

PRIVACY, DEFAMATION AND THE MEDIA

The Government's Draft Defamation Bill and

Consultation Paper - Proposals, Problems and Practicalities

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Introduction

1. *"Nearly 30 years have elapsed since the last Government Committee on defamation, so that a review of the law is seasonable."*¹ These were the words of one commentator writing in the 1976 Modern Law Review about the recent report of the Faulks Committee on Defamation.² The author went on to observe that, *"although succeeding in its aim of simplifying the law, the Committee has not taken the opportunity for any radical reform"*.
2. Thirty-five years later, on 15 March 2011 the Coalition Government published its much trailed Draft Defamation Bill and Consultation Paper. Despite the hyperbole surrounding its announcement, in its present form the Bill proposes relatively few substantial changes and would mainly codify the existing common law. Plus ça change? Not quite – the Bill does contain some important proposals that are likely to have real consequences if they become law. Moreover, the very act of placing the main defences on a statutory footing would in itself represent a significant alteration to the defamation landscape. Practitioners will therefore wish to be familiar with the new provisions and the reasoning underlying their introduction.

¹ G. J. Pitt [1976] MLR 187

² The Report of the Committee on Defamation, Cmnd. 5909 (1975)

3. This Paper aims to outline the proposed changes and to provide an overview of some of the most important features of the draft legislation. It also considers the further issues raised by the Consultation Paper, some of which also touch upon points of real practical importance.

Background to the Draft Defamation Bill

4. The Draft Bill aims to fulfil the Coalition Agreement's promise of a "*review of libel laws to protect freedom of speech*". This follows on from the Report of the Ministry of Justice's Libel Working Group published in March 2010, which examined the issues of so-called "libel tourism", the possibility of reforming the multiple publication rule and of introducing a statutory public interest defence and explored various procedural points. Several of these issues were also tackled by the February 2010 Report of the Culture, Media and Sport Select Committee, *Press Standards, Privacy and Libel*.³
5. The Bill also comes against the backdrop of growing popular clamour for libel reform. English PEN and Index on Censorship recently published a joint report entitled *Free Speech is Not for Sale*, which calls for bold changes to English defamation law. The reform campaign has also been vociferously supported by newspapers, bloggers and the wider media.
6. In May 2010 Lord Lester of Herne Hill introduced a Private Member's Bill on the subject of defamation reform. This Bill received a Second Reading on 9 July 2010; however it was subsequently shelved after the Government announced its own plans to introduce legislation after a period of

³ Second Report of Session 2009-10 HC 362-1

consultation. However many of Lord Lester's proposals now find reflection in the Government's draft Bill, which has drawn heavily from some parts of the earlier Bill.

The Draft Defamation Bill

7. According to the Deputy Prime Minister the Draft Bill is intended to "*end the libel farce*" and "*will let the press be free*".⁴ However examination of the content of the proposed legislation reveals few radical changes to the status quo. Instead, much of the Bill focuses on replacing existing common law defences with new statutory defences covering very similar ground. The most significant changes involve the introduction of a substantial harm threshold for bringing defamation actions, the partial abrogation of the multiple publication rule and the removal of the presumption in favour of jury trial.
8. In overview the Draft Bill makes the following proposals:
 - a. Substantial harm – Under clause 1 a statement would not be defamatory unless its publication has caused or is likely to cause substantial harm to the claimant's reputation.
 - b. Responsible publication on matter of public interest – Clause 2 would create a new statutory defence of responsible publication on a matter of public interest.

⁴ Nick Clegg MP, the Guardian 15 March 2011

- c. Truth – Clause 3 would create a new statutory defence of truth and would repeal the existing common law defence of justification.
- d. Honest opinion – Clause 4 would create a new statutory defence of honest opinion and would repeal the existing common law defence of fair/honest comment.
- e. Privilege – Clause 5 would extend the range of situations that are protected by absolute or qualified privilege under the Defamation Act 1996.
- f. Single publication rule – Clause 6 would replace the common law’s “multiple publication rule” with a new “single publication rule” in certain circumstances.
- g. Jurisdiction – Clause 7 would create a new jurisdictional rule that would apply whenever a defamation claim is brought before the English courts against a defendant who is not domiciled in the UK, the European Union or a Lugano Convention state.
- h. Jury trial – Clause 8 would remove the presumption in favour of jury trial in all defamation cases and would replace it with a general discretion to order trial before a jury where the court considers it to be in the interests of justice to do so.
- i. Meaning of “publish” and “statement” – Clause 9 proposes to import the existing common law definitions of “publish”, “publication” and “statement” for the purposes of the Bill.

Clause 1 - Requirement to show substantial harm

9. Clause 1 of the Draft Bill proposes an exclusionary definition of “defamatory” in order to incorporate a “substantial harm” threshold. Clause 1 states:

“A statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant.”

10. The effect of this clause is that a statement will not be held to be defamatory unless it has caused or is likely to cause substantial harm to the claimant’s reputation. A similar provision had been included in Lord Lester’s Bill.⁵ The Consultation Paper endorses that approach and argues that clause 1 of the Draft Bill would provide extra certainty and would help to discourage trivial claims. It acknowledges that there is a risk that this might lead to “*some frontloading of costs*” but believes that this is a price worth paying to ensure that such issues are resolved at an early stage in proceedings.
11. In practice however the new provision is unlikely to take things much further than the existing common law position. In *Thornton v Telegraph Media Group Ltd*⁶ Tugendhat J referred to the judgment of the House of Lords in *Sim v Stretch*⁷ and to the judgment of Sharp J in *Ecclestone v Telegraph Media Group Ltd*⁸ and held that, “*whatever definition of ‘defamatory’ is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims*”.⁹ It seems

⁵ Clause 12 of Lord Lester’s Bill

⁶ [2010] EWHC 1414 (QB)

⁷ [1936] 2 All ER 1237

⁸ [2009] EWHC 2779 (QB)

⁹ Paragraph 89

unlikely that a requirement that the claimant must establish “*substantial harm*” will be applied very differently to a requirement that the statement must pass a “*threshold of seriousness*”. A statement that does not cause substantial harm is unlikely to pass a threshold of seriousness, and vice versa.

