Ministry of JUSTICE

The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill

February 2012

The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Introduction

1. We welcome the Committee's report and are grateful for the thorough and extensive consideration which it has given to these important issues. The recommendations cover a wide range of areas, and we have given these very careful consideration alongside the responses we received to our public consultation on the draft Bill. A summary of the responses to that consultation was published on 24 November 2011.

2. This response focuses on the recommendations made by the Committee on all the relevant issues. It also indicates our conclusions on certain points of detail which were raised in our public consultation but not addressed specifically in the Committee's report.

3. The paragraph numbers given at the end of each recommendation are those used by the Committee in its report.

General Recommendations

The Government should have particular regard to the importance of freedom of expression when bringing forward this Bill and developing proposals in its broader consideration of the law relating to privacy. (Paragraph 18)

4. As the Coalition Agreement made clear, we are firmly committed to reform of the law on defamation and the protection of free speech. The right to speak freely and debate issues without fear of censure is a vital cornerstone of a democratic society. We believe that it is important that our defamation laws strike a fair balance so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech and freedom of expression are not unjustiably impeded by actual or threatened defamation proceedings.

5. The Government also takes seriously the need to ensure that we have the correct balance between privacy and freedom of expression. The Privacy and Injunctions Committee is currently considering the operation of the current law in this area and we will of course give the Committee's recommendations careful consideration.

The Government should monitor whether, in due course, the codification carried out by the Bill is achieving its goal of improving accessibility and clarity of the law. (Paragraph 20)

6. It is confirmed that the Government will 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.

It is essential that the Government makes clear, in a way that the courts can take into account, during the passage of the Bill if not before, when it is seeking to make changes of substance to the law and when it is simply codifying the existing common law. We have sought to make this distinction clear in the specific changes to the draft Bill that we propose. In future, we recommend that the Government always makes clear at the date of publication whether the clauses of a draft Bill are intended merely to codify the existing law, or to codify with elements of reform. There should be no ambiguity over this important issue. (Paragraph 21)

7. We recognise the importance of providing as much clarity as possible on the Government's aims in introducing legislation and whether this is intended to codify or change the existing law. We will endeavour to provide clarity on these issues in the explanatory notes and during passage of the Bill.

Recommended changes to the draft Bill

Clause 1: Substantial harm

We recommend replacing the draft Bill's test of "substantial harm" to reputation with a stricter test, which would have the effect of requiring "serious and substantial harm" to be established. (Paragraph 28 and 62)

8. This is a key aspect of the Bill, and a wide range of views were expressed on our public consultation as to the appropriate test to be applied. As the consultation paper explained, the Government's intention in introducing a "substantial harm" test was to reflect the current law as articulated by the courts in a series of cases, and our view was that establishing a statutory test would have the effect of strengthening the law and would help to discourage trivial and unfounded claims being brought.

9. The Committee proposes that a higher hurdle should be applied, and that this should be reflected in a test of "serious and substantial harm". We are concerned that the use of two separate terms alongside each other would be likely to cause uncertainty and litigation over what difference may exist between the two terms, which would add to disputes and costs. However, in the light of the Committee's views and the balance of opinions received on consultation we are persuaded that it is appropriate to raise the bar for bringing a claim. We believe that a test of "serious harm" would do this, while maintaining a balance that is not unduly restrictive on claimants' rights.

10. We therefore propose to amend the draft Bill to provide for a test of "serious harm".

The threshold test should be decided as part of the proposed early resolution procedure and any claim that fails to meet this test should be struck out. (Paragraph 29)

11. Our consultation paper sought views on whether our proposed new early resolution procedure should deal with the question of whether the threshold test had been met where this is in dispute, and a majority of responses agreed with this. As noted below, we will be developing the early resolution procedure further in the light of the Committee's views and the responses received. As our consultation paper indicated, in 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.

Clause 2: Responsible publication on matter of public interest

On balance, we support the broad approach that is taken by the Government to the public interest defence, although in some detailed respects we prefer the approach of Lord Lester's Bill. (Paragraph 37)

12. We welcome the Committee's support for the approach which we have taken and respond to its detailed proposals below.

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. (Paragraph 63)

13. We accept that the existing common law defence should be explicitly abolished to avoid any potential confusion, and will amend the draft Bill to achieve this.

Overall, we support the approach that is taken in clause 2 of the Bill. In particular, we agree that the term "public interest" should not be defined. (Paragraph 64)

14. We welcome the Committee's agreement that the term "public interest" should not be defined, which also received majority support in responses to the public consultation.

The list of factors that is used to determine whether a publisher has acted responsibly should be amended as follows: (Paragraph 65)

A new factor should be added that refers to the "resources" of the publisher;

15. The draft Bill already contains a provision enabling the court to consider the nature and context of the publication in deciding whether a publisher has acted responsibly. We are concerned that the list of factors should not become too lengthy, as this could affect the simplicity and clarity of the defence, and on balance do not believe that an additional factor relating to the resources of the defendant would be appropriate.

A reference to "the statement in context" should be added to clause 2(2)(c);

16. The Committee indicates that the purpose of including these words is to make clear that the publication must be read as a whole rather than focusing primarily on the words that are subject to complaint. We consider that this approach would be taken by the courts in any event, and that including a specific reference of this nature in relation to one factor could perhaps cast doubt on the approach to be taken on other aspects and fuel unnecessary litigation. On balance we therefore do not believe that a specific provision is appropriate, but will make clear in the Explanatory Notes accompanying the draft Bill that we envisage that the courts will

consider the publication as a whole in reaching a decision as to whether the defendant has acted responsibly.

