Ministry of JUSTICE

Draft Defamation Bill
Consultation

Consultation Paper CP3/11

March 2011

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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Ministerial Foreword

By The Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and Lord McNally, Minister of State

The right to freedom of speech is a cornerstone of our constitution. It is essential to the health of our democracy that people should be free to debate issues and challenge authority – in all spheres of life, whether political, scientific, academic or any other. But freedom of speech does not mean that people should be able to ride roughshod over the reputations of others, and our defamation laws must therefore strike the right balance – between protection of freedom of speech on the one hand and protection of reputation on the other.

There has been mounting concern over the past few years that our defamation laws are not striking the right balance, but rather are having a chilling effect on freedom of speech. This is particularly important for the Coalition Government which is committed to empowering the citizen so that those in authority are held properly to account. But, as reflected in the manifestos of all three parties prior to the General Election, the consensus for reform goes much wider than this.

We are pleased to be able to publish the Government's proposals for reform of the law on defamation for public consultation and pre-legislative scrutiny. Our core aim in preparing these provisions has been to ensure that the balance referred to above is achieved, 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 unjustifiably impeded by actual or threatened libel proceedings.

We are particularly concerned to ensure that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by non-governmental organisations. We also wish to reduce the potential for trivial or unfounded 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.

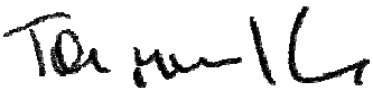
The draft Bill does not directly deal with issues relating to costs in defamation proceedings. However, a fundamental concern underlying these reforms is to simplify and clarify the law and procedures to help reduce the length of proceedings and the substantial costs that can arise. The proposals that the Government intends to take forward subject to the results of our recent consultation on Lord Justice Jackson's proposals for reform of civil litigation funding and costs including conditional fee agreements will have a significant

impact on reducing costs in civil proceedings generally, and proposals which will shortly be put forward in relation to civil justice reform will encourage and promote alternative dispute resolution and settlement. In addition, this paper consults on proposals for a new procedure to resolve key issues in defamation proceedings at an early stage to encourage settlement and prevent protracted and costly litigation, and the draft Bill proposes the removal of the presumption in favour of jury trial in defamation cases, which currently acts as an impediment to the early resolution of issues, so that the courts will have a discretion to provide for jury trials where this is in the interests of justice.

The law on defamation has evolved over a considerable period of time and is still largely a matter of common law. Because of this, there are inevitably risks in trying to encapsulate key elements of the law in statute in an area where extensive case law already exists. In formulating the proposals in the draft Bill we have been very conscious of the need to articulate key provisions in a way which is as simple and easy to understand and apply as possible, in order to avoid generating further uncertainty and litigation. We would very much welcome views on whether the draft Bill achieves this and manages to strike the right balance between the competing interests involved.

In publishing the draft Bill we would in particular like to record our appreciation of the contribution made by Lord Lester of Herne Hill to the debate on these important issues, both through his own Private Member's Bill on the subject and through the valuable assistance that he and his expert team (Sir Brian Neill and Heather Rogers QC) have given to our considerations. We believe that the detailed attention which the draft Bill and other consultation proposals will receive through the public consultation and pre-legislative scrutiny process represents an effective approach which will enable us to achieve fully considered legislative proposals which focus on core issues of concern where legislation can make a real difference. We look forward to a healthy debate, and encourage all those with an interest to take part.

Kenneth Clarke
Lord Chancellor and
Secretary of State for Justice



Lord McNally
Minister of State

Executive summary

The Coalition Agreement indicates that measures to reverse the erosion of civil liberties and roll back state intrusion will include "The review of libel laws to protect freedom of speech". A range of concerns have been raised about the detrimental effects that the current law on libel is having on freedom of expression, particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism, and the extent to which this jurisdiction has become a magnet for libel claimants.

Three main reports have been published over the past 18 months in the context of debate on these issues: a report by English PEN and Index on Censorship, "Free Speech is Not for Sale", was published in November 2009; a Libel Working Group set up by the Ministry of Justice which included media and claimant lawyers, academics, representatives from those campaigning for libel reform, and the scientific community published its report on 23 March 2010; and the Culture Media and Sport Select Committee published the report of its enquiry on press standards, privacy and libel on 24 February 2010. Subsequently Lord Lester introduced a Private Member's Bill in the new Parliament, and this received Second Reading on 9 July 2010.

The Government has taken the recommendations in all these reports and the contents of Lord Lester's Bill into account in formulating the provisions in the draft Bill and this consultation paper. We have also carried out informal consultation with a range of interested parties including non-governmental organisations; the media and publishing industry; the legal profession; internet-based organisations; and representatives of the scientific community.

