HOUSE OF COMMONS
LIBRARY

Defamation Bill

Bill No 5 2012-13

RESEARCH PAPER 12/30 28 May 2012

The Government indicates that the *Defamation Bill* is designed to reform the law of defamation to ensure that a fair balance is struck between the right to freedom of expression and the protection of reputation. Proposals to reform the defamation laws have a long history and bids to change the law have been somewhat contentious. Currently, defamation is governed substantially by the common law. Statutory intervention has been infrequent and the last Act exclusively concerned with defamation was passed in 1996. The Government committed to reform the defamation law in its Coalition Agreement. A draft Bill was published in March 2011 and subject to extensive pre-legislative scrutiny. The Government also conducted a separate consultation on the draft Bill. The *Defamation Bill* extends to England and Wales only. Second Reading is expected to take place on 12 June 2012.

Alexander Horne

Recent Research Papers

12/20	Sunday Trading (London Olympic Games and Paralympic Games) Bill [HL] [Bill 335 of 2010-12]	27.04.12
12/21	Social Indicators	27.04.12
12/22	Economic Indicators, May 2012	01.05.12
12/23	Financial Services Bill: Committee Stage and Report Stage(Day One) Report	15.05.12
12/24	Local Government Finance Bill 2012-13 [Bill 4 of 2012-13]	16.05.12
12/25	Unemployment by Constituency, May 2012	16.05.12
12/26	Electoral Administration Bill [Bill 6 of 2012-13]	17.05.12
12/27	Local Elections 2012	21.05.12
12/28	London Elections 2012	22.05.12
12/29	Members' pay and expenses – current rates and a review of developments since 2009	22.05.12

Research Paper 12/30

ISSN 1368-8456

Contents

Summary

The *Defamation Bill* is designed to reform aspects of the law of defamation. Proposals to reform the defamation laws have a long history. Currently, defamation is governed mostly by the common law. The Government committed to reform the defamation law in its Coalition Agreement in which it agreed to "review libel laws to protect freedom of speech."

A draft Bill was published in March 2011 and subject to pre-legislative scrutiny. The *Defamation Bill* was presented on 10 May 2012. It extends to England and Wales only. Second Reading is expected to take place on 12 June 2012.

The Bill would make a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute. Proposed changes (if the Bill were passed) include the fact that claimants would have to show they have suffered serious harm before suing for defamation. Under the law as it currently stands, a claimant does not have to prove the words they are complaining about have caused them actual damage.

The Bill would remove the current presumption in favour of a jury trial and would introduce a defence of "responsible publication on matters of public interest". It would also provide increased protection to operators of websites who host user-generated content, provided that they complied with the necessary procedure to enable the complainant to resolve any dispute directly with the author of the material concerned. It would introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment. The Bill is also designed to limit what has been described as "libel tourism." It introduces a single publication rule and extends the scope of absolute and qualified privilege.

The Bill does not address issues relating to parliamentary privilege (and the reporting of Parliament) which the Government has indicated will be dealt with through a separate consultation (which was published on 26 April 2012). Nor does it make any specific provision in respect of corporations bringing defamation proceedings.

The Government has said that the Bill is intended to ensure a "fair balance" between freedom of expression and protection of reputation. All main political parties have indicated that they are in favour of in favour of reforming the libel laws.

1 Background

1.1 Introduction

Proposals to reform the defamation laws have a long history. Currently, defamation is governed substantially by the common law. Statutory intervention has been infrequent: the last Act exclusively concerned with defamation was passed in 1996. This followed a review of some aspects of defamation law by a Committee chaired by Sir Brian Neill[1] (and updated a previous statute dating from 1952). There was also a comprehensive review of defamation law in 1975 (by the Committee chaired by Mr Justice Faulks).[2] Following the enactment of the *Human Rights Act 1998*, articles 8 and 10 of the *European Convention on Human Rights* (which relate to privacy and freedom of expression respectively) have become more relevant to the debate. Associated questions have been posed about the separate, but associated right to privacy (which will not be dealt with in this paper).[3]

In essence, the law of defamation exists to provide a means of redress for someone whose reputation has suffered unjustifiable harm by the publication of defamatory information. The general rule is that no one may speak falsely of his or her neighbour, and that it is in the public interest that "the law should provide an effective means whereby a man can vindicate his reputation against calumny".[4]

There is no statutory definition of what is 'defamatory.' The courts generally treat a statement as defamatory when it "lowers a person in the estimation of right-thinking members of society generally" or where it exposes a claimant to "hatred, contempt or ridicule."[5] There are two types of defamation: libel, when the defamatory statement is in writing;[6] and slander, when it is spoken. Both individuals and organisations (with some exceptions) can begin defamation proceedings. Someone accused of defaming another person has a variety of defences available.

These include defences reliant on the concept of privilege. A practitioner text, *Duncan and Neill on Defamation*, explains the defence of privilege in the following way:

> The law recognises that in some circumstances the public interest requires that a person should be protected from liability for a defamatory statement even though the words cannot be proved to be true or defended as fair comment. This protection, or 'privilege' as it is called, is of two kinds – absolute and qualified. Absolute privilege is very limited in its scope but where applicable provides the defendant with complete protection. Qualified privilege, on the other hand, covers a great many situations, but it is a defeasible defence and will be of no avail if the claimants pleads and proves that the defendant, in making the publication complained of, was actuated by express malice.[7]

In recent years, serious concerns have been voiced about the cost of defamation proceedings and the potential "chilling effect" on free speech. The Ministry of Justice

---

1 *The Supreme Court Committee, on Practice and Procedure in Defamation* (1991)

2 *Committee on Defamation* (1975) (Cmnd 5909)

3 See for example: Culture, Media and Sport Select Committee, *Press Standards, Privacy and Libel*, 9 February 2010, HC 362-I, 2009-10

4 *Horrocks v Lowe* [1975] AC 135 (HL), per Lord Diplock, at 149C-D.

5 See, for example, *Skuse v Granada Television Ltd* [1996] EMLR 278, per Sir Thomas Bingham MR at 286 and *Parmiter v Coupland* (1840) 6 M & W 105 at 108 (Parke B)

6 Or is so treated by statute: e.g. statements on radio or television

7 Neill, B. Rampton R. et al, *Duncan and Neill on Defamation* (Lexis Nexis, 3rd Edition, 2009), p 153. This is distinct from parliamentary privilege which is underpinned by Article 9 of the Bill of Rights. For more on this, see: O Gay, A Horne, *Parliamentary privilege and qualified privilege*, House of Commons Library Standard Note 2024, 25 May 2011

conducted a consultation on reducing costs in defamation proceedings in 2009, which led to some limited changes and the establishment of pilot schemes on reducing costs.[8] The Government has also recognised worries that the threat of libel proceedings might be used to frustrate robust scientific and academic debate or to impede responsible investigative journalism. Issues have also been raised about alleged "libel tourism." The Coalition Agreement gave an undertaking to "review libel laws to protect freedom of speech."[9]

At the outset, it is worth noting that although concerns have been raised about the libel laws, it is important to be clear that views do not go entirely in one direction. One example is that Mr Justice Eady has commented on the issue of alleged libel tourism (saying "it is not a phenomenon that we actually come across in our daily lives"), in a speech entitled *Privacy and the Press: Where are we now?* Lord Hoffman, the former Law Lord, also touched on these issues in his Dame Ann Ebsworth memorial lecture, *The Libel Tourism Myth*, at Inner Temple Hall.

