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Anonymity (Arrested Persons) Bill

Bill 9 of 2010-11

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The *Anonymity (Arrested Persons) Bill* is a Private Member's Bill. It was presented to Parliament by Anna Soubry on 30 June 2010 as Bill 9 of 2010-11. It is due to have its second reading on 4 February 2011.

The Bill would prohibit the publication or broadcast of the name, address or image (still or moving) of a person arrested for an offence if such information would be likely to lead members of the public to identify him or her as the person suspected of committing the offence in question. These reporting restrictions would remain in force unless and until the arrested person was charged with the offence for which he or she had been arrested.

A Crown Court judge would, however, have the power to direct that the reporting restrictions should not apply in any particular case: for example, where identifying the suspect in the press might lead to additional complainants coming forward or to information that would assist either the police investigation or the suspect.

The Bill follows recent controversy over press coverage of a man arrested (and subsequently released on bail without charge) on suspicion of the murder of Joanna Yeates. The *Sunday Times* has suggested that the Bill has the support of the Justice Secretary and the Attorney General, although it should be emphasised that there has been no official confirmation of the Government's position.

Sally Almandras

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Summary

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The Bill would prohibit the publication or broadcast of the name, address or image (still or moving) of a person arrested for an offence if such information would be likely to lead members of the public to identify him or her as the person suspected of committing the offence in question. These reporting restrictions would remain in force unless and until the arrested person was charged with the offence for which he or she had been arrested.

A Crown Court judge would, however, have the power to direct that the reporting restrictions should not apply in any particular case. Such a direction could be made where it was:

- required to comply with the *Human Rights Act 1998*;
- in the interests of justice; or
- otherwise in the public interest.

The Bill gives a non-exhaustive list of cases where it might be "in the interests of justice" to make such a direction, including where a report of the suspect's identity might lead to additional complainants coming forward or to information that assisted either the police investigation or the suspect.

If enacted, the Bill's provisions would work alongside existing rules restricting the reporting of criminal proceedings. For example, the law currently gives automatic anonymity to defendants under 18 appearing in the youth court, and discretionary anonymity to defendants under 18 appearing in adult courts. Also relevant is the *Contempt of Court Act 1981*, which prohibits the press from reporting comments or information that would create "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". Examples of reports that might be in contempt could include details of a defendant's previous convictions, or insinuations as to a defendant's guilt.

Ms Soubry has said that the Bill was prompted by the media treatment of actor and television presenter Matthew Kelly, following his arrest in 2003 for alleged sex offences and his subsequent release without charge. She has argued that the media is unable to regulate itself and that Parliament should step in. The *Sunday Times* has suggested that the Bill has the support of the Justice Secretary and the Attorney General, although there has been no official confirmation of the Government's position.

According to press reports, some have argued that naming arrested suspects enables the public to hold the police to account and provides a degree of protection for the arrested person. It may also lead to new witnesses coming forward. Practical objections have also been raised, in particular as to how the reporting restrictions would be enforced in relation to internet speculation.

1 Introduction

The *Anonymity (Arrested Persons) Bill* is a Private Member's Bill. It was presented to Parliament by Anna Soubry on 30 June 2010 as Bill 9 of 2010-11. It is due to have its second reading on 4 February 2011.

The Bill would extend to England and Wales.

2 Current restrictions on reporting the identity of suspects

Generally speaking, the criminal justice system in England and Wales operates in accordance with the principle of "open justice". The Judicial Studies Board has emphasised the importance of this principle:

> The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media are able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court act as the eyes and ears of the public enabling it to follow court proceedings and to be better informed about criminal justice issues.
>
> The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward.
>
> It provides public scrutiny of the trial process, maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified.
>
> Parliament has recognised the importance of contemporaneous media reports of legal proceedings by giving protection from liability for contempt of court and defamation to fair, accurate and contemporaneous reports of court proceedings.[1] The important role of the media as a public watchdog is also recognised under the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECHR).[2]
>
> As public authorities under the Human Rights Act, courts must act compatibly with Convention rights, including the right to freedom of expression under Article 10 ECHR and the right to a public hearing under Article 6 ECHR. Any restriction on the public's right to attend court proceedings and the media's ability to report them must be necessary, proportionate and convincingly established.[3]

However, there are a number of controls on the principle of open justice: some statutory and some a matter of practice.