12. Moreover, under the doctrine established in *Jameel v Dow Jones*¹⁰ a claimant may apply to have a claim struck out as an abuse of process on the basis that it does not involve the commission of a “*real and substantial tort*”. In deciding whether to strike out, the court must ask whether “*the game is worth the candle*”. As Lord Phillips MR explained in *Jameel*:

*“Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant’s reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.”*¹¹

13. In other words, “*the Claimant must be pursuing the legitimate purpose of protecting its reputation. If it is not doing that, or if the means by which it is doing it are disproportionate, the court may have regard to the principle of freedom of expression in deciding whether or not the claim should be allowed to go forward at all.*”¹² The key issue is whether the cost of bringing a claim is disproportionate to “*the true value of the vindication available to a claimant*”.¹³ In cases where a

¹⁰ [2005] QB 946

¹¹ At [55]

¹² *Hays Plc v Hartley* [2010] EWHC 1068 (QB) at [62]

¹³ *Cristiano Ronaldo v Telegraph Media Group Limited* [2010] EWHC 2710 (QB) at [61]

claimant has suffered no substantial harm to her reputation and is unlikely to suffer such harm in future, it will usually be disproportionate to continue with the claim.

14. The Bill does not specifically address the mechanics for striking out claims that fail to satisfy the substantial harm threshold. The Consultation Paper proposes that, *“this would best be achieved by enabling the court to exercise its existing discretion to strike out or give a summary judgment, rather than by imposing a mandatory requirement for the court to strike out in these circumstances”*. This implies that the courts would retain a discretion not to strike out claims that are incapable of passing the substantial harm test even though the effect of clause 1 is that those claim would be bound to fail at trial. The Consultation Paper indicates that the matter will be raised with the Civil Procedure Rule Committee in due course.

Clause 2 - Statutory defence for responsible publication on a matter of public interest

15. Clause 2(1) of the Bill would establish a new statutory defence of responsible publication on a matter of public interest:

“Responsible publication on matter of public interest

- (1) It is a defence to an action for defamation for the defendant to show that
- - (a) the statement complained of is, or forms part of, a statement on a matter of public interest; and
 - (b) the defendant acted responsibly in publishing the statement complained of.”

16. Clause 2 has been heralded as a powerful new defence of responsible public interest publication. There have been widespread calls for the introduction of a statutory public interest defence. English PEN and Index on Censorship recently complained that the existing *Reynolds* defence “has not been applied widely enough beyond investigative reporting”. They call for the introduction of “a stronger public interest defence that also extends to journalists and writers who may not appear to be obvious candidates for a *Reynolds* defence”. The Culture, Media and Sport Select Committee also considered there to be “potential for a statutory responsible journalism defence to protect serious, investigative journalism and the important work undertaken by NGOs”.

17. However despite being acclaimed as a powerful rebalancing in favour of defendants, in essence clause 2 is little more than a statutory reformulation of the existing common law defence of *Reynolds* privilege. *Reynolds* privilege provides a defence whenever a statement has been published on a matter of public interest and the publisher has acted responsibly in all the circumstances.¹⁴ Despite the way that the defence is sometimes portrayed, it is now clear that it applies to all forms of public speech and is not limited to publications by conventional media organisations.¹⁵ Whilst there remains an academic debate about whether *Reynolds* belongs to a different jurisprudential category to conventional qualified privilege, the existence, scope and conditions of the defence are now well established.

18. According to the Consultation Paper, clause 2 of the Draft Bill is designed to provide a statutory defence that is “clearer and more readily applicable outside of

¹⁴ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127

¹⁵ *Seaga v Harper* [2009] AC 1 at [11]

the context of mainstream journalism” than *Reynolds* privilege. The Paper describes the concerns expressed by NGOs, the scientific community and others that *Reynolds* is “*difficult to rely on*” and that as a result legal advice on running the defence is often “*extremely cautious and discouraging*”. In addition, the media have expressed concerns about the way that *Reynolds* operates in practice, citing the complexity and costs incurred in running the defence. In a similar vein, the Libel Working Group described how “*the uncertainty experienced by organisations in this area is a major factor in creating a chilling effect on freedom of expression and investigative reporting*”.¹⁶

19. Despite these concerns, the structure of the proposed statutory defence is substantially the same as the existing common law defence. The leading authority on the application of *Reynolds* privilege is *Jameel v Wall Street Journal Europe Sprl*¹⁷. In that case Lord Hoffmann explained that it was necessary to follow a two-stage test when applying *Reynolds*. At stage one the court must consider two questions: First, did the article concern a matter of public interest? This must be decided by reference to the article as a whole and not by looking at the defamatory statement in isolation. Secondly, was the inclusion of the defamatory statement within the article itself justifiable? This latter question “*is often a matter of how the story should have been presented*” and therefore “*allowance must be made for editorial judgment*”.

20. At the second stage the court must then go on to consider whether the steps taken by the defendant to gather and publish the information were responsible and fair. In *Reynolds* Lord Nicholls laid down a non-exhaustive

¹⁶ Report of the Libel Working Group at [62]

¹⁷ [2007] 1 AC 359

list of ten matters that the courts should take into account when considering this issue. In *Jameel* Lord Hoffmann approved Lord Nicholls' approach and emphasised that the standard of conduct required of the publisher must be applied in a "*practical and flexible manner*" and "*must have regard to practical realities*".¹⁸

21. The public interest defence contained in the Draft Bill adopts a similar two-stage approach. At the first stage, the court must ask whether the statement complained of is or forms part of a statement on a matter of public interest. If the answer to the first question is affirmative, the court must then go on to consider whether the defendant acted responsibly in publishing the statement. Unlike the approach articulated by Lord Hoffmann in *Jameel*, this formulation does not expressly direct the court to ask whether the inclusion of the defamatory statement in the article was justified. However in practice it seems unlikely that this will make any practical difference to the outcome of any case. The question of whether inclusion of the defamatory statement was justified will presumably be subsumed within the broader question of whether the defendant acted responsibly.