The term "urgency" should be removed from clause 2(2)(g) and replaced with a more general test of whether "it was in the public interest for the statement to be published at the time of publication";

17. We agree that the term "urgency" should be removed for the reasons given by the Committee. However, we believe that the replacement wording proposed by the Committee referring to the public interest may run the risk of making this factor more onerous than the equivalent factor in *Reynolds*, and believe that a simple reference to "the timing of the publication" is preferable.

The reference to whether the publication draws "appropriate distinctions between suspicions, opinions, allegations and proven facts" at clause 2(2)(h) should be removed;

18. We accept this recommendation, and intend to insert an additional provision to ensure that the removal of these words does not lead to any doubt as to whether clause 2 applies to statements of opinion as well as statement of fact.

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. (Paragraphs 35, 64 and 65)

19. The Committee indicates that the inclusion of a provision relating to editorial judgment may offer some comfort to publishers facing pressurised decisions about publishing material. It is unclear why it considers that such a provision is only of relevance in relation to the tone and timing of the publication, and not more generally.

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

We recommend that the "reportage" defence at clause 2(3) is reformulated as a new matter to which the court may have regard under clause 2(2) namely "whether it was in the public interest to publish the statement as part of an accurate and impartial account of a dispute between the claimant and another person." (Paragraph 66)

21. In making this recommendation, the Committee refers to criticisms about the breadth of the reportage defence in the draft Bill, and similar concerns were expressed by some consultation responses. As explained in our consultation paper, our intention in including this provision was to focus on the key elements of the defence which have been established in case law without unduly restricting the further development of the law in this area in future.

22. We have considered the case law further in the light of the concerns expressed. We accept that the approach taken in the draft Bill, which makes the provision completely free-standing from clause 2(2) would widen the scope of the defence. On the other hand, we think that the approach proposed by the Committee simply to make reportage one of the factors to be considered in clause 2(2) would risk narrowing the defence, which we do not believe would be desirable.

23. We therefore intend to consider further whether there is a way – without unduly complicating the legislation – of reflecting more accurately the existing position.

The judge who upholds a public interest defence should make it clear when the truth of the allegation is not also proven. It may be appropriate, depending on the facts of the case, for the judge to order a summary of his or her judgment to be published, to make this clear. This would help to protect the reputation of the claimant, but without the practical and legal complications associated with declarations of falsity. The Ministry of Justice should work with the Lord Chief Justice and senior members of the judiciary to implement this reform. (Paragraph 36)

24. The Government's response to this recommendation is set out below in the context of the Committee's recommendations on clause 3.

Clause 3: Truth

We recommend that the name of the "truth" defence be changed to "substantial truth" which better describes the nature of the test that is applied. We also recommend that the Government includes a provision, in line with Lord Lester's approach, to make clear that a defamation claim should fail if what remains unproved in relation to a single allegation does not materially injure the claimant's reputation with regard to what is proved. This should assist in providing clarity. (Paragraph 38 and 67)

25. 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 that the defence will succeed where the defendant

can show that the imputation conveyed by the statement complained of is substantially true.

26. The Committee expresses the view that the proposal in Lord Lester's Bill relating to single allegations may well already be covered by the word "substantially" in Clause 3(1) of the draft Bill, but that this opportunity should be taken to remove any uncertainty. There was also majority support for such a provision on consultation. We will give further consideration to whether a specific provision of this nature would be useful.

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.
(Paragraph 40 and 68)

27. We share the Committee's view that where a publisher has got something seriously wrong, the public interest and the interests of the victim require that a suitable correction is made, and we agree that the power to order publication of a summary of the court's judgment which is currently available under the summary disposal procedure should be made more widely available. This view was also supported by a small majority of those responding to our consultation on the issue. We will consider further how practical issues such as the applicability of the provision to broadcasting could be resolved and will include an appropriate provision in the substantive Bill.

28. In its recommendations under clause 2, the Committee expressed views on how the court might approach this issue in cases where the truth of the allegation is not proven. 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.

29. We also agree with the Committee and most of those responding to our consultation that it would not be appropriate to give the court a power to order publication of an apology.

30. More generally, the consultation paper sought views on whether the common law defence of justification should be explicitly abolished as proposed in the draft Bill. In the light of the support for this in responses a provision to this effect will be retained in the substantive Bill.

Clause 4: Honest Opinion

We support the Government's proposal to place the defence of honest opinion on a statutory footing, subject to the following amendments: (Paragraph 69)

The term "public interest" should be dropped from the defence as an unnecessary complication;

31. 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 Bill, where the public interest may have a narrower interpretation.

The Bill should not protect "bare opinions". It should be amended to require the subject area of the facts on which the opinion is based to be sufficiently indicated either in the statement or by context;

32. The Committee indicates that unless an indication of the subject matter on which the opinion is based is included, readers are left with no way of assessing the real nature of the criticism, and the victim is seriously handicapped in defending himself in response. We accept that difficulties could potentially arise in these circumstances, and will explore if a suitable provision can be included in the Bill without affecting the simplicity and clarity of the new defence.

Neither the Government's draft Bill nor Lord Lester's Bill imposes any requirement that the commentator need know the facts relied on to support the opinion. In line with our concern to improve clarity, we welcome this change, which removes an undesirable layer of complexity;

33. We welcome this recommendation, which supports the position taken in the draft Bill.

The Bill should require the court, when deciding whether an honest person could have held the relevant opinion, to take into account any facts that existed at the time of publication which so undermine the facts relied on that they are no longer capable of supporting the opinion;

34. The Committee indicates that a provision to this effect is necessary because a person may honestly express a defamatory opinion on the basis of a fact which, although once true, has by the time of publication wholly lost its validity because of a subsequent fact that may be unknown to the commentator (e.g. a conviction later overturned on appeal). It

appears that in these situations the Committee would like the claimant to be able to rely on the further fact.