Carter-Ruck on Libel and Privacy, published in 2010, considered the state of the law and noted that while some changes in the law had been made by legislation (most notably the *Defamation Act 1996*) over the last fifteen years "many of the most important changes have come about through the development of the common law by the courts."[10] The book argued that the law has become "more accommodating to the right of freedom of expression than was the case in the early 1990s." The most obvious changes that it notes are the "curtailment of damages"; the "development of the *Reynolds* 'public interest' privilege" and the "related 'reportage' defence."[11] In spite of these changes, the book noted that since 2008, there has been a "sustained and well-resourced campaign for the reform of libel law."[12]

Reports on some of the abovementioned issues have been issued by English PEN and the Index on Censorship (*Free Speech is not for Sale*) and the House of Commons Culture, Media and Sport Select Committee (*Press Standards, Privacy and Libel*).

1.2 Proposed legislative reform

Lord Lester's Defamation Bill

Following the publication of these reports, Lord Lester of Herne Hill QC introduced a *Defamation Bill* in the House of Lords. It received a Second Reading on 9 July 2010. The House of Lords Library produced a note on these issues, entitled *Defamation*, which set out the background to the main proposals for reform. This note will not attempt to rehearse these arguments; however, the Explanatory Notes to Lord Lester's Bill provide a useful legislative history.

Although this Bill did not go forward, the Ministry of Justice recognised the contribution made by Lord Lester (and Sir Brian Neill and Heather Rogers QC who had supported his work in this area) and indicated that it had taken the Bill "into account" in formulating its own proposals.

The draft Defamation Bill

The Ministry of Justice published a *draft Defamation Bill* and associated consultation (Consultation Paper CP3/11) in March 2011. In a Written Ministerial Statement made on 15 March 2011, the Lord Chancellor said that the draft Bill was aimed at dealing with the following issues:

---

8 Ministry of Justice, *Controlling costs in Defamation Proceedings* , CP4/09, February 2009
9 Cabinet Office, *Coalition: Our programme for government*, May 2010, p 11
10 Doley, C and Mullis, A. (Eds) *Carter-Ruck on Libel and Privacy* (Lexis Nexis, 6th Edition, 2010), p 1
11 *Ibid*, p 1-2
12 *Ibid*, p 8

- A new requirement that a statement must have caused or be likely to cause substantial harm in order for it to be defamatory;
- A new statutory defence of responsible publication on matters of public interest;
- A statutory defence of truth (replacing the current common law defence of justification);
- A statutory defence of honest opinion (replacing the current common law defence of fair/honest comment);
- Provisions updating and extending the circumstances in which the defences of absolute and qualified privilege are available;
- Introduction of a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one-year limitation period has passed;
- Action to address libel tourism by ensuring a court will not accept jurisdiction unless satisfied that England and Wales is clearly the most appropriate place to bring an action against someone who is not domiciled in the UK or an EU member state;
- Removal of the presumption in favour of jury trial, so that the judge would have a discretion to order jury trial where it is in the interests of justice.

He also noted a number of issues for consultation which had not been included in the draft Bill. These included:

- Responsibility for publication on the internet. The paper seeks views on whether the law should be changed to give greater protection to secondary publishers such as internet service providers, discussion forums and (in an offline context) booksellers, or alternatively how the existing law should be updated and clarified;
- A new court procedure to resolve key preliminary issues at as early a stage as possible, so that the length and cost of defamation proceedings can be substantially reduced;
- Whether the summary disposal procedure should be retained, and if so whether improvements can usefully be made to it;
- Whether the power of the court under the summary procedure to order publication of a summary of its judgment should be made more widely available in defamation proceedings;
- Whether further action is needed beyond the proposals in the draft Bill and the introduction of a new court procedure to address issues relating to an inequality of arms in defamation proceedings, including whether any specific restrictions should be placed on the ability of corporations to bring a defamation action;
- Whether the current provisions in case law restricting the ability of public authorities and bodies exercising public functions to bring defamation actions should be placed in statute and whether these restrictions should be extended to other bodies exercising public functions.

The consultation ran until June 2011 and the Government published a summary of responses. Upon publication of the draft Bill, the Deputy Prime Minister, Nick Clegg, was quoted as having said:

> For too long, our outdated libel laws have made it easy for the powerful and the wealthy to stifle fair criticism. We cannot continue to tolerate a culture in which scientists, journalists and bloggers are afraid to tackle issues of public importance for fear of being sued.
>
> These reforms will restore a sense of proportion to the law, upholding the importance of free speech while ensuring that people are able to defend themselves against unfair and untrue allegations.[13]

The initial reaction to the draft Bill was mixed. John Kampfner, the chief executive of Index on Censorship suggested that the Bill was well balanced:

> When we launched the Libel Reform Campaign in 2009, only the Liberal Democrats backed change. Now the cause has cross party support. The aim of the bill is not to allow a free-for-all in which reputations are impugned without redress. It is about balance and proportion.[14]

Robin Shaw and Paul Chamberlain, writing in the legal periodical the *Solicitors Journal*, contended that there were "no alarms and no surprises", but suggested that some parts of the draft bill did "little more than restate the relevant common law principles."[15] Jenny Afia and Phil Hartley, lawyers at Schillings, were more critical, arguing in the *New Law Journal* that "our libel laws are highly regarded" and that "new libel laws could decimate years of painstakingly crafted common law principles."[16]

1.3 The Joint Committee on the Draft Defamation Bill

The draft Bill was considered by a Joint Committee of both Houses of Parliament, which took written and oral evidence between April and July 2011. The Committee's terms of reference were fairly extensive and included consideration of the following issues: whether there should be a statutory definition of defamation; whether a "substantial harm" test should be introduced; whether a "responsible publication test" would overcome problems with current legal defences; whether libel tourism was a problem and whether the existing presumption in favour of trial by jury should be removed.

The Joint Committee on the Draft Defamation Bill published its report on the 19 October 2011.[17] It also published a significant volume of oral and written evidence. The Committee welcomed some of the reforms suggested by the Government. It highlighted "worthwhile reforms of defamation law, notably in effectively removing trial by jury, with its associated high costs, and in providing better protection for publishers by introducing the new single publication rule". It also stressed that the Government should have "particular regard to the importance of freedom of expression when bringing forward this Bill" and recommend "a higher threshold of seriousness in order for libel claims to progress."