22. The Bill omits any definition of "*public interest*". This omission is deliberate – the Consultation Paper says that the meaning of public interest "*is well-established in the English common law*" and that attempting to define the term in statute would be "*fraught with problems*". By way of example, the Paper cites the risk of inadvertently missing matters that are of public interest from any statutory definition and the risk of encouraging satellite litigation that could lead to increased costs. However this omission is likely to disappoint

¹⁸ *Jameel* at [56]

members of the Libel Working Group, who argued that English law needs “a better definition of a public interest defence”.¹⁹

23. On the question of what constitutes responsible behaviour, the Draft Bill proposes that the courts should consider a non-exhaustive list of factors similar to the list laid down by Lord Nicholls in *Reynolds*.

24. In *Reynolds* Lord Nicholls stated that the courts should consider the following:

- (a) The seriousness of the allegation;
- (b) The nature of the information and the extent to which the subject matter was a matter of public concern;
- (c) The source of the information;
- (d) The steps taken to verify the information;
- (e) The status of the information;
- (f) The urgency of the matter;
- (g) Whether comment was sought from the claimant;
- (h) Whether the article contained the gist of the claimant’s side of the story;
- (i) The tone of the article; and
- (j) The circumstances of the publication, including the timing.

25. Subsection (2) of clause 2 of the Draft Bill largely covers the same ground:

- (2) In determining whether a defendant acted responsibly in publishing a statement, the matters to which the court may have regard include (amongst other matters) –
 - (a) the nature of the publication and its context;

¹⁹ Report of the Libel Working Group at [69]

- (b) the seriousness of any imputation about the claimant that is conveyed by the statement;
- (c) the extent to which the subject matter of the statement is of public interest;
- (d) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;
- (e) whether the defendant sought the claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;
- (f) whether the defendant took any other steps to verify the accuracy of the statement;
- (g) the timing of the publication and whether there was reason to think it was in the public interest for the statement to be published urgently;
- (h) the tone of the statement (including whether it draws appropriate distinctions between suspicions, opinions, allegations and proven facts).

26. Perhaps the only significant difference from *Reynolds* privilege is the fact that the draft Bill is expressly intended to cover *statements of opinion* as well as statements of fact. The Consultation Paper explains that the new public interest defence will be available "*regardless of whether the statement complained of is a statement of fact, an inference or an opinion*". It is not considered necessary to include a specific provision to this effect within the clause because the language of the clause does not limit the scope of protection to factual statements (indeed sub-paragraph (h) refers to "*suspicions*" and "*opinions*", thereby highlighting the breadth of the new defence).

27. The Consultation Paper acknowledges that extending the public interest defence to cover statements of opinion means that "*there will be a degree of*

overlap between this defence and the new honest opinion defence". It is therefore possible that both defences would potentially be available in some circumstances. However the precise relationship between the two remains to be seen.

28. According to the Consultation Paper, it had been suggested that the list of factors in subsection (2) should include a reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines. A provision to this effect was included in Lord Lester's Bill²⁰; however the Government's Bill decided against including such a provision, citing the risk of satellite litigation over the meaning of the codes and the extent to which they had been complied with.

29. In response, it could be pointed out that s. 32(3) of the Data Protection Act 1998 allows the court to have regard to a data controller's compliance with relevant codes of practice when deciding whether or not the controller had a reasonable belief that publication of certain data would be in the public interest. There is no evidence that this provision has generated any satellite litigation in the data protection field, although it was significant in the *Naomi Campbell* case. Similarly s. 12(4)(b) of the Human Rights Act 1998 requires the court to have particular regard to "*any relevant privacy code*" whenever it is considering granting any relief which may affect the right to free expression in a case involving journalistic, literary or artistic material. Again, there is no sign of significant litigation on this point.

30. Furthermore, in *Jameel* Lord Hoffmann said that "*the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by*

²⁰ Clause 1(4)(g) of Lord Lester's Bill

the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance." There is therefore clear authority that codes of conduct are relevant to the assessment of whether a defendant has acted responsibly in publishing certain material.

31. The Bill also seeks to clarify the reportage doctrine. Under the existing regime the common law defence of reportage applies where *"judging from the thrust of the report as a whole, the effect of the report is not to adopt the truth of what is being said, but to record the fact that the statements which were defamatory were made"*.²¹ In other words a defendant may have a defence where it has reported defamatory allegations made by a third party about the claimant. The reportage defence is thus a modification of the repetition rule made in the interests of *Reynolds* privilege.²²

32. Clause 2(3) would elevate reportage onto a statutory footing. It provides that:

"A defendant is to be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person."

33. In summary, apart from the fact that clause 2 extends protection to statements of opinion the Bill does little more than codify *Reynolds* privilege. This may be thought surprising, since the Libel Working Group had previously concluded that *"pure codification of Reynolds would not be of value"*. The Consultation Paper itself concedes that *"there are clearly limits on the extent to which any statutory provisions could provide clarity and certainty in what is a complex area of the law"*

²¹ *Charman v Orion Group Publishing Group Ltd* [2007] EWCA Civ 972, [2008] 1 All ER 750 at [48]

²² *Roberts v Gable* [2008] QB 502

and it acknowledges that any statutory provisions will inevitably be subject to interpretation and development by the courts. This echoes the earlier conclusion of the Libel Working Group that *“there will always have to be a degree of flexibility inherent in any test – and therefore uncertainty in terms of its application in any particular situation.”*²³ It also reflects Lord Hope’s observation in *Jameel* that: *“Any test which seeks to set a general standard which must be achieved by all journalists is bound to involve a degree of uncertainty”*.