35. The Committee recognises that this sort of situation is unlikely to arise very often, and we are concerned that including such a provision would inevitably result in the clause becoming more complicated and would work against our aim of achieving provisions which are as simple and clear as possible. In addition, any difficulty in this area may in practice be resolved by the claimant using subsection (5) of the clause in the draft Bill to argue that the defendant must have known about the intervening fact, and hence that he or she did not really hold the opinion expressed. On balance we therefore do not consider that a provision to this effect is appropriate.

36. On a slightly different but related point, the consultation paper sought views on whether the honest opinion defence should be available where someone makes a statement which they honestly believe has a factual basis, but where the facts in question prove to be wrong. There was majority support for such a provision. However, on further consideration we believe that in most cases involving an honest mistake the offer of amends procedure would enable the case to be resolved speedily, and that including a provision of this nature could complicate the law and undermine the need for a factual basis to the opinion. We would therefore propose not to pursue this point.

The Bill should require the statement to be recognisable as an opinion, in line with Lord Lester's Bill;

37. The Committee's report indicates that the honest opinion defence should only arise where the ordinary reader or viewer will recognise the statement as opinion, and that this should be made explicit on the face of the Bill. While we agree with the principle underlying the Committee's views, we believe that the point is adequately addressed in the draft Bill, which provides for the defence to apply where "the statement complained of is a statement of opinion".

38. We believe that in deciding whether this requirement is satisfied the court would inevitably ask itself whether an ordinary person would have understood it to be a statement of opinion, and that it would not add anything of substance if it were amended to require the statement to be recognisable as opinion, or to be one which an ordinary person would understand to be an opinion in the particular context. There would also be a risk that any reference to "an ordinary person" in this context could create confusion in relation to references to "an honest person" elsewhere in the clause. On balance, we do not therefore propose to include a specific provision on the face of the Bill, but will make the position clear in the explanatory notes.

The vague reference to "privilege" must be clarified to make it clear that this term is confined to the absolute or qualified privilege which presently attaches at common law or by statute to the fair and accurate reporting of various types of public proceedings or notices. (Paragraph 43 and 69)

39. The draft Bill provided for a "privileged statement which was published before the statement complained of" to be used to support whether an honest person could have held the opinion. The Committee considers that the absence of clarification on the extent of the reference to privilege in this context will cause further litigation, and on the face of it would appear to protect comments based on wholly false statements contained in private communications where the publisher and recipient have a common law defence of qualified privilege based on a reciprocal duty and interest.

40. We agree with the Committee that clarification on the extent of this provision is needed, and will give further consideration to the scope of an appropriate provision for inclusion in the substantive Bill.

41. A further issue raised in our consultation paper on which the Committee did not express a view was that of whether a provision should be included indicating that the condition that an honest person could have held the opinion would be satisfied if the honest person could have done so on the basis of material which satisfies the test of responsible publication in the public interest in clause 2. A majority of consultation responses supported this. There may be circumstances where this provision could not be relied on in practice (for example where the opinion had been expressed by a third party on an article by another person they would not be in a position to know whether that person could have satisfied the clause 2 test). However, it may be that in other situations it could be helpful and we will give further consideration to whether a provision of this nature would be useful.

42. The consultation paper also sought views on whether the common law defence of fair comment should be explicitly abolished as proposed in the draft Bill. In the light of the support for this in responses a provision to this effect will be retained in the substantive Bill.

Clause 5

Qualified privilege should be extended to fair and accurate reports of academic and scientific conferences and also to peer-reviewed articles appearing in journals. (Paragraph 48 and 70)

43. The draft Bill already provides for qualified privilege to be extended to fair and accurate reports of academic and scientific conferences. This was supported by the majority of consultation responses, and we will retain provisions on this in the substantive Bill. We are 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, and how key

elements of the peer-review process can be defined to ensure that the scope of any provision is clear.

We recommend that the Government prepares guidance on the scope of this new type of statutory qualified privilege in consultation with the judiciary and other interested parties. (Paragraph 49)

44. As noted above, we are considering the position on defining key elements of the peer-review process. In relation to scientific and academic conferences, our consultation paper indicated that a clear and comprehensive definition would be very difficult to achieve, and that any definition used could in practice cause more problems than it would solve. The paper therefore proposed that this would best be left to the courts, and the majority of responses supported this approach.

45. The Committee recognises the difficulties that exist in attempting any definition on the face of the Bill, and on balance we remain of the view that it would best be left to the courts to determine in individual cases whether the defence should extend to the report of a particular conference or not. We will however give further consideration as to whether any informal guidance in this area is feasible.

46. More generally, we welcome the Committee's support for the changes to qualified privilege proposed in our consultation paper. These also received widespread support on consultation and will be taken forward in the substantive Bill. On particular points, we will consider further the need to adjust the definition of public company in the light of concerns that this may be too narrow, and whether a specific reference to press conferences would be helpful. We have also identified certain other aspects of Schedule 1 to the 1996 Act which we believe would benefit from clarification, and will consider these further with a view to including appropriate provisions in the substantive Bill.

47. There was support on consultation for absolute privilege to be available for non-contemporaneous reports of court proceedings as well as contemporaneous reports, rather than the qualified privilege which applies at present. However, the Government recognises arguments that absolute privilege should be carefully circumscribed and that a distinction is appropriate as publishers of non-contemporaneous reports have more opportunity to consider the matter, and on balance does not intend to change the existing provisions on this point.