This consultation paper is divided into two main parts: consultation on proposals which have been included in the draft Bill at Annex A, and consultation on other issues which have not at this stage been included in the draft Bill.

Issues included in the draft Bill are as follows:

- A new requirement that a statement must have caused 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

Issues for consultation which have not been included in the draft Bill at this stage are:

- 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 draft Bill relates to the law in England and Wales only.

Introduction

This paper sets out for consultation a draft Defamation Bill containing proposals for legislation, together with a number of other issues on which views are sought for possible inclusion in the Bill. The consultation is aimed at a wide range of people and organisations with an interest in the law on defamation, including individuals involved in defamation proceedings, non-governmental organisations, the legal profession, the media and publishing industry, the scientific and academic community, and internet-based organisations in England and Wales.

This consultation is conducted in line with the Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 125, have been followed.

An Impact Assessment indicates that potential claimants in defamation proceedings; potential defendants in defamation proceedings; and members of the legal profession working in the area are likely to be particularly affected. The proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, insofar as they are involved in defamation proceedings. An Impact Assessment is at Annex E.

Comments on the Impact Assessment and the Equality Impact Assessment attached at Annex F are very welcome.

Copies of this consultation paper are being sent to a wide range of interested parties, and in addition responses are welcomed from anyone with an interest in or views on the subject covered by the paper.

The proposals

Issues in the Draft Bill

Clause 1: a requirement to show substantial harm

1. Libel is currently actionable without proof of actual damage. This means that if a statement can be shown to be defamatory (broadly that it tends to lower the reputation of the claimant in the estimation of right-thinking members of society), it is presumed that the claimant has suffered damage as a result of the publication, and he or she does not need to prove that this is the case. In the case of slander, unless the slander falls within certain specified categories, some special damage must be proved to flow from it.

2. The courts have considered in a series of cases over the last century the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd*[1] in which an earlier House of Lords decision in *Sim v Stretch*[2] was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co*[3] it was established that there needs to be a real and substantial wrong.

3. A number of concerns were raised in our discussions with interested parties about the need for a statutory provision, including the view that the law is already clear in the light of the judgment in *Thornton*; that the common law provides greater flexibility; and that the introduction of a statutory test would frontload costs by creating a need for evidence to be gathered and an additional preliminary hearing to be held to determine whether the harm caused is sufficient to establish a claim. However, from the other perspective there was a widespread view that legislation would provide extra certainty and help to discourage trivial claims. It was recognised that this could lead to some frontloading of costs. However, the view was taken that it would be better to resolve the issue at an early stage so that only meritorious cases would proceed rather than potentially allow costs to accumulate over an extended period before an unmeritorious action could be struck out as an abuse of process.

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[1] [2010] EWHC 1414 (QB)
[2] [1936] 2 All ER 1237
[3] [2005] EWCA Civ 75

4. On balance, we consider that there is merit in legislating to remove the scope for trivial and unfounded actions succeeding. Clause 1 of the draft Bill therefore provides that a statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant. We recognise that the introduction of a substantial harm test may impact to some extent on the presumption of damage. However, we believe that the importance of ensuring that trivial and unfounded actions do not proceed make the introduction of this test desirable, and that it will reflect and strengthen the current law. We would welcome views on whether the test of "substantial harm" would meet that aim.

5. In the event that the substantial harm requirement 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 exercise its existing discretion to strike out or give a summary judgment, rather than by imposing a mandatory requirement for the court to strike out in these circumstances. We intend to raise the need for appropriate amendments to the Civil Procedure Rules and Practice Directions with the Civil Procedure Rule Committee in due course in the light of responses to this consultation.

6. As noted above, 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. One such category relates to the Slander of Women Act 1891, section 1 of which provides that "words spoken and published …which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable." There is also a special common law category where the imputation is that a person is suffering from venereal disease, leprosy or the plague. We believe that these provisions are outdated in the modern context and, in the case of the Slander of Women Act, potentially discriminatory. We propose to include them among the laws for repeal in the proposed Repeals Bill[4].

Q1. Do you agree with the inclusion of a substantial harm test in the Bill?

Q2. Do you have any views on the substance of the clause?

[4] http://www.number10.gov.uk/wp-content/uploads/MOJ-FINAL-Business-Plan.pdf

Q3. Do you agree that the Slander of Women Act 1891 and the common law rule referred to in paragraph 6 should be included among the measures for repeal in the Repeals Bill?