34. Placing the defence on a statutory footing will not necessarily make it significantly easier to predict whether the defence is likely to succeed in a particular case. In addition, some would argue that the concerns expressed about the vagueness of *Reynolds* are overblown and that Lord Hope’s words in *Jameel* are apposite: *“‘Responsible journalism’ is a standard which everyone in the media and elsewhere can recognise.”*²⁴

35. Finally, it is worth noting that it is unclear what will be the fate of the existing common law *Reynolds* defence if clause 2 becomes law. The Draft Bill expressly repeals the common law defences of justification and honest comment and replaces them with new statutory defences; however in establishing a new public interest defence the Bill makes no reference to the future status of common law *Reynolds* privilege. This would suggest that the Bill envisages the common law defence remaining in existence alongside the new statutory defence. However it is not clear how this would work in practice or whether this co-existence might make the law more rather than less complicated. Whilst there seems to be little daylight between the two

²³ Report of the Libel Working Group at p. 33

²⁴ *Jameel* at [107]

defences, the possibility of parallel regimes does little to achieve the clarity and simplicity that the draft Bill aspires to achieve.

Clause 3 – New statutory defence of truth

36. Clause 3 of the Bill proposes the establishment of a new statutory defence of truth:

“(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.”

37. At the same time the clause would also abolish the existing common law defence of justification:

“(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.”

38. The Consultation Paper explains that where a defendant wishes to rely on the new statutory defence the court would be required to apply the words used in the statute and not the current case law. However it goes on to say that “*in cases where uncertainty arises the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied*”. It is not clear exactly how this is intended to operate in practice. It is apparent from the Consultation Paper that the substance of the defence is intended to remain the same and that the old case law is intended to illuminate the new statutory meaning. This proposed approach has attracted criticism from some

commentators²⁵, who have cited Lord Hoffmann's comments during the second reading of the Lester Bill:

"I am always nervous, speaking as a former judge, about legislative attempts to restate rules of common law. They lead to expensive litigation over whether or not Parliament intended to change things."

39. Under clause 3 the defendant will have a defence if it can show that the imputation conveyed by the statement is substantially true. This reflects the current law as stated in *Chase v News Group Newspapers*.²⁶ Accordingly litigants will continue to argue about, and the courts will continue to apply, the so-called *Chase* Level meanings: actual guilt (*Chase* Level 1); existence of reasonable grounds to suspect guilt (*Chase* Level 2); existence of grounds to investigate (*Chase* Level 3).

40. The new defence retains the so-called "repetition rule", which provides that it is no defence to an action for defamation for the defendant to prove that he was merely repeating what someone else had said. For example if D writes that "X told me that C is a thief", D cannot escape liability by arguing that his statement was nothing more than a truthful description of what X had said to him about C. Clause 3(1) of the Draft Bill maintains the repetition rule by focusing on the "imputation" conveyed by the statement. In the present example the imputation of D's statement is that C *is* a thief. Thus in order to invoke the defence of truth, D would need to prove that C actually *is* a thief.

²⁵ See for example Alastair Mullis "*The Government's Defamation Bill – Insufficiently Radical?*" available at <http://inform.wordpress.com/2011/03/19/opinion-the-government%e2%80%99s-defamation-bill-%e2%80%93-insufficiently-radical-part-1-alastair-mullis-2/>

²⁶ [2002] EWCA Civ 1772

41. The Bill would also repeal but substantially reproduce the defence of partial justification under s. 5 of the Defamation Act 1952. Clause 3(2) and (3) provide that where a statement contains two or more distinct imputations, the new defence of truth would not fail if, having regard to the imputations which are shown to be substantially true, the allegations which are not shown to be substantially true do not “*materially injure*” the Claimant’s reputation. Thus the subsections provide as follows:

(2) Subsection (3) applies in an action for defamation in relation to a statement which conveys two or more distinct imputations.

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not materially injure the claimant’s reputation.

42. The Consultation Paper also addresses one particular issue that has arisen from time to time, namely whether the partial justification defence should be extended to cover situations where there is a *single* defamatory imputation which may have several *different shades of meaning*. Parties frequently disagree on the exact meaning that certain words bear. A claimant may argue that a particular statement means that he has knowingly lied, whereas the defendant may contend that the words merely mean that he has behaved recklessly. If the court agrees with the claimant’s meaning (i.e. if the court rules that the words meant that he had knowingly lied) should it be a defence if the defendant can prove that the claimant was reckless, even though he cannot prove the more serious allegation that the claimant knowingly lied?

43. At present this situation falls outside of the scope of s. 5 of the Defamation Act 1952. However it has been suggested that the defence of truth should be available where there is a single imputation and, having regard to what can be proved by the defendant, there is no material injury to the claimant's reputation. A clause was included in Lord Lester's Bill to this effect.²⁷ The Consultation Paper therefore invites views on whether the law should be amended in this way.

Clause 4 - Statutory defence of honest opinion

44. Clause 4 would repeal the existing common law defence of fair/honest comment and replace it with a new statutory defence of "*honest opinion*". Whilst much of the substance of the new defence matches the common law defence, there are also some important differences concerning the factors that the defendant must establish in order to invoke the defence.

45. The existing honest comment defence has spawned some notoriously complex case law. It was recently considered by the Supreme Court in *Spiller v Joseph*²⁸, where Lord Phillips summarised the constituent elements of the defence as follows:

(a) The comment must be on a matter of *public interest*.

²⁷ Clause 5(3) of Lord Lester's Bill

²⁸ *Spiller v Joseph* [2010] 3 WLR 1791

- (b) The statement must be recognisable as one of *comment* and not an imputation of fact (but an inference of fact from other facts referred to may amount to comment)
- (c) The comment must be based on *facts which are true* or by a *statement of fact protected by privilege*.
- (d) The comment must *explicitly or implicitly indicate*, at least in general terms, the *facts on which it is based*.
- (e) The comment must be one that an *honest person* could have made on the proved facts (however prejudiced he might be and however exaggerated or obstinate his views).

46. The Consultation Paper highlights concerns about the complexity and uncertainty of the current defence. Particular concerns have arisen in the context of several recent cases involving comment on issues of scientific and academic debate (for instance the high profile case of *Singh v British Chiropractors Association*²⁹). English PEN and Index on Censorship complain that “*defendants have to jump through too many hoops for their publication to qualify as ‘comment’, while judges tend to be overly analytical in their approach*”. The Culture, Media and Sport Select Committee also singled out “*the issue of fair comment in academic peer-reviewed publications*” as requiring specific consideration.