However, it concluded that the Government's proposals were "modest" and argued that "changes to the defences available against libel claims, while welcome, do not always achieve the clarification sought."

The Committee argued, amongst other things, that "the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to

---

13 "Government publishes *Defamation Bill*", *Law Society Gazette*, 16 March 2011. See also: "Libel law: 10 reasons why the *Defamation Bill* needs more work", *The Guardian,* 16 May 2011

14 "At last, a blow to oligarchs", *Financial Times*, 16 March 2011

15 Robin Shaw and Paul Chamberlain, "No alarms and no surprises", *Solicitors Journal*, 21 March 2011

16 Jenny Afia and Phil Hartley, "Tipping the balance" , *New Law Journal*, 18 March 2011

17 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12

legal redress a possibility for the ordinary citizen." It also stated that "defamation law must adapt to modern communication culture." Individual recommendations made by the Committee will be outlined in more detail at the relevant parts of this paper.[18]

John Kampfner welcomed the report, but concluded:

> It's not all good news. Despite the committee's move towards a stronger public interest defence that will take into account the resources of the publisher (a key issue for bloggers), we still believe there is further to go to ensure that the defence is robust and accessible. And some of the provisions for web forums and social media, particularly concerning anonymous comments, may be problematic.[19]

Leading libel silk, Desmond Browne QC observed that:

> The cold draft in the chilling effect of defamation is the cost, not the law. It is no good amending the substantive law unless serious attention is paid to costs and judicial case management.[20]

1.4 The Government's response to the Joint Committee

The Government published a response to the Committee in February 2012. The Government accepted a number of the Committee's suggestions in whole or in part. Notably, it accepted the Committee's recommendation to replace the draft Bill's test of "substantial harm" to reputation with a stricter test, which would have the effect of requiring "serious harm" to a claimant's reputation in order to proceed with a claim. The Government rejected the Committee's proposal for the harm to have to be "serious and substantial" indicating that the use of two terms could be confusing and lead to "uncertainty and litigation." The purpose of this new test is to try to ensure that trivial claims are dismissed promptly before unnecessary time and money is expended.

The Government also stated that it was "sympathetic to the need to provide clear protection for peer-reviewed articles published in scientific and academic journals and will consider further whether this can best be achieved through qualified privilege or other means."

In answer to one of the Committee's more general recommendations about post-legislative scrutiny, the Government gave an undertaking to "assess the impact of any legislation which is passed by Parliament in due course in accordance with the requirements of the post-legislative scrutiny process."

Parliamentary Privilege

One issue which may be of interest to Parliamentarians is the fact that the Committee had recommended that the Government add "a provision to the Bill which provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate." In response, the Government indicated that it thought that "it would be more appropriate for these issues to be addressed in the context of the draft Bill and Green Paper on Parliamentary privilege", and that it would take the views of the Committee "into account" in that context.

---

18 For a short analysis of the Committee's conclusions, see: "Report of the Joint Committee on *Draft Defamation Bill* Reports – reforms welcomed, Government urged to go further", International Forum for Responsible Media Blog, 19 October 2011

19 Index on Censorship, *Libel Reform: A final push*, Press Release 19 October 2011

20 "Libel reform is coming" *Law Society Gazette,* 15 March 2012.

A consultation paper on parliamentary privilege, including draft clauses, (*Parliamentary Privilege* (Cm 8318)) was published in April 2012. The issue of press reporting is dealt with between pages 70-77 of the consultation paper. It states, amongst other things, that:

> 313. The Government is not aware of circumstances in which any media organisation has been prevented from publishing reports of parliamentary proceedings by doubts over the extent of the current protection in law; but we would welcome evidence that sheds light on the possible extent of any problem, and on whether there is reason to believe that the courts cannot currently weigh the appropriate factors in coming to decisions within the current law. The draft clauses in this paper are restricted to the rebalancing of the burden of proof in favour of reporters, and a further unambiguous protection for broadcasts of proceedings whose broadcasting has been authorised by the House together with a qualified protection for broadcasts of parliamentary proceedings not authorised by the House; but in the light of the recommendations of the two recent Joint Committees, we would welcome views as to whether there are other changes which could be made to the law that would clarify the extent of protection for publishers, while still protecting individuals' rights.[21]

The consultation paper made further reference to the law of defamation and section 13 of the *Defamation Act 1996*. Section 13 allows a person (not necessarily an MP) to waive the protection of privilege in relation to proceedings in Parliament, so far as they concern him or her, where his or her conduct in those proceedings is at issue in a defamation case. It was introduced following a failed attempt by the Member, Neil Hamilton, to sue the *Guardian* following allegations that he had accepted payments in return for tabling Parliamentary Questions. The consultation paper notes that "the court ruled that The *Guardian* was precluded by parliamentary privilege from introducing evidence to question his conduct and motives in tabling the questions concerned, Mr Hamilton was himself precluded from clearing his own name." Section 13 of the 1996 Act has been the subject of some criticism (set out in the consultation paper) and there is no evidence that the power has ever been used since the Hamilton case (Neil Hamilton planned to resume his legal action against the *Guardian*, previously stayed due to Article 9, after the passage of s13, but withdrew his action after the discovery process).[22] The paper poses a question as to its future:

> 192. There is therefore a question as to what, if anything, needs to be done in relation to section 13 of the Defamation Act 1996. It could be repealed without replacement, amended, or left as it is, given that the existing power of waiver has never been used. The Government would welcome views on this matter.[23]

The consultation on parliamentary privilege is due to close in September 2012.

1.5 Alternative Dispute Resolution and Early Resolution

The Joint Committee supported the Government's intention to promote early resolution of defamation cases, but thought the Government had not gone far enough down this particular avenue. It proposed an approach "which is based upon strict enforcement of the Pre-Action Protocol governing defamation proceedings, and has three elements: a presumption that mediation or neutral evaluation will be the norm; voluntary arbitration; and, if the claim has not been settled, court determination of key issues using improved procedures."

---

21 Cabinet Office, *Parliamentary Privilege* (Cm 8318), April 2012

22 For more on this, see: "The Hamilton affair" in *Conduct Unbecoming* Gay, O and Leopold, P. (Eds) (Study of Parliament Group/ Palgrave 2004)

23 Cabinet Office, *Parliamentary Privilege* (Cm 8318), April 2012

The *Law Society Gazette* reported that the Chair of the Joint Committee, Lord Mawhinney, had said that if it were up to the committee, Alternative Dispute Resultion (ADR) would be statutorily binding.