Clause 2: responsible publication on matter of public interest

7. Clause 2 of the draft Bill introduces a new defence of responsible publication on a matter of public interest. This provides a defence where the defendant can show that the statement complained of is, or forms part of, a statement on a matter of public interest, and that he or she acted responsibly in publishing the statement.

8. A common law defence has been developed by the courts in this area in recent years, initially in the case of *Reynolds v Times Newspapers*[5]. However, concerns have been expressed by NGOs, the scientific community and others that there is a lack of certainty over how the *Reynolds* defence applies outside the context of mainstream journalism, and that this creates a chilling effect on freedom of expression and reporting. They have indicated that the current common law provisions in *Reynolds* are difficult to rely on, and that this has led to a situation where legal advice given to them on running the defence is extremely cautious and discouraging, and so the defence is seldom used. They believe that a statutory defence would help small organisations to be more robust in reaching decisions in favour of publication.

9. The media and publishers also expressed concerns about the way in which *Reynolds* operates in practice, and have found the defence very complicated and expensive to run. From an opposing perspective, some lawyers working in the field expressed the view that the courts have already made clear that the *Reynolds* defence applies more widely than just to mainstream journalism[6], and that there is a risk that any statutory provision would complicate the law rather than clarify it.

10. There are clearly limits on the extent to which any statutory provisions could provide clarity and certainty in what is a complex area of the law, and inevitably any provisions would be subject to interpretation and development by the courts in individual cases. There is also a need to ensure that the right balance is struck between statute and the common law so that problems are not created as a result of legislating in areas where the common law is well established and the subject of extensive case law. This point is discussed further in the sections on the defences

[5] [1999] 4 All ER 609 and further developed in *Jameel v Wall Street Journal* [2006] UKHL 44

[6] In *Seaga v Harper* [2008] UKPC 9, the Privy Council made clear that the *Reynolds* defence applies to all forms of public speech and is not confined to the media.

of truth and honest opinion below. However, the development of a common law defence relating to responsible publications on matters of public interest is quite recent so case law directly on the issue is relatively limited.

11. On balance, we consider that there is merit in providing a statutory defence which is clearer and more readily applicable outside the context of mainstream journalism, and that this would be helpful in ensuring that publications on matters of public interest are sufficiently protected so that responsible journalism can flourish and investigative journalism and the work of NGOs are not unjustifiably impeded by the threat of defamation proceedings.

12. As noted above, to make use of the new defence the defendant must be able to show that the statement complained of is, or forms part of, a statement on a matter of public interest, and that he or she acted responsibly in publishing the statement. This wording has been used to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest. This reflects the need for the statement to make a contribution to the public interest element of the publication.[7]

13. The draft Bill does not attempt to define what is meant by "the public interest". We believe that this is a concept which is well-established in the English common law and that in view of the very wide range of matters which are of public interest and the sensitivity of this to factual circumstances, attempting to define it in statute would be fraught with problems. Such problems include the risk of missing matters which are of public interest resulting in too narrow a defence and the risk of this proving a magnet for satellite litigation adding to costs in relation to libel proceedings.

14. In relation to the second limb, the clause makes clear that, when deciding whether a defendant acted responsibly in publishing a statement, the matters to which the court may have regard include a number of specific circumstances. These are broadly based on the factors established by the House of Lords in *Reynolds* and subsequent case law. However, in the light of concerns that these should not be interpreted as a checklist or set of hurdles for defendants to overcome, the draft Bill adopts the approach of setting out these specific

[7] See Lord Hoffman in *Jameel* at [48] onwards.

circumstances in an illustrative and non-exhaustive way for the courts to consider as appropriate within the overall circumstances of each case. Reference has been included to "the nature of the publication and its context" to reflect the flexible way in which the clause is to be applied and the need to bear in mind the circumstances in which the publisher was operating (e.g. the context of a national newspaper is likely to be different from the context of a non-governmental organisation or scientific journal). A broad definition of the terms "publish", "publication" and "statement" is also used with this approach in mind. It has been suggested that the nature of the publication and its context is more important than the other factors and that it should be given greater weight. We would welcome views on this point.

15. It has been suggested that the list of specific circumstances should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines, and that this would help to ensure that the new defence is relevant to a wide range of different circumstances. It has also been argued that this might help to support self-regulation by the Press. A provision of this nature was included in the Private Member's Bill introduced by Lord Lester. We recognise the desirability of ensuring that the new defence is widely available. However, in our view the inclusion of such a provision would create a risk of satellite litigation over the meaning of the codes and the extent to which they had been complied with, which could be both costly and time-consuming and make consideration of the defence more complicated. This may also cause confusion as the existing voluntary codes of practice do not extend to all areas of the media or more widely to other bodies. On balance we are minded that it would not be helpful to include a provision on this issue in the draft Bill. However, we would welcome views on this point.