47. Clause 4 of the Draft Bill provides:

4 Honest Opinion

²⁹ *Singh v British Chiropractors Association* [2010] EWCA Civ 350

- (1) It is a defence to an action for defamation for the defendant to show that Conditions 1, 2 and 3 are met.
- (2) Condition 1 is that the statement complained of is a statement of opinion.
- (3) Condition 2 is that the opinion is on a matter of public interest.
- (4) Condition 3 is that an honest person could have held the opinion on the basis of –
 - (a) a fact which existed at the time the statement complained of was published;
 - (b) a privileged statement which was published before the statement complained of.
- (5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.
- (6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
- (7) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

48. The Draft Bill proposes that three conditions would need to be satisfied in order to establish the new defence. First, the statement complained of must be an expression of opinion and not an assertion of fact. Secondly, the opinion must be on a matter of public interest. Thirdly, the opinion must be one that an honest person could have held on the basis of a fact which existed at the

time the statement was published or on the basis of a privileged statement that was published before the statement complained of.

49. Conditions one and two reflect the current law. In *Spiller* it had been suggested that the public interest requirement might be dropped from the defence at some point in future.³⁰ However the Bill deliberately opts to retain the public interest requirement as part of the new defence. Whilst the arguments are “*finely balanced*”, the Consultation Paper concludes that removing the public interest requirement would extend protection to expressions of opinion on private matters, the airing of which may raise issues under Article 8 and which could not be justified as being in the public interest.

50. The third condition also sets out largely to maintain the current law. However it abandons the requirement that a comment must indicate expressly or impliedly the facts on which the opinion is based. This condition was the subject of detailed consideration in *Spiller*. The rationale for the requirement was explained by Fletcher Moulton LJ in *Hunt v The Star Newspaper*: the injustice that an unjustified defamatory comment can cause to the claimant’s reputation may be mitigated if the reader can see the basis of the comment and can thus be in a position to appreciate that it is not justified.³¹ Clause 4 of the Draft Bill “*avoids the complexities which have arisen in case law*” by jettisoning this requirement.

51. Under condition 3, the statement must be based on a fact that existed at the time or upon a statement protected by privilege. In *Galloway v Telegraph Group*

³⁰ *Spiller* at [113]

³¹ *Hunt v The Star Newspaper* [1908] 2 KB 309

Limited Eady J appeared to suggest that a defence of honest comment could be based on a statement protected by *Reynolds* privilege.³² However unlike Lord Lester's bill³³, the draft Bill does not expressly include statements protected by *Reynolds* privilege within the ambit of the third condition. The Consultation Paper explains that: "*it is not intended that statements to which the public interest defence in clause 2 of the Bill applies will be covered by this subsection*". Accordingly the question whether a statement protected by *Reynolds* privilege (or the proposed statutory equivalent) can form the basis of a defence of honest comment under clause 4 remains uncertain.

52. The Draft Bill also maintains the current position by requiring the opinion to be one that an honest person could have held. In *Spiller* Lord Phillips had suggested that this requirement might be replaced by a test of whether the defendant *subjectively believed* that his or her opinion was justified by the facts on which he or she based it.³⁴ The Consultation Paper rejects this approach on the basis that a subjective test could add to the complexity of the defence and would give rise to "*difficult evidential requirements*". It therefore adopts an objective test.

53. There is however an important difference between the new defence and the existing honest comment defence. Under the proposed honest opinion defence the defendant need only establish that an honest person would have been justified in holding the opinion based on one or more facts or privileged statements. However the defendant does not need to establish that he or she was actually aware of the fact(s)/privileged statement(s) at the time of

³² *Galloway v Telegraph Group Limited* [2004] EWHC 2786 (QB) at [176]

³³ See clause 3(4)(b) of Lord Lester's Bill

³⁴ *Spiller* at [112]

publication of the words complained of. This stands in contrast to the current law. In *Lowe v Associated Newspapers Ltd* Eady J held that in order to rely on the honest comment defence the defendant must have *actually known* of the facts in question (although he added that “*it is not necessary that they should all have been in the forefront of the commentators mind*” and said that a commentator could rely on a fact even if he has forgotten it, since “*it may have contributed to the formation of his opinion*”).³⁵ Although in *Spiller* Lord Phillips cast doubt on some aspects of Eady J’s reasoning, it is clear that under the present law a defendant must establish some prior personal knowledge of the facts on which he is basing his defence. The defence proposed by the Draft Bill would appear to abandon this requirement, meaning that it will be easier for defendants to avoid liability for defamatory statements of opinion.

54. Subsection (5) maintains the current law in relation to malice. Thus the defence of honest opinion would only fail if the claimant could prove that the defendant did not hold the view expressed. For these purposes the fact that the defendant was motivated by spite or ill-will is irrelevant provided that he genuinely did hold the opinion expressed.³⁶

Clause 5 - Absolute privilege

55. Clause 5(1) would extend the scope of absolute privilege. Under the present law s. 14 of the Defamation Act 1996 provides that fair, accurate and contemporaneously published reports of proceedings before all UK courts, the European Court of Human Rights, the Court of Justice of the European

³⁵ *Lowe v Associated Newspapers Ltd* [2007] QB 580

³⁶ See Lord Nicholls in *Tse Wai Chun Paul v Cheng* [2001] EMLR 777 at [41] and Lord Phillips in *Spiller v Joseph* at [108]

Union and any international criminal court established by the UN Security Council are protected by absolute privilege. In view of the responses to Lord Lester's Bill, the Government's Draft Bill proposes that s. 14 of the Defamation Act 1996 should be amended so that it covers:

- (a) any court in the United Kingdom;
- (b) any court established under the law of a country or territory outside the United Kingdom;
- (c) any international court or tribunal established by the UN Security Council or by an international agreement.