> Most claimants, he said, are more concerned with setting the record state and receiving an apology than with damages, which he said can be achieved faster and more cheaply through ADR.[24]

In response, the Government indicated that it:

> [A]ccepts that the Pre-Action Protocol should be strengthened so that parties are more strongly encouraged to use mediation or early neutral evaluation, and so that those unreasonably refusing to do so are penalised if and when it comes to the awarding of costs.[25]

As to the issue of arbitration, it observed:

> We agree with the Committee that there could well be value in there being a range of arbitration options available and this is something which the media industry could usefully consider further. Methods of redress and the type of body required to secure effective regulation are issues which are central to Lord Justice Leveson's Inquiry. The Government will be receiving his recommendations later in the year and will consider matters further in the light of those.[26]

1.6 Costs and the use of Conditional Fee Agreements

The issue of costs in libel and defamation proceedings has been addressed in part by an Act that was passed in the previous session: namely the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This was designed to implement parts of the Jackson Review[27] on civil litigation costs and changed the mechanism of Conditional Fee Agreements (often referred to as 'no win, no fee agreements') by removing the recoverability of success fees and after the event insurance policies in most cases. These restrictions are expected to come into force in April 2013.

During the passage of the Bill, Lord Prescott sought to move an amendment that would have retained the recovery of success fees and 'after the event' insurance premiums from the losing side in privacy and defamation cases. Lord Prescott indicated that he had benefitted from such an agreement in pursuing his "case against the Murdoch press." In response, Lord McNally said:

> As I explained, the basic rationale for the proposed reforms to no-win no-fee conditional fee agreements is to squeeze the inflation out of our legal system. It is to rebalance the system to make it fairer as between claimants and defendants. They do this by correcting the anomaly whereby those who bring cases have no incentive to keep an eye on the legal costs. Right now, the recoverability of success fees and insurance premiums from the losing side can have the perverse effect of preventing

---

24 "Libel reform is coming" *Law Society Gazette,* 15 March 2012

25 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 67

26 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 68

27 In November 2008 the then Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. The final report was published in January 2010

> defendants fighting cases, even when they know they are in the right, for fear of the disproportionate legal costs involved if they were to lose.
>
> High and disproportionate costs have a negative impact not just because they can deny access to justice but more broadly because they can lead people to change their behaviour in damaging ways because of the fear of claims. Nowhere is that more true than in relation to responsible journalism, as well as to academic and scientific debate. The judgment of the European Court of Human Rights, to which my noble friend Lord Lester referred, in January 2011 in *Mirror Group Newspapers v the UK* - the so-called Naomi Campbell case - found the existing CFA arrangements with recoverability in that instance to be contrary to freedom of expression under Article 10 of the convention. Editors and journalists have long warned of the chilling effect of the current libel regime and argued that part of the problem is the huge costs that no-win no-fee cases impose. However, defendants are not always rich and powerful newspapers; they are also scientists, NGOs, campaigners and academics.
>
> I have already made the general argument that any exception to reforms intended by Lord Justice Jackson to apply across the board is invidious and likely to lead to unfair anomalies with special treatment for some areas of law but not others. In the case of defamation, I additionally argue that these amendments are premature because, as the noble Lord, Lord Lester, explained, these issues need to be considered in the context of the *Defamation Bill*, which we aim to introduce as soon as a legislative opportunity arises.[28]

Following further questions from Lord Lester, Lord McNally said:

> I give noble Lords as full an assurance as I can. Bills have to go through Cabinets and Cabinet committees, et cetera, but they also have to go through two Houses of Parliament, where this issue is extremely live. I cannot imagine that the kind of issues that the noble Lord, Lord Prescott, has raised tonight will not be dealt with fully in that *Defamation Bill*.[29]

1.7 Other matters not included in the Bill

The Joint Committee had made a series of specific recommendations relating to corporations (including the introduction of a new 'permission stage' for corporate claims, which would have required a corporation to apply to the court for permission to bring a claim for defamation). The Government concluded that if it introduced a new 'serious harm' test for bringing defamation proceedings, "a corporation would in practice be likely to have to demonstrate actual or likely financial loss" in order to bring proceedings. The Government also considered that an additional 'permission stage' for corporate claims would add to costs and would not be appropriate.[30]

The Government had also consulted on whether the *Derbyshire* principle (under which local authorities, political parties and organs of central Government cannot bring actions for defamation) should be codified in the Bill. It determined that:

> [L]ittle evidence has been provided to show that the current position is causing significant problems in practice, and we are concerned that codification could remove the flexibility that exists under the common law for the courts to develop the principle

---

28 HL Deb 27 March 2012, c1330

29 HL Deb 27 March 2012, c1332. For more on the issue of costs, see: "Libel reform is coming" *Law Society Gazette,* 15 March 2012 and "Kate and Gerry McCann urge PM to save 'no win, no fee' for libel cases", *The Guardian*, 26 March 2012

30 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, paras 91-92

further in the light of individual cases. On balance we therefore believe that the courts should be allowed to continue to develop the law in this area without a statutory provision.[31]

2 The *Defamation Bill*

2.1 Background

The *Defamation Bill* was presented and had its First Reading on 10 May 2012. The Bill is relatively short, containing only 16 substantive clauses. It includes many of the provisions considered during the consultation on the *draft Defamation Bill*. In addition, certain clauses (Clause 5, 6, 10 and 13) contain substantively new provisions that were not included in the draft legislation.

The Government has said that the main benefits of the Bill would be:

- Rebalancing the law to ensure that people who have been defamed are able to protect their reputation, but that free speech and freedom of expression are not unjustifiably impeded by actual or threatened libel proceedings.
- Ensuring that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism.
- Reducing the potential for trivial claims and address the perception that our courts are an attractive forum for libel claimants with little connection to this country, so that our law is respected internationally.[32]

In brief, the Government has described its proposals as follows:

The main elements of the Bill are:

- Introducing a requirement that a statement must have caused serious harm for it to be defamatory in order to discourage trivial claims.
- Creating a new statutory defence of responsible publication on matters of public interest (essentially to codify the common law "Reynolds" defence).
- Creating statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment.
- Updating and extending the circumstances in which the defences of absolute and qualified privilege are available, including extending qualified privilege to peer-reviewed material in scientific and academic journals.
- Introducing a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one year limitation period has passed.
- Addressing libel tourism by tightening the test to be applied by the courts in relation to actions brought against people who are not domiciled in the UK or EU Member State.
- Removing the presumption in favour of jury trial, leaving the judge a discretion to order jury trial where it is in the interests of justice.

---

31 *Ibid*, para 98

32 Cabinet Office, *The Queen's Speech 2012 - Briefing Notes*, 9 May 2012, p 40

- Introducing a new process governing responsibility for publication on the internet, to give greater protection to operators of websites hosting user-generated content provided they comply with a procedure to enable the complainant to resolve any dispute direct with the author of the material concerned.

- Offering greater protection to secondary publishers such as booksellers by taking away the court's jurisdiction to hear an action for defamation brought against them except where it is not reasonably practicable for the claimant to bring the action against the author, editor or commercial publisher.