48. The consultation paper also sought views on whether a new form of qualified privilege should be created to protect bodies such as the National Archives which make previously unpublished material available to the public. Mixed views were expressed on consultation, with some supporting such a provision for the National Archives only, others seeking a broader provision protecting other public archives, and others opposing any extension of the law in this area. We are giving further consideration to this issue in the light of the lack of consensus on the best approach.

49. We also consulted on whether qualified privilege should be extended to fair and accurate copies and reports of material in an archive where the limitation period for an action against the original publisher of the material has expired, and this is discussed further under clause 6 below.

Clause 6: Single publication rule

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. (Paragraph 59 and 71)

50. The Committee's recommendation would extend the scope of the single publication rule much more widely than the approach adopted in the draft Bill, and would prevent an action being brought against anyone who republishes the same material in a similar manner. 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.

51. We are therefore unable to accept the Committee's recommendation. However, we recognise that unfairness could arise where a fair and accurate copy or report of material is published by an archive after the one year limitation period for an action in respect of the original publication has expired. Our consultation paper sought views on whether qualified privilege should be available in these circumstances, and this received majority support. In these situations, the privilege would be subject to explanation and correction, and so the claimant would potentially be offered some redress where appropriate (for example where an action had been brought against the original publication of which the archive operator was unaware). We will give further consideration to whether qualified privilege should be available in these circumstances.

It should be clarified that the simple act of making a paper-based publication available on the internet, or vice versa, does not in itself amount to republishing in a "materially different" manner unless the extent of its coverage in the new format is very different.
(Paragraph 59 and 71)

52. The draft Bill already enables the court to have regard to the level of prominence that a statement is given and the extent of the subsequent publication when considering if it has been made in a materially different manner. As the Committee recognises, the extent of coverage is a valid consideration, which may clearly be an issue where material is placed online as the effect could be to make it available to a much wider audience. We are concerned that setting out in statute specific instances in which the test of whether a publication has been made in a materially different manner may or may not be satisfied could result in the legislation

becoming over-complex and unwieldy, and cast doubt on instances which are not mentioned. On balance therefore, we believe that how the "materially different manner" test is applied is best left to the courts to determine in individual cases.

53. More generally, a range of views were expressed on consultation on the merits of the "materially different manner" test. These broadly fell into those who supported the test and the proposed scope of the single publication rule; those who thought that the scope of the rule should be broadened; and those who thought that it should be narrowed. As noted above, on balance the Government believes that the approach it has proposed strikes a fair balance and that a general test is preferable to one which attempts to differentiate between the many specific situations which may arise.

54. The consultation paper raised certain other issues which were not the subject of specific recommendations by the Committee. Firstly, it sought views on the provision in the draft Bill for the single publication rule to apply to publications to the public. Mixed views were expressed on this, with some supporting the approach taken, but others concerned that it would cause uncertainty, particularly in relation to publications on the internet. We are giving further consideration to the position on this in the light of the views expressed.

55. The consultation paper also sought views on whether any specific provision is needed in addition to the court's existing discretion under section 32A of the Limitation Act 1980 to allow a claim to proceed outside the limitation period of one year from the date of the first publication. Most consultation responses did not support any additional provision, and the Government agrees that the discretion under section 32A is sufficient.

Clause 7: Action against a person not domiciled in the UK or a Member State etc

The Bill should make clear that residents in England and Wales may sue in this jurisdiction in respect of publication abroad provided there has been serious and substantial harm suffered by them. In particular, this section should not be applicable to residents of England and Wales who wish to sue in respect of publication abroad where there is permission under the current law. The clause should be confined to foreign parties using English courts to resolve disputes where the principal damage has not been suffered here. (Paragraph 72)

56. We welcome the Committee's support for the thrust of our proposals on libel tourism. We share its concern that claimants domiciled in England and Wales who wish to bring an action here in respect of publication abroad should not be put at a disadvantage as a result of the Bill's provisions. However, legal advice suggests that amending the clause to exclude claimants domiciled in this jurisdiction could raise difficulties in relation to anti-discrimination principles in European law, as this would be

giving more favourable treatment to claimants domiciled in England and Wales than claimants from elsewhere in the European Union. This could operate as a disincentive to the latter in exercising their right to freedom of movement, and would be difficult to justify as necessary to achieve our policy aim of restricting access to the English courts to cases where this is clearly the most appropriate jurisdiction.

57. In practice, we consider that if a claimant is domiciled in this jurisdiction the courts are likely to be slow to find that he or she did not meet the test of England and Wales being clearly the most appropriate place to bring an action, and that it will also often be the case that more harm will have been done here than elsewhere. In view of the difficulties which make a provision on the face of the Bill inappropriate, we propose to clarify in the explanatory notes and during passage of the Bill that we would normally expect claimants domiciled in England and Wales to satisfy the requirements of the clause.

In line with the Lord Lester Bill, the courts should be required, when determining this issue, to assess the harm caused in this country against that caused in other jurisdictions. (Paragraph 72)

We recommend that the Government should provide additional guidance on how the courts should interpret the provisions relating to libel tourism. We also believe that in such cases the courts should have regard to the damage caused elsewhere in comparison to the damage caused here. (Paragraph 56)

58. The Government agrees that the extent of harm caused to the claimant in this jurisdiction compared to that suffered elsewhere is a valid consideration when the courts are applying the test established in the draft Bill. However, as our consultation paper explained, this is only one of a range of factors which it may be appropriate to take into account, including, for example, the extent of each party's connection to England and Wales and whether there is reason to think that the claimant would not receive a fair trial elsewhere.