56. The Consultation Paper invites views on whether a statutory clarification of the term "*contemporaneous*" is desirable. It also asks whether the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports should be removed.

Clause 5 - Qualified privilege

57. Clause 5 of the draft Bill also proposes amending Schedule 1 of the Defamation Act 1996 in order to extend the scope of qualified privilege in the following ways:

- (a) In addition to protecting copies and extracts of the materials listed in Part 2 of Schedule 1 to the Defamation Act 1996, clause 5(3) of the draft Bill would extend qualified privilege to a fair and accurate "*summary*" of that material. This mirrors an identical amendment proposed by the Lester Bill.
- (b) Clause 5(7) of the draft Bill would introduce a specific provision into Part 2 of Schedule 1 giving protection of

qualified privilege to fair and accurate reports (and summaries) of proceedings at “*academic and scientific conferences*”. However the Bill provides no definition of the phrase “*academic and scientific conferences*”. On this point the Consultation Paper explains that “*a clear and comprehensive definition would be very difficult to achieve*” and that it may therefore be preferable for the courts to consider in a flexible way whether the defence should be available in particular circumstances.

(c) At present Part 2 confers qualified privilege upon certain publications arising in the UK and EU Member States. Clause 5 extends the scope of this protection to publications arising anywhere in the world. Thus clause 5(4) extends protection for reports of public meetings and clause 5(6) extends protection for reports of findings or decisions of certain kinds of association.

(d) At present Part 2 confers qualified privilege upon fair and accurate reports of proceedings at general meetings and documents circulated by UK public companies. Clause 5(5) of the draft Bill proposes extending this protection to cover public companies anywhere in the world.

58. The Consultation Paper explains that the Government decided not to extend qualified privilege to cover fair and accurate copies and extracts from material

in an archive where the limitation period for an action against the original publisher has expired. The Paper explains that there is “no generally agreed definition of what constitutes an archive” and says that it is “difficult to see a clear rationale for extending qualified privilege to archives generally”.

Clause 6 - Single publication rule

59. Under the current law, each publication of defamatory material gives rise to a separate cause of action subject to its own limitation period. This principle is known as the “multiple publication rule”. However the advent of the internet age and the development of online archives have placed considerable strain upon this rule. Under the multiple publication rule every “hit” on a web page constitutes a fresh publication which potentially gives rise to a fresh cause of action in defamation. This means that publishers are potentially liable for any defamatory material accessible on an online archive regardless of how much time has passed since the initial publication and regardless of whether proceedings have already been brought in relation to the initial publication. Although the European Court of Human Rights has held that the rule does not in itself violate Article 10³⁷, it is clear that it can have an onerous impact upon newspapers and other online publishers.

60. Support for reform of the multiple publication rule has come from a number of quarters. *Free Speech is Not For Sale* argues that “the definition of ‘publication’ in libel is no longer fit for the internet age”. The Report of the Libel Working Group identified a range of possible alternatives:

³⁷ *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* (Apps Nos 3002/03 and 23676/03) [2009] EMLR 254.

- a. Introduce a single publication rule with a one-year limitation period coupled with a discretion to the court to extend the limitation period where appropriate.
- b. Introduce a single publication rule with a one-year limitation period. After expiry of the limitation period a claimant would be barred from recovering any further damages; however it would still be entitled to apply to the court for an order requiring the defendant to correct a defamatory statement.
- c. Adopt the approach taken in s. 11 of the Irish Defamation Act 2009, which provides that only one cause of action exists in relation to a multiple publication. However the court possesses a discretion to grant leave for a further action to be brought where this is required by the interests of justice.
- d. Retain the multiple publication rule but introduce a defence that protects a publisher from legal action outside of the one-year limitation period provided that the publisher attaches a notice to the online archive indicating that the accuracy of the material is disputed by the claimant.

61. Clause 6 of the Draft Bill would adopt the first of these options. Under clause 6 a claimant would be prevented from bringing an action in relation to a subsequent publication of the *same material* by the *same publisher* where more than a year has passed since the date when that material was first published to the public or a section of the public. Thus clause 6(1) provides:

“(1) This section applies if a person –

- (a) publishes a statement to the public (‘the first publication’), and
- (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same”

62. Subsection (2) explains that “*publication to the public*” includes “*publication to a section of the public*”. The Consultation Paper explains that this is intended to ensure that the provision catches publications to a limited number of people (e.g. a blog with a small number of subscribers).

63. Subsection (3) then provides that for the purposes of s. 4A of the Defamation Act 1980 (which lays down the one-year limitation period in defamation actions) any cause of action against the publisher in relation to the subsequent publication is treated having accrued on the date of the first publication.

64. However under subsection (4) the new single publication rule will not apply to the subsequent publication “*if the manner of that publication is materially different from the manner of the first publication*”. Exactly how this subsection applies to particular cases may well be a matter of dispute. Subsection (5) therefore attempts to provide some certainty by laying down the following guidance:

“(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters) -

- (a) the level of prominence that a statement is given;
- (b) the extent of the subsequent publication.”

65. The effect of the Draft Bill is that a claimant could still bring a new claim in respect of a later statement if:

- a. the later statement is published less than a year after the original statement was published;
- b. the later statement is not “substantially the same” as the original statement;
- c. the manner of publication of the later statement is materially different from the original publication; or
- d. the original material is republished by a new publisher;

68. The court would also retain discretion under s. 32A of the Limitation Act 1980 to allow the claimant to bring an action outside of the one-year limitation period where it is equitable to do so.

69. Clause 6 will be of particular interest to newspapers and other publishers who maintain online archives of earlier publications. Typically the articles stored in those archives will be in substantially the same form as the article originally published to the public. Therefore the Bill would offer substantial protection against the risk of claims based on dormant defamatory material that is resurrected years after it was initially published.

Clause 7 - Jurisdiction

70. Clause 7 contains proposals that are aimed at tackling “*the widespread perception that the English courts have become the forum of choice for those who wish to sue for libel*” and the “*chilling effect*” that this is supposedly having on freedom of expression “*throughout the world*”.