For example, there are statutory reporting restrictions relating to the identity of under 18s involved in court proceedings (whether as suspect, victim or witness). Also relevant is police guidance on the naming of adult suspects, which suggests that the police will not usually name a suspect until he or she has been charged. However, this is currently a matter of practice rather than law, and it is therefore open to the police to name a suspect at a pre-charge stage of the investigation should they choose to do so.

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1 See s4(1) *Contempt of Court Act 1981*; s14 *Defamation Act 1996*

2 *Observer and Guardian v UK* (1992) 14 EHRR 153, para 59

3 Judicial Studies Board, *Reporting Restrictions in the Criminal Courts*, October 2009, p6

Although there are not currently any statutory restrictions on the reporting of an adult suspect's identity, contempt of court laws provide a degree of protection as they prohibit the reporting of anything that "may interfere with the course of justice in particular legal proceedings". Although these rules would not usually prohibit the reporting of an adult suspect's identity, they could (for example) prohibit the reporting of the suspect's previous convictions or speculative assertions as to his or her guilt.

Further information on each of these controls is set out in the following sections of this note.

2.1 Reporting restrictions in respect of under 18s

At present, the only suspects who are routinely given protection from having their identities reported are children and young people under 18. There are statutory reporting restrictions – some automatic and some discretionary – that prohibit the reporting of the name, address, school or image of a child or young person involved in court proceedings (whether as suspect, victim or witness). It should be noted that legally these reporting restrictions only come into play once court proceedings are active, and would not therefore technically cover the case of a young person who had been arrested but not yet charged. However, a degree of non-statutory protection is provided by some of the codes of practice followed by the media. For example, Rule 1.9 of the Ofcom Broadcasting Code states:

> When covering any pre-trial investigation into an alleged criminal offence in the UK, broadcasters should pay particular regard to the potentially vulnerable position of any person who is not yet adult who is involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of them. **Particular justification is also required for the broadcast of such material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant**. [*Emphasis added*]

Automatic reporting restrictions: the youth court

Under section 49 of the *Children and Young Persons Act 1933* (as amended), reporting restrictions will apply *automatically* to proceedings in a youth court. Section 49(1) imposes the following prohibitions:

> (a) no report shall be published which reveals the name, address or school of any child or young person concerned in the proceedings or includes any particulars likely to lead to the identification of any child or young person concerned in the proceedings; and
>
> (b) no picture shall be published or included in a programme service as being or including a picture of any child or young person concerned in the proceedings.

In certain circumstances the court can, however, order that the automatic restrictions should not apply. The court may make such an order where it is satisfied that:

- it is appropriate to do so for the purpose of avoiding injustice to the child or young person, for example if naming the child or young person might encourage witnesses to come forward;[4]
- in relation to a child or young person who is unlawfully at large having been charged with or convicted of a specified serious offence, it is necessary for the purpose of

[4] s49(5)(a) of the 1939 Act

apprehending him and bringing him before a court or returning him to the place in which he was in custody;[5] or

- the child or young person has been convicted of an offence and it is in the public interest to do so.[6]

Discretionary reporting restrictions: young people in adult courts

Where a young offender is tried in an adult court rather than the youth court, no automatic reporting restrictions apply. However, under section 39 of the *Children and Young Persons Act 1933* (as amended) the court has the discretion to order that the identity of a young person involved in court proceedings (whether as defendant, victim or witness) must not be reported. Section 39 provides:

> **39 Power to prohibit publication of certain matter in newspapers**
>
> (1) In relation to any proceedings in any court, the court may direct that -
>
> (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;
>
> except in so far (if at all) as may be permitted by the direction of the court.