16. It is intended that the defence will be available regardless of whether the statement complained of is a statement of fact, an inference or an opinion. A specific provision is not considered necessary to achieve this because there is nothing in the clause which suggests that the defence is not relevant to these things (indeed, the reference to a range of matters in subsection (2)(h), including "opinions" indicates the potential breadth of the provision). The reason we think a broad application to statements of fact, inferences and opinions is sensible is because this will avoid it being argued on a technicality that part of a publication falls outside the defence simply because it is not factual in nature, and because it is sometimes difficult to draw a distinction between fact and opinion. However, we would welcome views on the approach taken.

17. The fact that the clause extends to opinions means that there will be a degree of overlap between this defence and the new honest opinion defence discussed below, so that both defences will potentially be

available in some circumstances. We would welcome views on how the two defences would interact, any difficulties this may cause and any advantages.

18. It has also been suggested that it would be helpful to clarify the law in relation to the reportage doctrine (described by the courts as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[8]). In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication. This is a developing area of the law and we believe that it is important to ensure that any provision is sufficiently flexible so that it focuses on the key elements which have been established in case law without unduly restricting the further development of the law in this area in future. The core elements on which the provision in subsection (3) of the clause focuses are the existence of a dispute between the claimant and another person and a requirement for the statement to have been published by the defendant as part of an accurate and impartial account of the dispute.

Q4. Do you agree with the inclusion of a new public interest defence in the Bill? Do you consider that this is an improvement on the existing common law defence?

Q5. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that it would not be appropriate to attempt to define "public interest"? If not, what definition would you suggest?

b) Do you consider that the non-exhaustive list of circumstances included in subsection (2) of the clause should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines?

c) Do you consider that the nature of the publication and its context should be given greater weight than the other circumstances in the list?

d) do you agree that the defence should apply to inferences and opinions as well as statements of fact, but that specific reference to this is not required? If so, are any difficulties likely to arise as a result of the overlap between this defence and the new honest opinion defence?

[8] Per Simon Brown in *Al-Fagih* [2001] All ER (D) 48

e) do you agree with the approach taken on the issue of "reportage"?

Clause 3: a statutory defence of truth

19. Under the current law, a defendant has a defence of "justification" where he or she can prove that the imputation in respect of which he is being sued is substantially true. Apart from a provision in section 5 of the Defamation Act 1952 relating to one particular aspect of the defence, it is wholly a matter of common law.

20. In our discussions with interested parties there was support from many organisations for key elements of the defence to be put on a statutory basis, although others questioned the need for statutory provisions. Those in favour also considered that it would be helpful for the defence to be renamed as the defence of "truth" (as had been proposed in 1975 in the Faulks Report[9]).

21. On balance we consider that legislation to rename the defence and clarify key aspects where problems have arisen would be helpful, and provisions have been included in clause 3 of the draft Bill. However, as noted above in relation to a public interest defence, it is important to ensure that the right balance is struck between statute and the common law. This is particularly relevant in relation to this defence and that of honest opinion as the defences of justification and fair comment have been long established and extensive case law exists on a wide range of different aspects of the defences.

22. Clause 3 adopts the approach of abolishing the common law defence of justification and provides a clear statutory test in relation to key issues where problems have arisen with the current law.

23. We have considered carefully the implications of abolishing the existing common law defence. Unless the existing defence is formally abolished, it would continue to exist, and defendants would potentially be able to use this as a separate defence either instead of or in parallel with the new statutory defence. This would be contrary to our aim of simplifying and clarifying the law, and there would be a risk of uncertainty and confusion in practice and more lengthy court cases.

24. The effect of the approach taken in the draft Bill is that where a defendant wishes to rely on the new statutory defence the court would be required to apply the words used in the statute, not the current case

[9] The Report of the Committee on Defamation, chaired by Mr Justice Faulks, Cmnd.5909 (1975)

law. In cases where uncertainty arises the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied. Given the complexity of the law in this area, it is not feasible for the new statutory defence to overcome this difficulty by attempting to capture all the nuances of the existing case law. In addition, on balance we do not consider that it would be appropriate for the draft Bill to refer specifically to preserving previous case law (for example by requiring the courts to take it into account where relevant), as this could run the risk of creating further confusion, and the courts will in practice do this anyway. We would, however, welcome views on the approach we have taken.