71. The rules regarding jurisdiction in defamation proceedings are already subject to international legislation. Under the Brussels I Regulation jurisdiction must be exercised by the Member State where the defendant is

domiciled (Art. 2). However under Art. 5(3) a person domiciled in a Member State can also be sued in tort in the courts of the Member State where the harmful event occurred. In *Shevill v Presse Alliance* it was held that publication of defamatory material in this jurisdiction is a “harmful event” for the purposes of Art. 5(3).³⁸

72. In cases where the defendant is not domiciled in a Member State the English courts have a discretion to decline jurisdiction if not satisfied that there was a real and substantial tort committed within the jurisdiction (*Jameel* at [70]; CPR 6.37 and Practice Direction 6B para 3.1(9)), or if the Claimant cannot establish that England and Wales is the proper place in which to bring the claim (CPR 6.37(3)). These provisions are already available to the court to prevent “libel tourism” in an appropriate case – see for example the recent decision in *Firtash v Public Media & Ors*, 24/2/11.

73. Clause 7 would apply to actions in defamation against a person who is not domiciled in the UK, another Member State or a State that is a party to the Lugano Convention.³⁹ In those cases, a claimant would only be permitted to bring a claim in the English courts if this is “clearly the most appropriate place” in which to bring such a claim. Clause 7(2) accordingly provides that:

“A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.”

³⁸ *Shevill v Presse Alliance* [1996] AC 959 and [1995] ECR I-415

³⁹ The Lugano Convention is the Convention on judgments and the recognition and enforcement of judgments in civil and commercial matters between the European Community and Ireland, Norway, Switzerland and Denmark.

74. The Consultation Paper explains that the “new” approach is intended to ensure that in cases where a statement has been published in this jurisdiction and abroad, *“the court is required to consider the overall picture to consider where it would be most appropriate for the claim to be heard”*. In terms of procedure, it is intended that the new rule would be applied within the existing procedural framework for defamation claims. Thus, if a person applied for permission to serve a claim form outside of the jurisdiction under CPR rule 6.36, the court would refuse to exercise its discretion to grant permission if it was of the view that it would not have jurisdiction to hear the claim as a result of clause 7. If permission was granted under CPR rule 6.36, the defendant would be able to make an application under CPR rule 11(1)(a) challenging the court’s jurisdiction and asking the court to set aside the claim form and service of it. It might be thought that this does little more than re-emphasise what is already apparent from the existing rules relating to jurisdiction.

Clause 8 - Jury trial

75. Under the current law there is a right to trial by jury in defamation proceedings on the application of any party *“unless the court considers that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury”* (s. 69 of the Senior Courts Act 1981 and s. 66 of the County Courts Act 1966).

76. In cases involving a jury, the following issues are left to the jury:

- i. The meaning that the words complained of bear and whether that meaning is defamatory.

- ii. In cases where a defendant pleads a defence of justification, whether the defendant has shown that the words were substantially true.
- iii. In cases of honest comment, all issues of fact are for the jury. The only exception is that it is for the judge to decide whether the subject matter is a matter of public interest (this is treated as a question of law). The same is true in relation to the defence of *Reynolds* privilege.
- iv. Whilst the judge decides whether a publication attracts qualified or absolute privilege, all disputed facts relevant to the existence of privilege are determined by a jury (e.g. whether a report is fair and accurate).
- v. The question whether a publication was malicious is for the jury.
- vi. The assessment of damages is also decided by the jury.

77. In practice however few defamation cases ever actually end up before a jury. In 2010, for example, there were no defamation jury trials. Yet there is still widespread support for reform of the rules relating the right to trial before a jury. Much of this support derives from a belief that the right to jury trial encourages the parties to engage in protracted interlocutory disputes. This view was expressed by Lord Phillips in *Spiller v Joseph*:

“Finally, and fundamentally, has not the time come to recognise that defamation is no longer a field in which trial by jury is desirable?”

The issues are often complex and jury trial simply invites expensive interlocutory battles...which attempt to pre-empt issues from going before the jury."⁴⁰

78. Clause 8 of the draft Bill therefore proposes that the presumption in favour of jury trial should be substituted for a discretion to order jury trial where it is in the interests of justice. The Bill does not contain any guidelines to assist the court in exercising this discretion, but the Consultation Paper indicates that it would be desirable to do so and invites submissions on what criteria would be appropriate.

Other issues for consultation

79. In addition, the Bill also raises several other issues where reform has been suggested. It invites comments on these points and indicates that further provisions may be included in the Draft Bill in the light of this consultation exercise.

A. Responsibility for publication on the internet

80. This is a key issue that has attracted much attention in the debate over libel reform. In practice many types of information society service provider (eg search engines) are not regarded as publishers at common law – see *Metropolitan International Schools v Google Inc* [2009] EMLR 27. Further, section 1 of the Defamation Act 1996 provides a defence of innocent dissemination to people who are not the author, editor or commercial publisher of a defamatory statement. Secondary publishers are protected from liability if they can show that they took reasonable care in relation to the publication and did not know or have reason to believe that what they had done had

⁴⁰ *Spiller* at [116]

contributed to the publication of a defamatory statement. However the Consultation Paper notes that *“the growth of the internet and the increase in the use of user generated content has raised concerns that the section 1 provisions may be unclear and may not sufficiently protect secondary publishers engaging in multimedia communications”*.

81. Similarly the Electronic Commerce (EC Directive) Regulations 2002, which implement in domestic law the E-Commerce Directive, provide protection along broadly similar lines to certain online intermediary services. However the scope of protection offered by these Regulations is not always clear, and the extent to which they correctly transpose the Directive is controversial and the subject of litigation.

82. The Consultation Paper invites views on the following issues:

- a. Whether the law should be changed to protect Internet Service Providers (ISPs) and other secondary publishers against liability for defamatory material posted online. Possible options include:
 - i. Removing liability altogether.
 - ii. Introducing a system akin to that which currently applied in relation to copyright disputes in the US. Under this system the ISP or discussion board would act as a liaison point between the complainant and the poster of the defamatory material. If the issue is not resolved this way, the complainant would have to take legal action against the individual poster and would be barred from bringing a claim against the ISP.