Once a section 39 order has been granted, it may be lifted following a further application to the court. When considering an application to lift an existing section 39 order, a judge will therefore consider factors such as the severity of the offence, whether the individual subject to the order has been convicted and, if so, the likelihood of a successful appeal against conviction.[7] Applications to lift section 39 orders are usually brought by the media.

2.2 ACPO guidance

Police guidance suggests that current general police practice is not to name a suspect until he or she has been charged:

> 4.1 This covers the identification of adults under investigation, including those arrested. Juveniles in Youth Court proceedings are subject to automatic anonymity. When they appear as defendants in adult courts, an order under s 39 of the Children and Young Persons Act is routinely applied for, and routinely granted. These orders impose anonymity unless and until the judge orders otherwise.
>
> 4.2 A person may not know he or she is under police investigation, or the scope of the inquiry, and forces do not, generally, volunteer the name of those they are investigating.

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5 s49(5)(b) of the 1939 Act: note that the restrictions may not be lifted on this ground unless an application has been made by/on behalf of the Director of Public Prosecutions and unless notice of such application has been given to any legal representative of the child or young person.

6 s49(4A) of the 1939 Act

7 Richardson (ed), *Archbold – Criminal pleading, evidence and practice*, 2011, para 4-28

> 4.3 Although there is no specific law to prevent forces identifying those they have arrested, in practice they give general details of arrests which are designed to be informative but not to identify – for example 'a 27 year old Brighton man' – are given. In high profile cases which may cause major public concern – such as terrorism or murders – forces sometimes provide substantial detail about their investigations without identifying individuals.
>
> 4.4 The media frequently discover the name of people under investigation and seek confirmation. Again, there is no law to prevent forces giving confirmation. Some forces to choose to confirm the name; others choose not to do so but may indicate that a name is incorrect.
>
> 4.5 If a suspect is released without charge or bailed to reappear at a police station, the fact of the police action occurring is generally released, though the person remains unidentified. Again, this is practice, rather than an approach dictated by any law.
>
> 4.6 Most forces give the name and age, with details of the charge and forthcoming court appearance, at the point of charge. Some also give the occupation.
>
> 4.7 The address can be given unless there are compelling operational reasons not to do so – such as that the location is still subject to sensitive inquiries.
>
> 4.8 If a charge is dropped before someone reaches court, most forces will endeavour to release this information as soon as practicable. However, the responsibility for accurate reporting lies ultimately with the media.[8]

However, as the guidance repeatedly states, this is a matter of practice rather than law, and there is nothing to prevent the police from naming a suspect at a pre-charge stage of the investigation should they choose to do so.

2.3 Contempt of court

Although there are not currently any automatic restrictions on reporting an adult suspect's identity, any such reports would have to comply with the general rules on contempt of court.

Under the *Contempt of Court Act 1981*, the press are prohibited from reporting (whether orally, in writing or by some other method) comments or information that would create "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".[9] Examples of reports that might be in contempt could include details of a defendant's previous convictions, or insinuations as to a defendant's guilt:

> Though an ill-defined concept, roughly, news reports must not suggest the guilt of a person in custody or before the court. Such material could be argued to "prejudice" the deliberations of the jury.
>
> For example, using the headline "Police arrest cat burglar" would land a reporter in hot water. "Man arrested in cat burglar case" would not.
>
> Spicing up news reports with tales of a defendant's past behaviour (including any former convictions) will also probably result in contempt proceedings.

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8 Association of Chief Police Officers, *Communication Advisory Group: Guidance 2010*, paras 4.1-4.8

9 Section 2 of the 1981 Act

> While journalists have a duty to openly report court proceedings, they must also take care not to mention any legal arguments made while the jury has been sent out or any evidence which has been deemed inadmissible.[10]

The prohibition applies to both criminal and civil proceedings,[11] but only where those proceedings are "active". In criminal cases, proceedings become active following:

- an arrest without a warrant;
- the issue of a warrant of arrest;
- the service of a summons to appear at court;
- the service of an indictment specifying the criminal charge; or
- oral charge.