25. The clause provides that the new statutory defence applies if the defendant can show that the imputation conveyed by the statement complained of is substantially true. This reflects the current law as established in the case of *Chase v News Group Newspapers Ltd*[10], where the Court of Appeal indicated that "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".

26. In any case where the defence of truth is raised, there will be two issues: i) what imputation (or imputations) are actually conveyed by the statement; and ii) whether the imputation (or imputations) conveyed are substantially true. The defence will apply where the imputation is one of fact.

27. There is a long-standing common law rule that it is no defence to an action for defamation for the defendant to prove that he or she was only repeating what someone else had said (known as the "repetition rule"). Subsection (1) of the clause focuses on the *imputation conveyed by the statement* in order to incorporate this rule. For example, if the defendant published a statement which said "X told me that C murdered Y", the imputation is that C murdered Y. In order to establish the defence, the defendant would need to prove the fact that C murdered Y and not merely that X said that C had done so.

28. The *Chase* judgment established three different levels of gravity of a defamatory imputation: level 1, an allegation of guilt; level 2, an allegation of a reasonable suspicion of guilt; and level 3, an allegation that there are grounds for investigating whether the claimant is responsible for the act. Each level has a different standard of proof which will apply where a defendant is seeking to prove the truth of a

[10] [2002] EWCA Civ 1772 at para 34

statement. There has been some uncertainty in the case law as to whether the repetition rule either does not apply at all or needs to be less stringently applied in Chase level 3 cases. The approach taken in the draft clause would mean that where a defendant published a statement that there are grounds for investigating whether the claimant is responsible for a particular act the court would first have to determine the precise imputation conveyed by that statement, having regard to the publication as a whole. The court would then have to decide whether the defendant had shown the substantial truth of that imputation. We would welcome views on whether this is the right approach.

29. The clause also repeals and replaces section 5 of the Defamation Act 1952 (the only significant element of the law in this area which is currently in statute) so that all statutory provisions directly concerning the new defence can be found in one place. The new provisions are in subsections (2) and (3) of clause 3 and mean that where the statement complained of contains two or more distinct imputations, the defence does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not materially injure the claimant's reputation. An example of a case where section 5 of the 1952 Act was applied so that the defence of justification succeeded is *Henry v BBC*[11]. In that case falsification of waiting list figures and complicity in waiting list fraud was proved but bullying was not proved. Falsification of waiting list figures and bullying are two distinct imputations. The provisions in subsections (2) and (3) are intended to have the same effect as those in the 1952 Act, but are expressed in more modern terminology to improve their clarity.

30. Concerns have also been raised about a perceived gap in the provisions in section 5 of the 1952 Act which has been identified as causing difficulties in practice. This relates to the fact that section 5 does not apply in situations where there is a single defamatory imputation which may have different shades of meaning. This issue arises where the parties each put forward a different view of the meaning of the imputation. An example would be where the claimant maintains that the meaning of the imputation is that he has lied, but the defendant maintains that the meaning is just that the claimant has been reckless. If the ruling on meaning upholds the claimant's view, but the defendant can prove that the claimant has been reckless, the question arises as to which party should succeed.

[11] [2006] All ER (D) 124 (Mar)

31. The view has been expressed that it is not right that the claimant should win in such circumstances, if the difference between what the defendant has proved and has not proved is so small as to have no real significance in terms of damage to the claimant's reputation. It has been suggested to address this that the new defence of truth should apply where there is a single imputation and, having regard to what can be proved by the defendant, there is no material injury to the claimant's reputation. For example, Lord Lester's Bill included a provision that the defence of truth would not fail only because a particular meaning alleged by the claimant is not shown as being substantially true, if that meaning would not materially injure the claimant's reputation having regard to the truth of what the defendant has shown to be substantially true.

32. We would welcome views on whether the current law is producing unfair results, and if so whether the requirement in the draft clause to prove substantial truth would address any problem without the need for a specific provision, or if not how it could best be addressed.

Q6. Do you agree that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth?

Q7. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Q8. Do you have any views on the substance of the draft clause?

Q9. Do you consider that the current law is producing unfair results where there is a single defamatory imputation with different shades of meaning? If so, how could this best be addressed?

Clause 4: a statutory defence of honest opinion

33. The defence of fair comment[12] has developed, primarily in the common law, over centuries, and has recently been the subject of consideration by the Supreme Court in the case of *Spiller v Joseph*[13]. The core elements of the defence are:

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

[12] Very recently renamed "honest comment" – see further paragraph 38 below.
[13] [2010] UKSC 53

b) The statement must be recognisable as one of comment and not an imputation of fact (but an inference of fact from other facts referred to may amount to comment).

c) The comment must have a sufficient factual basis (that is, the opinion must be based on facts which are themselves sufficiently true or which are protected by privilege).

d) The comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based.

e) The comment must be one which an honest person could have made on the proved facts (however prejudiced he might be and however exaggerated or obstinate his views).

f) The defence will fail if the claimant can show that the comment was actuated by malice.