- iii. Requiring the claimant to obtain a court order for the removal of defamatory material before the ISP or website host is under any obligation to remove it.
 - iv. Developing separate frameworks for dealing with small scale forums and blogs, on the one hand, and larger corporate ISPs on the other.
- b. Whether section 1 of the Defamation Act 1996 should be updated and clarified. Clause 9 of Lord Lester’s Bill proposed a new overarching framework and terminology to govern the circumstances in which different types of online and offline publishers would be liable. The Consultation Paper invites submissions on the desirability of this approach.
- c. Whether there should be a new statutory procedure for notice and take down of defamatory material. Again, clause 9 of Lord Lester’s Bill included a provision to this effect and consultees are invited to comment on this.

B. A new procedure for defamation cases

83. The Consultation Paper outlines proposals for introducing a new preliminary rulings procedure whereby rulings would be given on certain key issues at an early stage in proceedings. This proposal echoes the recent suggestion of Sir Charles Gray and Alastair Brett that a voluntary scheme could be established to determine preliminary issues in disputes involving the media.

84. The main issues identified by the Consultation Paper as being suitable for preliminary determination are:

- a. Whether the claim satisfies the new substantial harm test.
- b. What the actual meaning of the words complained of is and whether that meaning is defamatory.
- c. Whether the words complained of are a statement of fact or an opinion.

85. Other issues that could possibly be dealt with under a preliminary hearing system include:

- a. Whether the publication is on a matter of public interest.
- b. Whether the publication falls within the categories of publication to which qualified privilege is available under Schedule 1 to the Defamation Act 1996.
- c. Consideration of costs budgeting. (Note, the Defamation Proceedings Costs Management Scheme is currently being piloted at the Royal Courts of Justice and an extension to this pilot programme has recently been approved.)

C. The summary disposal procedure

86. Under the present law ss. 8 and 9 of the Defamation Act 1996 establish a summary disposal procedure for claims where the court is satisfied that either the claimant's case or the defendant's defence has no realistic prospect of success and there is no other reason why the claim should be tried. The court is empowered to make a declaration that the statement complained of was false and defamatory, to order the defendant to publish a suitable correction

or apology, to prohibit the defendant from republishing the defamatory statement, and can award up to £10,000 in damages to the claimant.

87. The Consultation Paper notes that the summary disposal procedure is rarely used in practice. It therefore asks whether the regime should be retained. If the procedure is retained, the Consultation Paper asks whether the court should be given the power to order a losing defendant to publish the full judgment of the court.

D. The ability of corporations to sue in defamation

88. This is another particularly contentious issue. At present a trading corporation can sue for defamatory statements that harm its trading or business reputation (however it cannot sue for injury to feelings). The Culture, Media and Sport Select Committee referred to a “*mismatch in resources between wealthy corporations and impecunious defendants*”. It raised the possibility of introducing a new tort of “*corporate defamation*” which would require a corporation to prove actual damage to its business before it could claim in defamation. Alternatively, the Report suggested that corporations could be forced to rely on the existing tort of malicious falsehood (with its more onerous requirements of establishing actual damage and malice or recklessness). The Report also suggested reversing the burden of proof in cases where the claimant is a corporation. In a similar vein English PEN and Index on Censorship recommend that large and medium sized corporations should be unable to bring claims for libel and should instead be confined to bringing claims in malicious falsehood.

89. The Consultation Paper appears to take a slightly cool approach to proposals to limit the ability of corporations to sue in defamation. The Paper states that, “it should be recognised that corporations do have reputations which deserve protection against defamatory allegations” and notes that “the damage caused by such allegations can have wide-ranging effects on the employees and shareholders of the company, and on wider society”. It also says that reversing the burden of proof in claims brought by medium and large corporations would not be viable. The Paper adds that the introduction of a new preliminary hearing procedure and the other provisions in the Draft Bill, together with the broader proposals on civil costs outlined in Lord Justice Jackson’s report⁴¹ should mean that defamation proceedings are “far less susceptible to manipulation by those with greater resources, whether they are companies or individuals”. However the Paper does not rule out the possibility of reform and invites views on whether any further provisions should be enacted to address the problems that may arise when large corporations bring claims in libel.

E. The ability of public bodies to bring claims in defamation

90. In *Derbyshire County Council v Times Newspapers Ltd* the House of Lords held that a local authority could not bring a claim in libel in respect of its governmental and administrative functions.⁴² Subsequent case law suggests that the ambit of the doctrine is broader and applies to agencies and companies that exercise some form of governmental function. The Consultation Paper invites views on whether the *Derbyshire* principle should be placed on a statutory footing and extended to cover all public authorities within the meaning of s. 6 of the Human Rights Act 1998. The Paper notes

⁴¹ *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales*

⁴² *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534

that the definition of “public authority” under s. 6 has generated much case law. It therefore suggests as an alternative possibility the creation of a statutory list of public authorities similar to that contained in Schedule 1 to the Freedom of Information Act 2000.

Conclusion

91. In *Slim v Daily Telegraph Ltd* Lord Diplock referred to “*the artificial and archaic character of the tort of libel*”.⁴³ Many would argue that this description rings even more true today than it did four decades ago. The Draft Defamation Bill represents an important attempt to tidy up defamation law and to look afresh at some of the issues that have generated such complicated and unwieldy case law. Whilst overall the Bill is more evolutionary than revolutionary, the changes that it proposes are certainly not just cosmetic. In particular, the revamped honest opinion defence, the partial abrogation of the multiple publication rule and the removal of the presumption in favour of jury trial would each involve important changes to the existing law. At the same time Consultation Paper raises crucial questions about the procedure for trying defamation claims and the application of the law of libel to internet publications.

92. In conclusion, whilst the Draft Bill and Consultation Paper are unlikely to satisfy the most ardent advocates of defamation reform, some of the proposals contained in those documents have the potential to effect a significant change to the shape and substance of English defamation law.

⁴³ *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171

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