59. In the light of this, the consultation paper indicated that the draft Bill did not include a detailed list of factors for the courts to take into consideration, as the range of circumstances are diverse and this would appear more appropriate to secondary legislation where a more flexible approach could be taken. That remains our view, and we do not therefore believe that it would be appropriate to single out a particular factor for inclusion on the face of the Bill. However, we can confirm that we will ask the Civil Procedure Rule Committee in due course to consider a suitable list of factors, including the one identified by the Committee, together with detailed procedural guidelines to support the introduction of the new provisions.

60. More generally, a range of views were expressed on consultation as to whether the provisions in the draft Bill struck the right balance or should be either narrowed or made more extensive. As explained in the consultation

paper, the scope of the provision is limited by the need to comply with European law, and on balance we do not consider that any change in scope is feasible or appropriate. We do, however, intend to amend the clause on a point of detail to ensure that a statement which is substantially the same as the statement complained of is regarded as that statement, to avoid unreasonable arguments that statements published in other jurisdictions should be treated as different publications.

Clause 8: Trial to be without a jury unless the court orders otherwise

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. (Paragraph 24)

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 circumstances should generally be limited to cases involving senior figures in public life and ordinarily only where their public credibility is at stake. (Paragraph 25 and 73)

61. We welcome the Committee's support for the approach taken in the draft Bill, which was also supported by most consultation responses.

62. The Committee recommends that guidelines on when a judge may order trial by jury should be set out on the face of the Bill. However, 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 (which the Government shares) that jury trial should be exceptional.

63. In the light of these considerations, and as the courts are already familiar with exercising their discretion to order jury trial where appropriate, on balance we believe that it would be preferable to allow the courts to continue to do this without specific guidance on the face of the Bill.

64. The consultation paper also sought views on whether the Bill should clarify what issues should be decided by a jury (where there is one) and which by the judge. There was little support for this in the responses, and in view of the fact that jury cases are (as now) likely to be very few in number, we consider that any uncertainty would best be resolved by the courts.

Consultation Issues

Early resolution and cost control

The Government's proposal

We agree with the Government's intention of promoting early resolution by allowing the judge to determine key issues in question at an initial hearing—within a few weeks, certainly not months—and believe that this will go a significant way towards improving the chances of early resolution. (Paragraph 77)

The changes to procedures proposed by the Government are largely a tightening up of existing mechanisms: they cannot be seen as radical and do not go far enough towards reducing costs to the extent that legal action will be realistically accessible to the ordinary citizen. (Paragraph 78)

65. We welcome the Committee's support for our intention of promoting the early resolution of key issues through a new preliminary court procedure. Our proposals were also broadly welcomed on consultation and we will develop them further to ensure that the new system is brought into effect on a timely basis on passage of the Bill.

66. The draft Bill did not directly address the issue of costs. However, we believe that our proposals for a new preliminary procedure and other provisions to simplify and clarify the law and deter trivial claims will have a significant impact in reducing costs and encouraging settlements. Our views on the Committee's specific recommendations in relation to costs are set out in detail below.

We propose 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. (Paragraph 79)

Initial stages of action: mediation or evaluation

We believe that ordinarily the first step following the initial exchange of letters under the Pre-Action Protocol should (in the absence of an offer of amends) be mediation or assessment by a suitably qualified third party, known as "early neutral evaluation".[...] The mediation process must be swift, inexpensive and resistant to delaying tactics. To counter this latter possibility, any failure to engage constructively with the process should be punished if and when it comes to the awarding of costs. If there has been no mediation or neutral evaluation, the judge should have power to order it at the first hearing in the case. (Paragraph 82)

67. The Government is firmly committed to resolving legal disputes by dispute resolution techniques other than litigation wherever it is possible and acceptable to both sides. The overriding objective of the Civil Procedure Rules puts the onus on courts to encourage and facilitate the use of alternative dispute resolution (ADR), and the Defamation Pre-Action Protocol already requires parties to consider some form of ADR, including mediation or early neutral evaluation. However, the Government accepts 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.

Arbitration

We encourage the Government to explore further the development of a voluntary, media-orientated forum for dispute resolution in the context of the current review of the regulatory regime governing the media. (Paragraph 84)

Arbitration represents a cost-effective alternative to the courts, and helps to reduce the impact of any financial inequality between the parties. The financial and other incentives to use arbitration must be strengthened as far as possible. (Paragraph 85)

68. 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.

Proceedings reaching court

To bring costs down further, more radical changes to the way in which our courts operate—not just in defamation cases—would need to be contemplated. Some suggestions include the application of maximum hourly rates, mandatory capping of recoverable costs, paper hearings with limits on written submissions and changes to the Conditional Fee Agreement regime. Such issues extend well beyond our brief. Nevertheless, we recommend that the Government gives serious consideration to these and other measures, which are essential if court costs are to be attacked in a more radical and effective way. In the meantime, we believe that more aggressive case management can help to minimise costs, if it is applied fairly and consistently. We recommend that the Ministry of Justice and the judiciary take measures to ensure that judges personally and consistently manage defamation cases in a robust manner that minimises delays and costs incurred by both parties. (Paragraph 86)

69. The Civil Procedure Rules already provide for costs capping orders to be made in any civil proceedings in appropriate cases. A process of costs budgeting - where the court monitors and approves the parties' anticipated costs as the case progresses and makes case management decisions in the light of those costs - has been piloted for defamation claims since 1 October 2009. The pilot is due to end on 30 September 2012. We will decide on the basis of the operation of that pilot whether costs budgeting should be continued for these claims in the future.