34. In our discussions with interested parties there was broad agreement that the law in this area is complex and generates uncertainty, and many considered that it would be helpful for key elements of the defence to be articulated in statute in as clear and simple a way as possible. Particular concerns have arisen in the context of a number of recent cases involving comment on issues of scientific and academic debate (for example *British Chiropractic Association v Singh*[14]). The view of those arguing for reform was that legislation would assist in helping achieve greater clarity and earlier resolution of issues around meaning and the distinction between fact and opinion. Set against this, some concerns were expressed that statutory provisions might add to uncertainty and could lead to disputes becoming more protracted and expensive.

35. On balance we consider that legislation to rename the defence and to simplify and clarify key aspects where difficulties have arisen would be helpful, and provisions have been included in clause 4 of the draft Bill.

36. Similar difficulties arise in relation to this defence as in relation to the new statutory defence of truth (see discussion at paras 22 to 24 above), in that unless the existing common law defence is formally abolished and replaced by a new statutory defence, the common law defence will continue to exist and could potentially create confusion and uncertainty in practice. However, abolition of the common law defence would mean that the extensive body of current case law would no longer be binding.

[14] [2010] EWCA Civ 350

37. Clause 4 adopts a similar approach to that in relation to the new defence of truth. It abolishes the common law defence of fair comment and provides a clear statutory test in relation to key issues where problems have arisen with the current law. We would welcome views on this approach.

38. The clause provides for a new statutory defence of honest opinion. Traditionally, the common law defence was one of fair comment. However, in the Court of Appeal judgment in *British Chiropractic Association v Singh*, the Lord Chief Justice expressed the view that the term "honest opinion" best reflected the nature of the defence. This term also seems to have been preferred by the House of Lords in *Reynolds*.[15] In *Spiller*, Lord Phillips expressed a preference for the phrase "honest comment" and renamed the defence as such. We recognise that the arguments in favour of each name are finely balanced. The draft Bill opts for the phrase "honest opinion" as, on balance, we believe that this accurately conveys the nature of the defence in a way which would be most easily understood by the ordinary reader and it seems to have received most support.[16] However, we would welcome views on which name is preferable.

39. Clause 4 sets out three conditions which need to be met to establish the defence of honest opinion. Firstly, it makes clear that for the defence to apply, the statement complained of must be an expression of opinion and not an assertion of fact (condition 1). Secondly, the opinion must be on a matter of public interest (condition 2). Thirdly, the opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or a privileged statement published before the statement complained of (condition 3).

40. It is intended that **condition 1** should reflect the current law and embrace the requirement established in *Cheng v Tse Wai Chun Paul*[17] that the statement must be recognisable as comment as distinct from an imputation of fact. We would welcome views as to whether this is wide enough and sufficiently clear.

41. **Condition 2** reflects the current law by providing that the matter in respect of which the opinion is expressed must be a matter of public interest. However, in *Spiller* the Supreme Court suggested that there may be a case for widening the scope of the defence by removing this

[15] See Lord Nicholls at 165

[16] See also the New South Wales Defamation Act 2005; the Irish Defamation Act 2009 and the fact that the current s.6 of the Defamation Act 1952 uses the phrase "[an] expression of opinion".

[17] (2000) 10 BHRC 525

requirement. The arguments on this are finely balanced. On the one hand, the view could be taken that people should be free to express an opinion, without risk of liability, on any matter and not only things confined to subjects of public interest. We also understand that the question of whether a matter is of public interest or not is rarely an issue in practice, and that the definition has been substantially broadened in recent years. There is also the potential for confusion in the light of the proposed introduction of a new public interest defence, as the role of the public interest and the consideration involved may be different in the two contexts.

42. Set against this, removal of the public interest requirement would widen the defence so that it would protect expressions of opinion on matters which are private in nature and, while of interest to the public, could not be justified as being of public benefit to be aired (for example a criticism of how a person is bringing up their children). Care would also be needed to ensure Article 8 rights would not be infringed. In addition, the fact that the definition of what is in the public interest has been widely interpreted means that it is not obvious that the current position represents an inappropriate restriction on freedom of speech. On balance, a provision requiring the opinion to be on a matter of public interest has been included in the draft clause, but we would welcome the views of consultees on this point.