- Making the power of the court under the existing summary disposal procedure to order publication of a summary of its judgment available in defamation proceedings generally.[33]

The move to introduce a *Defamation Bill* was welcomed by libel reform campaigners. Nonetheless, English PEN said that it (and its Libel Reform Campaign partners) had concerns about the *draft Defamation Bill* and the Government's response and that they would be pushing for "a stronger public interest defence that allows responsible citizens to raise matter of public concern; a strong test of 'harm' that weeds out trivial claims; a restriction on corporations' ability to use the libel laws to silence criticism; and, protection for internet hosts."[34]

The Law Society welcomed the announcement of the Bill, saying "we expect the vast majority of its provisions to lead to a clearer, more proportionate defamation law regime."[35]

The International Forum for Responsible Media Blog (which considers a wide range of media law topics) described the final Bill as "mostly harmless". It stated that:

> The substantive changes which are made to the law – for example, clauses 8, 9 and 10 – are unlikely to have much practical impact on libel litigation. The Bill will, in the short term, introduce uncertainty and increase litigation. It seems likely that, in the medium term, it will not, of itself, change the cost, volume or nature of libel litigation.[36]

A number of potential technical legal concerns about the changes were highlighted in a post on the UK Human Rights Blog, which concluded that "in terms of enhancing freedom of expression, it seems the government has done a good job, but could do better".[37]

2.2 Territorial Extent

The Explanatory Notes to the Bill make clear that the Bill extends only to England and Wales and that although the Bill amends a number of enactments which extend to Scotland and Northern Ireland, these amendments will extend to England and Wales only.

2.3 The Clauses

The Serious Harm Test

Clause 1 of the Bill would introduce a new test of serious harm, which would mean that a statement would not be considered to be defamatory unless its publication "caused or is likely to cause serious harm to the reputation of the claimant." The Explanatory Notes to the Bill state that the clause "builds on the consideration given by the courts in a series of cases

---

33 *Ibid*, p 40-41

34 English Pen, *Libel reform announced in Queens Speech*, Press notice 9 May 2012

35 "*Defamation Bill* 'a sop to media' says libel lawyer", *Law Society Gazette*, 10 May 2012

36 "News: Queens Speech – at last the *Defamation Bill*", *International Forum for Responsible Media Blog*, 15 May 2012

37 "Comment: How will the *Defamation Bill* protect free speech?", *UK Human Rights Blog*, 20 May 2012

to question what is sufficient to establish that a statement is defamatory".[38] The Notes acknowledge that the clause would "raise the bar for bringing a claim" so that only cases involving serious harm could be brought.

The move to develop the serious harm test is discussed at section 1.4 of this paper (above). When it first considered introducing the test, the Government said that the new serious harm test would set a higher hurdle than the original 'substantial harm' test without being "unduly restrictive on claimants' rights."[39] In its response to the Joint Committee, the Government said:

> [E]stablishing a statutory test would have the effect of strengthening the law and would help to discourage trivial and unfounded claims being brought.[40]

The Government also observed that:

> [I]n the event that the threshold test is not satisfied, there will need to be a straightforward mechanism to enable the claim to be struck out without the need for a further application to be made by the defendant. We believe that this would best be achieved by enabling the court to use its existing powers to strike out or give a summary judgment, and will consider the need for any amendments to the Civil Procedure Rules and Practice Directions to facilitate this in the context of developing the early resolution procedure.[41]

The Law Society has criticised moves towards a serious harm test. It is reported to have argued that while a mechanism is needed to discourage trivial claims, "this proposal is likely to inhibit many people trying to validly protect their reputation from doing so." It also warned that such a measure would "create an unreasonably high threshold to overcome at a very early stage, necessitating extensive and costly pre-action work."[42]

Defences

Clause 2 of the Bill would replace the common law defence of justification with a new statutory defence of truth. The Explanatory Notes indicate that "the clause is intended broadly to reflect the current law while simplifying and clarifying certain elements."[43] The Joint Committee had recommended, amongst other things, that:

> The name of the "truth" defence be changed to "substantial truth" which better describes the nature of the test that is applied...[44]

The Government responded:

> We do not consider that it is necessary to rename the defence as one of "substantial truth", as we believe that the substance of the clause already makes sufficiently clear

---

38 Explanatory Notes, para 12. See: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414; *Sim v Stretch* [1936] 2 All ER 1237; *Jameel v Dow Jones & Co* [2005] EWCA Civ 75

39 "Government proposes new 'serious harm' test in libel cases", *Solicitors Journal*, 5 March 2012

40 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 8

41 *Ibid*, para 11

42 "*Defamation Bill* 'a sop to media' says libel lawyer", *Law Society Gazette*, 10 May 2012

43 Explanatory Notes, para13

44 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 67

> that the defence will succeed where the defendant can show that the imputation conveyed by the statement complained of is substantially true.[45]

The International Forum for Responsible Media Blog has suggested that clause 2 "appears to make no change of substance to the current law."[46]

Clause 3 of the Bill replaces the common law defence of 'fair comment' (recently referred to by the Supreme Court in the case of *Spiller v Joseph* [2010] UKSC 53 as 'honest comment') with a new defence of 'honest opinion'. The main difference from the current law is that the defence would no longer include the present requirement for the opinion to be on a matter of public interest. This approach was backed by the Joint Committee, which said (amongst other things) that:

> We support the Government's proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments:
>
> > a) The term "public interest" should be dropped from the defence as an unnecessary complication.[...][47]

The Committee explained this conclusion in the following way:

> The law's protection of the right to personal privacy (which is another aspect of Article 8 of the ECHR) and confidentiality are now well established and can be used to prevent people from expressing opinions on matters that ought not to enter the public domain. In this respect, the public interest test no longer serves a useful purpose. It also creates the potential for confusion with the identically worded, but narrower, public interest test under the draft Bill's defence of responsible journalism in the public interest. Further, we note that it may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not.[48]

In response to the Committee, the Government said:

> The draft Bill contained a requirement for the opinion to be on a matter of public interest to reflect the current law, but the consultation paper sought views on whether the requirement should be retained. In the light of the support for the requirement to be dropped and the Committee's views on the subject we accept this recommendation. In particular, we recognise that the courts have interpreted the public interest very broadly in recent years in cases relating to the defence of fair comment, and that if this provision were retained there would be potential for confusion with clause 2 of the [draft] Bill, where the public interest may have a narrower interpretation.[49]

Professor Gavin Phillipson has produced a short comment on this issue for the International Forum for Responsible Media Blog in which he argued that the requirement of public interest should *not* be dropped from the honest opinion test. He contended, *inter alia*, that:

---

45 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 25

46 "News: Queens Speech – at last the *Defamation Bill*", *International Forum for Responsible Media Blog*, 15 May 2012

47 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, p 9

48 *Ibid*, para 69

49 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill,* (Cm 8295) February 2012, para 31

> [W]here speech is primarily concerned with a critique of someone's private life, it will generally be seen as of decisively lower value, easily outweighed by reputational or privacy interests Defamation law should recognise this by requiring that defamatory comments should be on a matter of public interest in order to attract protection under the 'honest comment' defence. This would ensure that both defamation and privacy law continue to develop in a harmonious way that answer to the relevant Article 8 and 10 values. Otherwise the result will merely be complex litigation in which newspapers seek to use 'comment' as a way of dragging peoples' personal lives into disrepute in circumstances where to make the *factual* allegations that could justify the opinion would clearly incur liability under the tort of misuse of private information. [50]

In order to succeed with the defence, a defendant would have to meet a series of conditions, namely:

- (i) the statement complained of was a statement of opinion;
- (ii) the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and,
- (iii) that an honest person could have held the opinion on the basis of (a) any fact which existed at the time the statement was published; or (b) anything asserted to be a fact in a privileged statement published before the statement complained of.

