3.2 In 1993, the Law Lords recognised that the existing libel law may have a serious chilling effect on free speech, and decided that a government body (in this case Derbyshire County Council) should not be able invoke libel law to protect its reputation. The Law Lords referred in their decision to a decision by the US Supreme Court that a 'public figure' could only sue for libel by proving malice or reckless disregard for the truth. In October 1994, the Supreme Court of India and the High Court of Australia both argued that this restriction on the use of libel should be limited to 'public officials'. The High Court of Australia held that the right to criticise a Member of Parliament was at the very centre of the freedom of political discussion. It therefore decided to make it a defence in an Australian libel suit for the defendant to show that they

were unaware of the falsity of the material published, did not publish the material negligently (not caring whether it was true or false) and published the material in reasonable circumstances. Liberal Democrats would introduce a similar ‘publication in good faith’ defence in libel cases involving the activities of government bodies and those holding or seeking public office in the UK. The defence would not be applicable where the material published had no bearing on the person’s or body’s ability to discharge its or their public duties.

4.3.3 It can be argued that this defence should be extended to all libel cases involving ‘public figures’ (such as directors of large public companies or film stars), as the Supreme Court decided in the US. Liberal Democrats believe that it would be a mistake to go that far for the present. The more limited reform which is proposed in this section would go a long way to protect and sustain freedom of speech and information in the area in which the public interest is most often and most acutely involved, namely the exercise of power and expenditure of public funds. Experience of that reform in practice would show whether its extension to other areas of human activity was necessary or desirable.

This Paper has been approved for debate by the Federal Conference by the Federal Policy Committee under the terms of Article 5.4 of the Federal Constitution. Within the policy-making procedure of the Liberal Democrats, the Federal Party determines the policy of the Party in those areas which might reasonably be expected to fall within the remit of federal institutions in the context of a federal United Kingdom. The Party in England, the Scottish Liberal Democrats and the Welsh Liberal Democrats determine the policy of the Party in all other areas, except that any or all of them may confer this power upon the Federal Party in any specified area or areas. If approved by Conference, this paper will form the policy of the Federal Party.

Many of the policy papers published by the Liberal Democrats imply modifications to existing government public expenditure priorities. We recognise that it may not be possible to achieve all these proposals in the lifetime of one Parliament. We intend to publish a costings programme, setting out our priorities across all policy areas, closer to the next general election.

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