70. We agree with the Committee about the importance of ensuring that case management is as active and effective as possible. We are confident that the judiciary will manage cases consistently and robustly and will liaise with them in developing and implementing the proposed new system.

71. The Committee also refers to the possibility of defamation proceedings being heard in the county court once the new system of streamlining measures is introduced. The Government will consider this issue further in due course in the light of the passage of the Bill and implementation of the new system generally.

Reform of civil litigation costs and access to justice

It is outside our remit to explore the impact of the Government's separate proposals on civil litigation costs reform in detail. Nonetheless we are sufficiently concerned about them to ask the Government to reconsider the implementation of the Jackson Report in respect of defamation actions, with a view to protecting further the interests of those without substantial financial means. (Paragraph 89)

72. The Committee is concerned about implementation of the Jackson reforms relating to 'no win no fee' conditional fee agreements (CFAs), namely abolishing the recoverability from the losing side of CFA success fees and after the event (ATE) insurance premiums if the case is won. The Committee is concerned about the impact of these changes on access to justice for ordinary citizens because the Government does not intend to apply some of Lord Justice Jackson's proposals in defamation related proceedings. This includes a cap on the success fee which the lawyer working under a CFA may take from the claimant's damages, and the mechanism of 'qualified one way costs shifting' (QOCS).

73. The Government intends to restrict both the cap and QOCS to personal injury cases. Personal injury cases as a class are different from other types of litigation. They are typically run on CFAs with ATE insurance, and involve claims by individuals against generally well-resourced bodies. They can also involve large amount of damages, including damages for future care and losses. The Government believes that personal injury claimants require the special protection afforded by the cap on the success fees and QOCS.

74. The current CFA regime with recoverable success fees and ATE insurance has led to high costs across all areas of civil litigation, but there have been particular concerns in defamation and privacy cases. These high and disproportionate costs hinder access to justice and can lead to a 'chilling effect' on journalism, and academic and scientific debate. The European Court of Human Rights judgment in January 2011 in *MGN v the UK* (the Naomi Campbell privacy case) found the existing CFA arrangements on recoverability in that particular case to be contrary to Article 10 (freedom of expression) of the Convention. Changes to the existing CFA regime are therefore necessary.

75. The Government is aware of concerns around access to justice and the ability of those with modest means to pursue claims against often powerful media organisations. However, we do not believe that it is necessary to make any special provision in relation to the costs of privacy or defamation proceedings. As the Committee recognises, these claimants will benefit from a 10% increase in the general damages. The Government will continue to monitor the position following the implementation of the CFA reforms and the other reforms to the law and procedure for defamation claims which are being taken forward.

Conclusions on procedural reform

We recommend that the Ministry of Justice prepares a document setting out in detail the nature of the rule changes required to ensure that the Civil Procedure Rule Committee will implement the procedural changes we recommend in this section of our Report. This document should be published at the same time as the Bill. (Paragraph 91)

76. We believe that it would be premature to attempt to produce detailed rule amendments in advance of the passage of the Bill, as there may be issues and amendments that arise that affect what rule changes may be appropriate. As noted above, we are fully committed to introducing a new procedure for early resolution of key preliminary issues and to taking steps to provide stronger encouragement for mediation and other forms of alternative dispute resolution in defamation cases. We will consider further what rule changes and other procedural amendments are needed to achieve this in the light of the passage of the Bill and other developments so that detailed provisions can be prepared for the Civil Procedure Rule Committee to consider at an appropriate stage.

Publication on the Internet

Social networking, online hosts and service providers

We recommend that the Government takes action by:

> **Ensuring that people who are defamed online, whether or not they know the identity of the author, have a quick and inexpensive way to protect their reputation, in line with our core principles of reducing costs and improving accessibility;**

Reducing the pressure on hosts and service providers to take down material whenever it is challenged as being defamatory, in line with our core principle of protecting freedom of speech; and

Encouraging site owners to moderate content that is written by its users, in line with our core principle that freedom of speech should be exercised with due regard to the protection of reputation. (Paragraph 100)

77. The issue of responsibility for publication on the internet is a very complex and difficult area, and we are grateful to the Committee for the detailed consideration that it has given to it. We recognise and share its core aims of striking a balance which provides an effective means for people to protect their reputation where this is defamed on the internet, while ensuring that internet intermediaries are not unjustifiably required to remove material or deterred from properly monitoring content because of the fear that this will leave them potentially liable.

Contributions published on the internet can be divided into those that are identifiable, in terms of authorship, and those that are unidentified, as described above. In respect of identified contributions, we recommend the introduction of a regime based upon the following key provisions:

Where a complaint is received about allegedly defamatory material that is written by an identifiable author, the host or service provider must publish promptly a notice of complaint alongside that material. If the host or provider does not do so, it can only rely on the standard defences available to a primary publisher, if sued for defamation. The notice reduces the sting of the alleged libel but protects free speech by not requiring the host or service provider to remove what has been said; and

If the complainant wishes, the complainant may apply to a court for a take-down order. The host or service provider should inform the author about the application and both sides should be able to submit brief paper-based submissions. A judge will then read the submissions and make a decision promptly. Any order for take-down must then be implemented by the host or service provider immediately, or they risk facing a defamation claim as the publisher of the relevant statement. The timescale would be short and the costs for the complainant would be modest. (Paragraph 104)

We recommend that any 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. (Paragraph 105)