The defence would be defeated if the claimant demonstrates that the defendant did not hold the opinion (Clause 3(5), save where the defendant is not the author of the statement (where for example an action is brought against a newspaper editor in respect of a comment piece), in which case the defence would be defeated if the claimant could show the defendant knew, or ought to have known that the author did not hold the opinion). The Explanatory Notes indicate that Clause 3(5) reflects the current law "whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice."[51]

Clause 4 would create a new defence of responsible publication on a matter of public interest. The provision is designed to be based on the existing common law defence established in the case of *Reynolds v Times Newspapers* [2007] 2 AC 127.

Duncan and Neill on Defamation notes that the *Reynolds* privilege "is of particular importance to the press and broadcasters" although it is available to anyone who publishes material in the public interest in any medium. The text explains that "the nature and scope of the defence of *Reynolds* privilege was examined and restated by the House of Lords in the case of *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359."[52]

Carter-Ruck on Libel and Privacy states that in *Jameel*, "the House of Lords sent a strong signal that the direction of travel, post-*Reynolds* had not been sufficiently in favour of press freedom."[53] It highlights Lord Hoffman's comment that the non-exhaustive list of ten factors that had been set out in *Reynolds* to consider whether the journalism employed had been responsible had been taken by some judges as a set of hurdles to be overcome by a defendant.[54]

---

50 "Free comment on private lives under the *Defamation Bill*?", *International Forum for Responsible Media Blog*, 31 March 2012

51 Explanatory Notes, para 25

52 Neill, B. Rampton R. et al, *Duncan and Neill on Defamation* (Lexis Nexis, 3rd Edition, 2009), p 203

53 Doley, C and Mullis, A. (Eds) *Carter-Ruck on Libel and Privacy* (Lexis Nexis, 6th Edition, 2010), p 340

54 *Ibid*

Prior to the case of *Reynolds*, it seems that "it was clear that, although no generic privilege existed for fair publication in the press on a matter of public interest, there were some situations in which a qualified privilege would attach to publications to the general public" but the exact circumstances in which they would apply was "unclear"[55]

The Joint Committee on the *Draft Defamation Bill* had concluded that:

> The *Reynolds* defence of responsible journalism in the public interest should be replaced with a new statutory defence that makes the law clearer, more accessible and better able to protect the free speech of publishers. The Bill must make it clear that the existing common law defence will be repealed.[56]

The Explanatory Notes to the Bill indicate that the statutory defence "is intended to reflect the principles" established in *Reynolds* and subsequent case law. Clause 4(1) states that a defence would be available where a defendant could show: (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and (b) the defendant acted responsibly in publishing the statement complained of.

The Joint Committee and the Government both concluded that the term 'public interest' should not be defined.

The Explanatory Notes state that (following the above mentioned comments of Lord Hoffman in *Jameel*) the factors listed in Clause 4(2) are "not intended to operate as a checklist or set of hurdles for defendants to overcome".

Relevant factors to be taken into account would include: the nature of the publication and its context; the seriousness of the imputation conveyed by the statement; the relevance of the imputation conveyed by the statement to the matter of public interest concerned; the importance of the matter of public interest concerned; the information that the defendant had before publishing the statement and what the defendant knew about the reliability of that information; whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement; whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement; the timing of the statement's publication; and, the tone of the statement. There had been some divergence of opinion between the Government and the Joint Committee on the drafting of some of these factors.[57]

The Joint Committee had suggested that "when deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication." This proposal was rejected by the Government. It said:

> We have considered the need for a specific provision of this nature, but believe that this is unnecessary, as in practical terms in determining whether a publisher had acted responsibly in publishing the statement complained of, the court would in reality be considering whether the publisher had exercised its editorial judgment responsibly. There is also the need to ensure that the defence is clearly applicable in a wide range of circumstances beyond mainstream media cases, and focusing on editorial judgment in this way might cast doubt on that. Including a specific provision would therefore

---

55 Doley, C and Mullis, A. (Eds) *Carter-Ruck on Libel and Privacy* (Lexis Nexis, 6th Edition, 2010), p 336

56 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 63

57 See: Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, paras 15-18

> appear unnecessary and potentially confusing, and we consider that the clause already provides protection for responsible editorial judgment as it stands.[58]

Clause 4(5) makes plain that the defence would be available "irrespective of whether the statement complained of is a statement of fact or a statement of opinion." Clause 4(6) would abolish the common law *Reynolds* defence.

Clause 5 of the Bill creates a new defence for operators of websites where a defamation action is brought against them in respect of a statement posted on the website by a third party. The defence would be defeated in circumstances where a claimant could show:

- (a) that it was not possible for the claimant to identify the person who posted the statement
- (b) the claimant gave the website operator a notice of complaint (containing various specified information); and
- (c) the website operator failed to respond to the notice of complaint in accordance with regulations to be made under secondary legislation.

Clause 5(5) provides that the Government would be able to make regulations to make provisions for "the action required to be taken by an operator of a website in respect of a notice of complaint"; the time limit for taking of action; conferring discretion on courts in relation to time limits and "any other provision for the purposes of this section." Regulations would be made by way of statutory instrument, "subject to annulment in pursuance of a resolution of either House of Parliament."

While it did not consider this clause, the Joint Committee observed that:

> Under the current law, online forums and hosts (who are commonly referred to as "secondary publishers" in this setting) are liable for statements made by their users (who are the authors or "primary publishers") where they fail to take down material once they know that it may contain a defamatory allegation.[59]

It concluded that there should be different treatment of 'indentified' and 'unidentified' (anonymous) material and recommended that:

> [A]ny material written by an unidentified person should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves, in which case a notice of complaint should be attached. If the internet service provider believes that there are significant reasons of public interest that justify publishing the unidentified material - for example, if a whistle-blower is the source - it should have the right to apply to a judge for an exemption from the take-down procedure and secure a "leave-up" order. We do not believe that the host or service provider should be liable for anonymous material provided it has complied with the above requirements.[60]

The International Forum for Responsible Media blog has highlighted some concerns about the treatment of anonymous and pseudonymous posts on websites. Particular unease is