Proceedings cease to be active following:

- acquittal or, if the defendant is convicted, sentencing;
- any other verdict, finding or decision that puts an end to the proceedings; or
- discontinuation of the proceedings.

Note that technically this means that the contempt laws come into play on the **arrest** of a suspect, rather than at the later stage of charging:

> The Act starts to apply when proceedings are "active". Strictly speaking, proceedings are active when an arrest is made or when it is likely that charges will be brought. The gap between arrest, charge and trial, however, has resulted in an increasing tendency for the media to treat the moment when charges are brought, rather than arrest, as the time to stop any potentially prejudicial reporting. Trials often take place a year or more after someone is charged, and it is reasonable to assume that a judge can direct a jury to put out of their minds any prejudicial stories that they may have read. Not many will be able to recall a specific story published many months earlier, is the theory.[12]

The risk and the degree of prejudice will generally increase with the proximity of the trial:

> Whether the publication creates a substantial risk of serious prejudice is judged at the time of publication. The longer the gap between publication and the trial ('the fade factor'), the less the substantial risk of serious prejudice is likely to be.[13]

Liability for contempt of court under the 1981 Act is "strict", which means that the reporter's knowledge or intention is irrelevant, as is the fact that no prejudice was actually caused: the risk of prejudice is sufficient for the purpose of the offence. When deciding whether a risk of prejudice has been created, the court will consider:

- The likelihood of the publication coming to the attention of a potential juror.

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10 "Q&A: Journalists in Contempt", *BBC News website*, 9 April 2001

11 But will be particularly relevant in the context of criminal trials involving a jury, where the jury members may be influenced by a report they read or hear outside of the courtroom.

12 "The danger of contempt", *Independent*, 27 August 2002

13 Crown Prosecution Service website, *Legal Guidance: Contempt of Court* [accessed on 2 February 2011]

- The likely impact of the publication on an ordinary reader at the time of publication.
- The residual impact of the publication on a notional juror at the time of trial.

> In assessing the likelihood of a publication coming to the attention of a potential juror, the court will consider whether the publication is distributed in the area from which jurors are likely to be drawn and the number of copies circulated.
>
> In assessing the likely impact of the publication on an ordinary reader, the court will consider the prominence of the article in the publication and the novelty of the content of the article in the context of likely readers.
>
> The court will also take into account the length of time between publication and the likely date of trial, the focusing effect of listening over a prolonged period to evidence in a case, and the likely effect of the judge's directions to a jury.[14]

The 1981 Act provides an exemption in that a reporter will not be guilty of contempt of court where the report is "a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith".[15] This enables the press to publish details of ongoing trials, provided they are published very soon after the hearing (or on the same day) and are a balanced and accurate report of what was said in court.

Contempt of court under the 1981 Act is a serious offence and can be punished by up to two years in prison and/or an unlimited fine. It can be committed by anyone responsible for the publication of the offending material, including the following: editors, newspaper proprietors, publishers, distributors, reporters, and their equivalents in broadcasting.[16] Proceedings may only be instituted by or with the consent of the Attorney General.[17]

The contempt of court rules have recently come under the spotlight in the case of Chris Jefferies, who was arrested in December 2010 on suspicion of the murder of Joanna Yeates. While he was in police custody he became the subject of intense media speculation, both in the press and on social networking sites such as Twitter. Much of the coverage was criticised for breaching contempt of court laws. The Attorney General was reported to have warned newspaper editors about the possibility of prejudicing any future trial:

> "I don't want to comment on the precise coverage today, but I think it's important to understand that the contempt of court rules are there to protect the rule of law and the fair trial process and they require newspapers, and indeed anyone who is covering material, to do that in a way that doesn't prejudice the possibility of a fair trial taking place at a later date," Mr Grieve said.[18]

Some argued that the 1981 Act provided insufficient protection to those accused of crimes, while newspaper executives said that the Act needed clarification:

> Thirty years after it went on the statute book, the legislation which seeks to deter the nation's media from being the cause of miscarriages of justice has rarely appeared more threadbare. A frenzied fortnight of "unprecedented" character assassination and fevered pre-trial speculation emanating from the suburbs of Bristol has left the

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14 Liberty "Your Rights" website, *About Contempt of Court* [accessed on 2 February 2011]

15 Section 4 of the 1981 Act

16 Publishers will have a defence if, having taken all reasonable care, they do not know and have no reason to suspect that relevant proceedings are active. Distributors will have a defence if, having taken all reasonable care, they do not know that the publication contains matter that is in contempt of court and have no reason to suspect that it is likely to do so.

17 Section 7 of the 1981 Act

18 "Newspapers warned over contempt law", *Independent*, 31 December 2010

> Contempt of Court Act, set up to preserve the principle of innocence until proven guilty, looking increasingly inconsequential.
>
> (...)
>
> With Jefferies pilloried in print and online, the attorney general was moved to warn newspaper editors about their coverage of the Yeates investigation. Yet Jefferies' lawyers say this warning had "little or no effect" on the media. "His name has been blackened, and his privacy invaded," says Rhys Mardon, one of Jefferies' representatives at The Stokoe Partnership. "This type and level of coverage in the media is, in our experience, unprecedented, particularly at this very early stage of the investigation."
>
> (...)
>
> "There needs to be a review," says one senior tabloid executive, who asked not to be named. "We have our own lawyers internally saying they don't know where the line should be drawn. And editors often overrule lawyers – at which point there is no comeback. We've always felt there shouldn't be a contempt of court act – but I can see you may feel differently if you've been dragged through the public prints unfairly."[19]

Police views were also considered:

> ... while the police have been uneasy about aspects of the coverage, they cannot afford to dismiss the media. The press and broadcasters are vital for putting out appeals and keeping a case like Yeates's murder in the public eye. That creates further incentives to push the contempt rules as far as they can go.
>
> Privately, some detectives will say it can sometimes be helpful if a suspect is named in the press – remember the police have never confirmed that Jefferies is the 65-year-old man they arrested. Sometimes if a suspect is named, it can flush out witnesses and prompt lines of inquiry.[20]

Mr Jefferies was subsequently released without charge; at the time of writing he remained on police bail. Another man has since been charged with the murder.

3 The Bill

3.1 Clauses

Clause 1 of the Bill would prohibit the publication or broadcast of the name, address or image (still or moving) of a person arrested for an offence if such information would be likely to lead members of the public to identify him or her as the person suspected of committing the offence in question. These reporting restrictions would remain in force unless and until the arrested person was charged with the offence for which he or she had been arrested.[21]

Under clause 2 a Crown Court judge would, however, have the power to direct that the reporting restrictions should not apply in any particular case. The direction could either disapply the reporting restrictions in their entirety, or in relation to specified matters and time periods only. A clause 2 direction could be made where the judge was satisfied that it was:

- required to comply with the *Human Rights Act 1998*;

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19 "Coverage of Joanna Yeates killing has left Contempt of Court Act in disarray", *Guardian*, 10 January 2011

20 Ibid

21 Clause 7(2) defines when a person will have been "charged" for the purposes of clause 1

- in the interests of justice; or
- otherwise in the public interest.

The Bill gives the following non-exhaustive list of cases where it might be "in the interests of justice" to make such a direction:

- where it may lead to additional complainants coming forward;
- where it may lead to information that assists the investigation of the offence;
- where it may lead to information that assists the arrested person; or
- where the conduct of the arrested person's defence at trial is likely to be substantially prejudiced if the direction is not given.

A direction could be made or reviewed on the application of the arrested person, a Chief Constable, a prosecuting authority or any other person considered by the judge to have a sufficient interest, or by the court of its own motion.

Clause 3 would make it a summary offence to breach the reporting restrictions set out in clause 1. If the material was published in a newspaper or periodical, the proprietor, editor and publisher would be liable. In the case of publication in any other form, the person publishing the material would be liable. For broadcast material, any body corporate engaged in providing the service in which the programme was included and any person with functions equivalent to a newspaper editor would be liable.