The Government needs to frame a coherent response to the challenge of enforcing the law in an online environment where it is likely to remain possible to publish unidentified postings without leaving a trace. As part of doing so, the Ministry of Justice should publish easily accessible guidance dealing with complaints about online material. We recommend that the Government takes the necessary steps to implement the approach we outline. (Paragraph 107)

78. The Committee proposes a two-track system depending on whether the author of the material is identifiable or not. We have discussed its proposals with internet organisations. In the light of that discussion, we are concerned that there are significant practical and technical difficulties with the proposal that, where the author can be identified, a notice of complaint should be published alongside the allegedly defamatory material. For example, the content complained about may be embedded within a number of different sites, making it unclear who should be responsible for attaching the notice and where exactly it should be placed. There could also be difficulties arising from the fact that audio-visual material cannot be edited easily, and imposing a caption over the material would be unnecessarily intrusive. In addition, it would be very difficult to ensure that the notice was transferred across to any subsequent site on which the material might appear, particularly since the notice could potentially need to remain posted in perpetuity if the complainant chose to take no further action.

79. While recognising that there may be legitimate reasons for a person posting material anonymously, we share the Committee's concern that anonymity should not be used as a cloak for making abusive or untrue statements without fear of any comeback. However, similar practical concerns arise in relation to its proposal that, in relation to material where the author cannot be identified, the online intermediary should be able to apply for a "leave-up" order where it believes that there are significant reasons of public interest for publishing the material. In many cases it is difficult to see how the intermediary will be in any better position to determine whether there are public interest reasons such as whistleblowing to justify the material than they currently are to know whether it is defamatory or not.

80. These practical difficulties mean that, while we agree in principle with the aims underlying the Committee's recommendations, we do not consider that they would be workable in practice.

81. Our consultation paper put forward a number of other options for approaching the issue, and these were the subject of a range of differing views. There was some support for an approach which involved legislation to simplify and clarify, but not change, the existing law in this area along the lines of Clause 9 of Lord Lester's Private Member's Bill. However, on balance we accept that the current position in the law is not satisfactory, and that a greater degree of protection against liability for intermediaries is appropriate.

82. In that context, two main options raised on consultation attracted support in the responses. The first would require the claimant to obtain a court order for removal of allegedly defamatory material before any obligation or liability could be placed on the online intermediary. We are concerned that this approach would be likely to have significant resource implications for the courts. It has proved difficult to obtain information on the likely number of cases, but indications are that complaints are received by intermediaries on a regular basis. There would be a degree of urgency attached to such applications to avoid the possibility of material remaining posted online for too long a period.

83. In addition there would be questions around the extent of the evidence the court would require in order to reach a decision on whether material should be taken down. Some responses to consultation suggested that the court should determine issues such as whether there is substantial (or serious) harm and what defences may be available alongside a decision on takedown. There would clearly be difficulties in such a "mini-trial" approach. However, the court will inevitably need a certain amount of evidence to satisfy it that takedown is or is not appropriate. The Committee suggests that a paper-based approach would be appropriate, but it is difficult to see this being adequate in many cases.

84. This would clearly raise issues of cost, both for the courts and for the parties. There is also the risk that bringing cases within the aegis of the court for the purposes of a decision on takedown could have the effect of encouraging claimants (where takedown is ordered) to pursue the litigation further against the author of the material for other remedies such as damages, whereas now they are generally satisfied with simply getting the material removed without going near the court. While this would not affect online intermediaries, it could add significantly to overall levels of litigation and reduce any perceived benefits for freedom of speech. On balance therefore we do not consider that this approach would be appropriate.

85. The other option would involve the online intermediary acting as a liaison point between the person complaining about a defamatory posting and the person who had posted the material, where the identity and contact details of the latter are not known to the complainant. Upon receipt of a notice of complaint, the intermediary would have to contact the author of the material (or if this did not prove possible, take the posting down). If after an initial exchange of correspondence the issue remained in dispute, the intermediary would be required to provide details of the author to the complainant, who would then have to initiate legal proceedings against him or her to secure removal of the material (if the matter could not be resolved by other means), and could not pursue an action against the intermediary.

86. An approach of this kind received support from the majority of those who favoured greater protection being extended to online intermediaries. It would have the benefit of resolving some cases without the need for court proceedings where the author of the material did not choose to dispute its being taken down or where it did not prove possible for the intermediary to contact the author. In other cases, the involvement of the court would be

87. A number of issues would remain to be resolved with such a system. For example, to ensure that inappropriate material did not remain posted for an extended period, the length of time needed for the initial liaison to take place would need to be strictly time limited. There would also be a need for any cases that required a court order to be expedited. In addition, there would be a need to ensure that appropriate safeguards were in place relating to the releasing of details of the author of the material to the complainant, taking into account concerns such as those expressed by the Committee in relation to whistleblowers.

88. On balance we consider that this option may provide the most practical and effective way of offering greater protection to online intermediaries and aiding free speech, while enabling claimants to protect their reputation by securing removal of defamatory material without undue delay. We will discuss this option further with interested parties and aim to develop the detail of this approach and resolve outstanding issues. Subject to these discussions and a full assessment of the impact on affected groups we will prepare provisions giving effect to this option for inclusion in the substantive Bill. If we proceed with this approach, we will also ensure that appropriate guidance on the new system is published as recommended by the Committee prior to its being implemented.