---

58 See: Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 20

59 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 98

60 *Ibid*, para 105

expressed about the amount of detail left to secondary legislation.[61] It also expressed concern that regulations might result in website operators being "compelled to disclose third party identity and contact details, or face sanctions for not doing so, merely through receipt of a notice alleging defamation, with no opportunity for a court to review the full circumstances and exercise its discretion."[62] The author of the post argues that:

> A troubling aspect of the provisions regarding non-identifiable posts is why, when there is already a widely used judicial route (the *Norwich Pharmacal* order) to obtaining the identity of anonymous posters of defamatory material, any of this is necessary at all.[63]

Clause 6 would create a new defence of qualified privilege relating to peer-reviewed material in scientific or academic journals. This flows from a recommendation of the Joint Committee. The Committee indicated that:

> [W]e were informed that 10% of all libel claims involve science and medicine, and that 80% of GPs feel inhibited in discussing medical treatments publicly due to fear of facing a claim. At a cultural and social level, it is also important for historians, geographers, political scientists and other academics similarly to be able to research and publish without undue fear of litigation. We took evidence from various individuals who have first-hand experience of the lengthy and costly trauma of being dragged through the courts. For most scientists and academics defending libel proceedings is unthinkable, with the effect that important issues are either not being discussed publicly or at all.
>
> [...]
>
> [O]ur inquiry revealed unanimous support for extending protection of qualified privilege to peer-reviewed articles published in scientific or academic journals, as recommended in 1975 by the Faulks Committee when the law of defamation was last reviewed comprehensively.[64]

The defence would apply where two conditions are met: namely that the statement relates to a scientific or academic matter; and that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned. The Explanatory Notes indicate that "the requirements in condition 2 are intended to reflect the core aspects of a responsible peer-review process." Subsection 4 extends protection to publications in the same journal of assessments (where the assessment was written by one of more of the people who carried out the peer review and the assessment was written in the course of that review). The clause would not apply to statements shown to be made with malice.

Clause 7 is designed to amend the current provisions contained in the *Defamation Act 1996* that relate to defences of absolute and qualified privilege in relation to reports. When it considered the draft Bill, the Joint Committee strongly supported these proposals which, it argued, "represents helpful additional protection of freedom of expression."[65] The Committee took the view that there were "two areas in which we believe that the Bill should go further in

---

61 "What the *Defamation Bill* means for the internet", *International Forum for Responsible Media Blog*, 17 May 2012

62 "What the *Defamation Bill* means for the internet", *International Forum for Responsible Media Blog*, 17 May 2012

63 *Ibid*

64 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 47-48

65 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 46

order better to protect scientific debate and the democratic process." The first was the extension of qualified privilege to peer reviewed scientific and academic material and to reports of scientific and academic conferences (which was dealt with in part by Clause 6 and in part by Clause 7). The second was reports of Parliament. The Committee said

> We recommend adding a provision to the Bill which provides the press with a clear and unfettered right to report on what is said in Parliament and with the protection of absolute privilege for any such report which is fair and accurate.[66]

As noted above, the Government has indicated that this issue would be dealt with as part of its consultation on parliamentary privilege.

Clause 7, as published, is intended to extend the circumstances in which these defences already contained in the 1996 Act can be used. This would include, for example, extending the scope of the existing defence concerning the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings so that it covers any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.

The clause would substitute the phrase "public interest" for "public concern" in a number of places. Subsections (3)-(10) would make a series of amendments to Part 2 of Schedule 1 to the 1996 Act. The Explanatory Notes state that this is again designed to "extend the circumstances in which the defence of qualified privilege is available."

Qualified privilege would extend to a wider range of reports of public meetings, certain kinds of associations, and listed companies, and to reports of press conferences and scientific or academic conferences (this last example was clearly supported by the Joint Committee). Protection would also be extended to summaries of notices or other matters issued for information by a number of governmental bodies and to summaries of documents made available by the courts.

Single Publication Rule

Clause 8 is designed to introduce a single publication rule to prevent an action being brought in relation to publication of the same material, by the same publisher, after a one year limitation period from the date of first publication. The Explanatory Notes indicate that this is designed to replace "the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period." The issue recently arose in a libel action involving the *Times* newspaper, which was sued following the continued publication on its internet site of two articles.[67] The case was eventually considered by the European Court of Human Rights. The press summary of the case provided by the Strasbourg court provides a useful précis of the case as it was presented in the domestic courts:

> The defendants [...] argued that only the first publication of an article posted on the Internet should give rise to a cause of action in defamation and not any subsequent downloads by Internet readers. Accordingly, they submitted, the second action had been commenced after the limitation period for bringing libel proceedings had expired. The court disagreed, holding that, in the context of the Internet, the common law rule according to which each publication of a defamatory statement gave rise to a separate

---

66 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 51

67 *Loutchansky v Times Newspapers Ltd & Others* [2001] EWCA Civ 1805

> cause of action meant that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule").
>
> The defendant appealed, arguing that the application of the common law rule to Internet publications gave rise to ceaseless liability of newspapers and could ultimately have a chilling effect on their readiness to provide Internet archives and thus limit their freedom of expression. The court, dismissing the appeal, stated that the maintenance of archives was a relatively small aspect of the freedom of expression, and that it need not be inhibited by the law of defamation as the publication of a notice warning readers against treating potentially defamatory material as truth would normally remove any sting form the material.[68]

The Strasbourg court upheld the ruling of the English court that this had not represented a disproportionate restriction on the newspaper's freedom of expression.[69]

The Joint Committee had supported the Government's introduction of a single publication rule but had concluded that it was too narrowly drafted. It stated that under the provision as included in the draft Bill:

> [A]n archive that publishes material written by someone else could be sued successfully, even though the original author could no longer be pursued for continuing to make the material available to readers. A publisher who republishes material previously published by a different person will similarly be exposed.[70]

It recommended that:

> The single publication rule should protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year.[71]

The Government did not accept this recommendation. It observed that:

> The Government does not believe that this would provide adequate protection for claimants. For example, if the claimant were to bring an action in the one year period then they would be prevented from bringing any further action in relation to that material, irrespective of who might republish it. Whilst the claimant may have obtained a court injunction against the original publisher to prevent further publication of the defamatory material, any other publisher would still be free to republish it, and the claimant would have no recourse.[72]

Clause 8 would not apply to subsequent publication where "the manner of that publication is materially different from the manner of first publication." In considering this issue, a court would have regard (amongst other matters) to the level of prominence given to the statement and the "extent of subsequent publication."

The section would not impact on the court's discretion under section 32A of the *Limitation Act 1980* to allow a defamation action to proceed outside the time limit where it was equitable to do so.

---

68 European Court of Human Rights, Press Release, 10 March 2009

69 See: *Times Newspapers Limited (Nos. 1 and 2) v. the United Kingdom* (applications no. 3002/03 and no. 23676/03

70 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 59

71 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 59

72 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 50

Jurisdiction

Clause 9 relates to actions against a person not domiciled in the United Kingdom, an EU Member State (or a state which is a contracting party to the Lugano Convention). It is focused on the issue of "libel tourism" and is expected to apply to cases with a tenuous link to England and Wales.