43. **Condition 3** aims to simplify the law by providing a clear and straightforward test which maintains the current law but avoids the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the provisions should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue; comments made on a social network; a view on a contractual dispute; or a review of a restaurant or play will differ substantially.

44. The new test focuses on whether an honest person could have held the opinion on the basis of a fact which existed at the time the statement was published or an earlier privileged statement .

45. Condition 3 is intended to do enough to ensure that the requirement that the defendant must prove “a sufficient factual basis” for the comment will be encapsulated. The clause has deliberately focused on “a fact” so that any relevant fact or facts will be enough and it will not be necessary for

the defendant to prove the truth of every single allegation of fact set out in the statement complained of. The existing case law on the sufficiency of the factual basis is covered by the requirement that "an honest person" must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it. It is envisaged that a fact may be expressed in or implied by the statement and that the courts will be able to apply this in a flexible way taking account of the particular context in which the opinion was formed.

46. A situation could arise where a defendant has made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong. In such cases involving an "honest mistake" the law would currently prevent the defendant from relying on the fair comment defence because the comment would have no factual basis. It could be argued that it is unfair for the defendant to be barred from using the defence in these circumstances. However, from the other perspective it could be argued that it would be wrong for a claimant not to have redress where the defendant has made a damaging statement based on false information. Care is needed here in order to ensure that this does not lead to insufficient protection for the Article 8 rights of claimants. We would welcome views on whether any change to the law is needed on this point.

47. Subsection (4)(b) ensures that condition 3 will be satisfied if an honest person could have formed the opinion on the basis of a statement which is protected by privilege and which was published before the statement complained of. It is intended that this will mean that an honest opinion may be formed on the basis of a report or other statement which is protected by absolute or qualified privilege (for example a report of Parliamentary proceedings). It is not intended that statements to which the public interest defence in clause 2 of the Bill applies will be covered by this subsection. We think the arguments for and against including this within the subsection are finely balanced. There are judicial comments which indicate that a fair comment defence may apply to material which is protected by *Reynolds* privilege[18] but this is not well established, and we do not wish to make the relationship between the public interest and honest opinion defences more complex. On balance, we therefore think that it is best not to include this in condition 3. We would however welcome views as to whether this is the right approach.

48. The new test in condition 3 reflects the current law by retaining the objective element that the opinion must be one which an honest person

[18] See for example, Eady J in *Galloway v Telegraph Group Ltd* [2004] EWHC at [176]

could have held. This aspect of the law was identified by Lord Phillips in *Spiller* as one where reform might be appropriate, and that a test of whether the defendant subjectively believed that his or her opinion was justified by the facts on which he or she based it would be preferable. However, we are concerned that a subjective test could add to the complexity of the defence rather than simplify it, as there would be difficult evidential requirements involved in a defendant having to prove his or her subjective belief, and this seems likely to make pleadings more complicated. We would welcome views on this point.

49. Subsection (5) of the clause reflects the current state of the law in relation to malice, and provides that the defence will fail if the claimant can prove that the defendant did not hold the opinion expressed. On the current formulation it is therefore only at this stage that a subjective test comes in.

50. The situation could also arise where the defendant is not the author of the statement (for example where an action is brought against a newspaper in respect of a comment piece rather than against the person who wrote it). In these circumstances subsection (6) of the clause provides that the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

Q10. Do you agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence, and that this should be called a defence of honest opinion?

Q11. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Q12. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that condition 1 adequately reflects the current law that the statement must be recognisable as comment?

b) do you consider that the requirement in condition 2 that the matter in respect of which the opinion is expressed must be a matter of public interest should be retained?

c) do you agree with the approach taken in relation to condition 3 that the opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or an earlier privileged statement?

d) **do you consider that the defendant should be allowed to rely on the honest opinion defence where they have made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong?**

e) **do you agree that the new defence should not apply to statements to which the public interest defence in clause 2 of the Bill applies?**

f) **do you agree that an objective test of whether an honest person could have held the opinion should apply? If not, would a subjective test of whether the defendant believed that his or her opinion was justified be appropriate?**

Clause 5: absolute and qualified privilege

51. The defence of privilege is a long-standing one in defamation law. It is based on the recognition that there are certain situations (privileged occasions) in which it is for the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given by the law to reputation. For all privilege there has to be some foundation in the public interest.