Innocent dissemination

We recommend that the Government amends the "innocent dissemination" defence in order to provide secondary publishers, such as booksellers, with the same level of protection that existed before section 1 of the Defamation Act 1996 was introduced. (Paragraph 60)

89. We share the Committee's concern that the position of offline intermediaries such as booksellers should be adequately protected. Alongside the development of a new system relating to online publication we will consider how offline intermediaries can best be protected and will ensure that any provisions which are included in the Bill take their concerns properly into account.

Corporations

It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss. However, we do not believe that corporations should lose the right to sue for defamation altogether.[...] We favour the approach which limits libel claims to situations where the corporation can prove the likelihood of "substantial financial loss". (Paragraph 114)

Our proposal to introduce a test of "substantial financial loss" applies only to corporations or other non-natural legal persons that are trading for profit; it does not extend to charities or non-governmental organisations. [...] Trade associations that represent for-profit organisations should be covered by the new requirements that we propose. (Paragraph 118)

90. We share the Committee's view that the inequality of financial means that exists where a large corporation sues or threatens smaller companies, individuals or non-governmental organisations lies at the heart of current concerns. We also agree that an absolute bar on corporations suing for defamation would not be appropriate and could raise issues of compatibility with the European Convention on Human Rights.

91. As indicated in our consultation paper, we believe that measures such as the new procedure for determining key preliminary issues and the introduction of a serious harm test will help to reduce the cost and length of proceedings and deter trivial and speculative litigation, and should lessen the likelihood of attempts being made by corporate or wealthy individual claimants to intimidate defendants with limited resources. In this context, in view of the fact that corporations are already prevented from claiming for certain types of harm such as injury to feelings, in order to satisfy the serious harm test in Clause 1 a corporation would in practice be likely to have to demonstrate actual or likely financial loss in any event. On that basis, we believe that the thrust of the Committee's recommendation will be met by the Bill without the need for a separate provision specifically relating to corporations.

Corporations should be required to obtain the permission of the court before bringing a libel claim. (Paragraph 116)

The Ministry of Justice and the courts must be determined and creative in preventing corporations from using the high cost of libel claims to force publishers into submission. The requirement for a corporation to obtain prior permission before bringing a libel claim provides the perfect opportunity to control the corporation's recoverable legal costs before they get out of hand, whether through cost capping or otherwise. Judges must redouble efforts to make the most of their case management powers by reducing the inequality of wealth that can exist between corporations and publishers. (Paragraph 117)

92. As noted above, the Government already proposes to introduce a new procedure for the early resolution of key preliminary issues in all cases, including those involving corporations. As part of that procedure, the court will be able to deal with the key issues in dispute and make detailed provisions in relation to cost control and the future management of the case in the light of the issues which remain to be resolved. A permission stage for corporate claims in addition to this new procedure would add to the costs involved, and it is difficult to see what additional benefits it would have. We do not therefore believe that an additional permission stage would be appropriate.

Other issues raised in Committee report

Parliamentary Privilege

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 (Paragraph 51).

We recommend that the Government adds a provision in the Bill protecting all forms of communication between constituents and their MP (acting in his or her official capacity as an MP) by qualified privilege (Paragraph 52).

93. These recommendations raise issues of considerable importance which have broader implications beyond the law of defamation. In a Written Ministerial Statement on 19 December 2011, the Deputy Leader of the House of Commons set out the next steps in the Government's preparation of a draft Bill on Parliamentary privilege. As the Deputy Leader indicated, the Government will publish a draft Bill together with a Green Paper before the end of this session. The Green Paper will consult on the desirability of certain changes that could be made to the operation of Parliamentary privilege, including whether there should be changes to the law on reporting of Parliamentary proceedings in the media.

94. In the light of the broader implications of the issues raised by the Committee the Government believes 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 rather than in isolation through the Defamation Bill. However, as the recent Written Ministerial Statement made clear, the views expressed by the Committee will of course be taken into account by the Government in developing its views.

Other issues arising from the Government's consultation where the Committee does not make specific recommendations

Should the summary disposal procedure under s8/9 of the 1996 Act be retained, and if so, should any changes be made to it? If so, could any amendments be made to make the procedure more useful in practice?

95. In view of the fact that the summary disposal procedure under the 1996 Act is little used in practice, the consultation paper sought views on whether it was worth retaining. Responses were evenly divided on this. In view of the fact that many people consider that the procedure does serve a useful purpose, and in the absence of any clear consensus, we consider that it should be retained.

96. The consultation paper also sought views on the need for changes to the current provisions. While the majority of responses did not seek changes, those that did support change focused primarily on the level of damages available under the summary disposal procedure (currently set at a maximum of £10,000). On balance we consider that there would be merit in increasing the level of damages available to encourage use of the procedure as an alternative to full proceedings, and that an increase to £20,000 would be appropriate. This change can be made through the order-making power given to the Lord Chancellor in section 9 of the 1996 Act without the need for primary legislation, and will be taken forward in due course.

The ability of public authorities and bodies exercising public functions to bring a defamation action

97. The consultation paper sought views 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, and whether the principle should be extended to cover other public bodies exercising public functions. A majority of responses supported codification of the *Derbyshire* principle, but rejected its extension more widely. As indicated in the consultation paper, there would be practical difficulties with extending the *Derbyshire* principle more widely through statute, and this could create uncertainty and represent a significant restriction on the right of a wide range of organisations to defend their reputation. In view also of the lack of support for this on consultation we do not consider that such a change is appropriate.

98. There remains the option of legislating to codify the *Derbyshire* principle in a way which reflects the current law. However, little 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 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.

Repeal of Slander of Women Act 1891

99. In the case of slander, the presumption of damage does not apply, and some special damage must be proved to flow from the statement complained of unless the publication falls into certain specific categories. 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.

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