Clause 4 would provide a defence where the person charged under clause 3 was not aware, and neither suspected nor had reason to suspect, that the publication or programme in question included the prohibited matter(s).

3.2 Reaction

Speaking to the *Sunday Times*, the Bill's sponsor Anna Soubry said she had been prompted to act by the case of Matthew Kelly, the actor and television presenter who had been arrested on child sex abuse allegations in 2003 but was never charged:

> "The law as it stands means an innocent person can be vilified, have their lives dismantled and their reputation sullied with complete disregard to his or her right to privacy. Since the media don't seem able to regulate themselves, parliament should do something about it."
>
> Soubry, who worked as a newspaper and television reporter before becoming a barrister in the criminal courts and then an MP, added that she had been inspired to draw up the bill last summer by the arrest in 2003 of Matthew Kelly, the actor and former Stars in Their Eyes television show presenter.
>
> The reporting of the Kelly case had convinced her that people should not have their identity reported while under police investigation unless a good enough reason could be provided to a crown court judge. Kelly was never charged.[22]

The article went on to suggest that the Bill has support from both the Justice Secretary and the Attorney General, and said that Ms Soubry had reportedly been in discussions with both

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[22] "Media face ban on naming criminal suspects", *Sunday Times*, 30 January 2011 [paywall]

about whether her proposals could be incorporated into a government bill or receive Government backing.[23]

Bob Satchwell, executive director of the Society of Editors, said:

> It sounds like a simple and easy measure but it's a complex issue.
>
> The public are entitled to know when someone is arrested and not naming people who are arrested only leads to speculation and rumour in place of absolute fact.
>
> The fact is that if anyone oversteps the mark there are laws of libel and contempt that are already quite capable of dealing with these issues.[24]

An editorial in the *Independent* lent support to the principles behind the Bill, saying that it was time to "tighten the screw on prejudicial reporting in newspapers". It did, however, query whether this could be done by better enforcement of the existing contempt of court laws:

> ...ministers already have the power to curb prejudiced reporting. The 1981 Contempt of Court Act makes it an offence to publish information "tending to interfere with the course of justice in particular legal proceedings". The prejudice displayed against Mr Jefferies in the tabloid press would certainly fall into that category. What has been lacking has been any appetite from ministers to use the powers at their discretion. It is puzzling why Mr Clarke and Mr Grieve prefer to have a backbencher do their job for them.
>
> (...)
>
> Some have warned that restrictions could have the unintended consequence of making it more difficult for the public to hold the police to account. It is argued that Ms Soubry's law would make it impossible to report who the police have taken into custody and that naming suspects in the media constitutes a form of protection for those arrested. It is further claimed that naming suspects can have the effect of encouraging witnesses to come forward, thus helping a case to proceed.
>
> Such defences might have been respectable if newspapers had behaved with more restraint in recent years but, in the present context of a populist press that smears reputations before the facts are known, it sounds like hollow special pleading.

The article went on to consider whether it was realistic to think that a ban on reporting suspects' identities could be policed in respect of the internet:

> A practical objection to tighter reporting restrictions is the internet. While websites are technically liable for contempt, in reality cyberspace is impossible to police. Does it make sense for print to be heavily policed, when the public can increasingly get information online? As Ofcom's latest report into News Corporation's bid to expand its ownership of BSkyB makes clear, online news tends to extend the reach of established providers, rather than new players. It is true that tighter laws on print would not be a silver bullet to take out character assassinations, but they would represent progress nonetheless.[25]

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23 Following the 2010 general election the Government had previously indicated that it would give anonymity to those accused of rape, although this proposal was later dropped: for further details see SN/HA/4746 *Anonymity in rape cases*.

24 "Media face ban on naming criminal suspects", *Sunday Times*, 30 January 2011 [paywall]

25 "The naming game should be brought to an end", *Independent*, 1 February 2011