Concerns have been expressed about this issue quite frequently,[73] however some judges (see above) and academics have suggested that the debate has been rather "one sided."[74] The Joint Committee concluded that:

> We believe that the extent of libel tourism has been exaggerated in some quarters but, in line with our core principle of protecting freedom of speech, we believe that the courts would benefit from more robust powers to prevent unwarranted legal action in this country. This would also help reduce any international chilling effect. Foreign parties should not be allowed use of the courts in this country to settle disputes where the real damage is sustained elsewhere or where another jurisdiction is more appropriate.[75]

The provision would ensure that a court would not have jurisdiction to hear and determine an action unless of all places in which the statement has been published, England and Wales was clearly the most appropriate place in which to bring an action. The Explanatory Notes say that the court would have to take into account a range of factors when making such a determination (including whether there is reason to think that the claimant would not receive a fair hearing elsewhere). The Notes also state that the Civil Procedure Rule Committee would be asked to consider including relevant factors in the Civil Procedure Rules.

Clause 10 would ensure that the court did not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless it was satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. It has been suggested that this bar against pursuing secondary publishers is "presented mainly as a defence for booksellers" but that the "clause will also benefit online intermediaries."[76]

Trial by Jury

Clause 11 removes the presumption in favour of jury trials in defamation cases. The Joint Committee had made the following recommendations:

> We conclude that the presumption in favour of jury trials works against our core principles of reducing costs by promoting early resolution and, to a lesser degree, of improving clarity. We support the draft Bill's reversal of this presumption, so that the vast majority of cases will be heard by a judge.
>
> We believe that the circumstances in which a judge may order a trial by jury should be set out in the Bill, with judicial discretion to be applied on a case-by-case basis. These

---

73 See for example: "English libel law is a vulture circling the world", *The Guardian*, 10 March 2011

74 See for example: "London: the capital of libel tourism?", *International Forum for Responsible Media Blog*, 29 March 2010

75 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, para 56

76 "What the *Defamation Bill* means for the internet", *International Forum for Responsible Media Blog*, 17 May 2012

> circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake.[77]

The Government declined to include guidance in the Bill. It stated that:

> [A] clear majority of responses to our consultation on this point, including from members of the senior judiciary, took the view that guidelines would not be necessary. Concerns were expressed that including guidelines in the Bill could be too prescriptive and could generate disputes. There would also be a risk that detailed provisions setting out when jury trial may be appropriate could inadvertently have the effect of leading to more cases being deemed suitable for a jury than at present, which would work against the Committee's view.[78]

Although it was supported by the majority of respondents to the consultation, this move to restrict jury trials did not have unanimous support. The editor of the *Guardian*, assistant editor of the *Telegraph* and a former legal director at the *Times* all told the Joint Committee of dangers in restricting jury trials, particularly where the key issue was "who's telling [the] truth."[79] However, it is worth noting that the Bill would still give the court discretion to order a jury trial where it considered it to be appropriate.

Summary of Court Judgment

Clause 12 of the Bill would extend the power of the courts to order that a summary of judgments be published. In summary disposal proceedings under section 8 of the *Defamation Act 1996*, the court can order an unsuccessful defendant to publish a summary of its judgment where the parties cannot agree a correction or apology. Clause 12 would apply this rule to defamation proceedings more generally. The introduction of this clause followed a recommendation of the Joint Committee (who also concluded that the courts should *not* have the power to order the publication of an apology).[80] The Committee stated that:

> The Bill should be amended, if necessary by a new clause, to provide the judge deciding a defamation case at final trial with the power to order the defendant to publish, with proportionate prominence, a reasonable summary of the court's judgment. In cases where media and newspaper editors are responsible for implementing such orders they should ensure that the summary is given proportionate prominence.

The Government accepted those recommendations, but indicated that:

> In view of the fact that we would propose to give the court a general power to order publication of a summary of its judgment, we consider that it would be preferable to leave the question of when this should be used to the courts to develop in individual cases as appropriate.[81]

---

77 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill*, 19 October 2011, HC 930-I, HL Paper 203, 2010-12, paras 24-25

78 Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 62

79 See for example:" Removing libel juries would be dangerous, warns newspaper industry", *The Guardian*, 11 May 2011

80 See: Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, paras 27-29 for the Government's response.

81 *Ibid*

Under Clause 12, the wording of any summary and the time, manner, form and place of publication would be matters for the parties to agree, but if they were unable to do so, the court would have the power to settle the wording and give directions as to the other matters.

Actions for Slander: Special Damage

Clause 13 would repeal the *Slander of Women Act 1891* and overturn a common law rule relating to special damage. In its response to the Joint Committee, the Government noted that:

> The consultation paper sought views on whether one such category contained in the Slander of Women Act 1891 relating to words imputing unchastity or adultery to any woman or girl, and a common law category relating to imputations that a person is suffering from a communicable disease such as venereal disease, leprosy or the plague, should be repealed through the Repeals Bill, on the basis that they are outdated and potentially discriminatory. There was overwhelming support for this in consultation responses, and on reflection we have decided to include a provision repealing these provisions in the *Defamation Bill* rather than the Repeals Bill.[82]

General provisions

Clause 14 provides a definition of the terms "publish"; "publication" and "statement" for the purposes of the Bill. The Explanatory Notes indicate that broad definitions have been used to ensure that the provisions of the Bill cover a wide range of publications, in any medium, reflecting the current law.

Clause 15 makes a series of consequential amendments (particularly in relation to the *Rehabilitation of Offenders Act 1974* to reflect new defences of truth and honest opinion).

Clause 16 provides that the Act would only extend to England and Wales and contains provisions on commencement.

3 Further Reading

Siamala Krishnan, *Lord Lester's Defamation Bill: striking a balance?* [2012] Entertainment Law Review 25

Alistair Mullis and Andrew Scott, *Reframing libel: taking (all) rights seriously and where it leads*, Northern Ireland Legal Quarterly, 2012, 63(1)

Eric Barendt, *Balancing freedom of expression and the right to reputation: reflections on Reynolds and reportage*, Northern Ireland Legal Quarterly, 2012, 63(1)

Trevor C. Hartley, *Libel tourism - a solution in sight?* Northern Ireland Legal Quarterly, 2012, 63(1)

David Howarth, *The cost of libel actions: a sceptical note*, [2011] Cambridge Law Journal 397

Robin Shaw and Paul Chamberlain, *Libel reform: draft Defamation Bill seeks a legal balance but ignores the costs issue* [2011] Communications Law 49

---

[82] Ministry of Justice, *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill*, (Cm 8295) February 2012, para 99

David Rolph, *Corporations' right to sue for defamation: an Australian perspective*, [2011] Entertainment Law Review 195

Siobhan Grey, *Libel reform: is it in the public's interest?* Counsel Magazine, May 2011 pp 31-33