52. The main provisions relating to statutory absolute and qualified privilege in relation to defamation are currently contained in sections 14 and 15 of and Schedule 1 to the Defamation Act 1996. Lord Lester's Private Member's Bill proposed a number of changes to broaden the scope of these provisions, and in our discussions with interested parties there was support for action to be taken to update and reform the law in this area in certain respects. In order to do this in as straightforward a way as possible, the draft Bill adopts the approach of amending the aspects of Schedule 1 where specific change is considered appropriate, and details of the changes made are discussed below. However, more generally Schedule 1 is complex and difficult to interpret, and so in addition to views on the changes proposed in the draft Bill, we would welcome views on whether it would be helpful to take the opportunity offered by the Bill to attempt further rationalisation and clarification of the provisions in the Schedule generally.

Absolute privilege

53. The defence of absolute privilege applies where the nature and circumstances of the publication are such as to justify an absolute defence. The most common instances in which absolute privilege arises are in respect of statements made in the course of court or Parliamentary proceedings. Section 14 of the 1996 Act currently

provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. The privilege applies where the report is published contemporaneously with the proceedings, or, where the report has to be postponed because of an order of the court or any statutory provision, if it is published as soon as practicable after publication is permitted.

54. Lord Lester's Bill proposed that absolute privilege should also be extended to cover fair and accurate reports of proceedings before a number of other international courts and tribunals (namely the International Court of Justice, the Inter-American Court of Human Rights, and the African Court of Human and People's Rights) and to foreign court proceedings generally. In discussions with interested parties, there was broad support for an extension to be made to the existing categories of proceedings. The rationale for privilege reflects the fact that the defendant is only reporting what others may find out themselves by observing public proceedings, and that it is appropriate for issues relating to the administration of justice to be made public. On that basis, we believe that it is reasonable for absolute privilege to be available more widely than at present, and subsection (1) of clause 5 extends the scope of the provisions accordingly.

55. As noted above, absolute privilege only applies to "contemporaneous" reports of court proceedings, and non-contemporaneous reports only receive the protection of qualified privilege under Part I of Schedule 1 to the 1996 Act. It is unclear exactly why this distinction is made, and case law on the interpretation to be given to the term "contemporaneous" is limited. For example, in *Crossley v Newsquest (Midlands South) Ltd*[19] Mr Justice Eady held that absolute privilege should attach not only to a report published on 23 July 2005 of a hearing which had taken place on 20 July, but to earlier hearings that had taken place in the proceedings, at least so far as it was reasonably necessary to give context to what took place on 20 July and to enable readers to understand it.

56. We believe that it would be difficult to provide clarity on the meaning of "contemporaneous" in a way which would not offer scope for significant further litigation, and have not included a definition in the draft Bill. We would, however, welcome views on whether clarification would be

[19] [2008] EWHC 3054 (QB)

desirable in light of any practical difficulties experienced, and alternatively on whether the distinction drawn between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports should be removed (and if so, which form of privilege should apply).

Qualified privilege

57. Historically, qualified privilege at common law has generally been one of two broad types. The first is where the maker of a statement has a legitimate duty or interest in making it and the recipient or recipients of the statement have a legitimate duty or interest in receiving it. While the assessment of whether such a duty or interest arises depends on the facts of the particular case, there are established categories of duty and interest and general principles governing their application. The second situation covers reports to the public at large of matters of legitimate concern to them, provided that the report is fair and accurate. The defence does not protect matter which is not relevant to the occasion in question, and publication must be proportionate to the necessity of the occasion.

58. Section 15 of and Schedule 1 to the Defamation Act 1996 currently provide for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.

59. Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (eg of local authorities) and general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).

60. Clause 5 proposes a number of extensions to the types of publication and situations falling within Part 2 of Schedule 1.

Summaries of material

61. Firstly, in addition to the protection given to copies of and extracts from material within the scope of Part 2 , Lord Lester's Bill extended the defence to summaries of the material. Summaries of material are somewhat different from copies or extracts, as they may involve an element of paraphrasing of the original material. On balance we believe that an extension of this nature is reasonable and would satisfy a legitimate public interest. We considered the risks of a summary being inaccurate or misleading but think that there are sufficient safeguards to prevent this. First, section 15 of the 1996 Act provides scope for explanation or contradiction, and second, privilege will not attach unless the summary is fair and accurate. A number of the amendments in clause 5 make this change in relation to the different types of publication to which qualified privilege is extended.

Scientific and Academic Conferences

62. In response to concerns raised by members of the science community, we consider that it would be appropriate to have a specific provision in Part 2 which would give protection to fair and accurate reports of proceedings at academic and scientific conferences, and that this may be helpful together with other proposals in the draft Bill in allaying concerns about the possible chilling effect of the current laws on scientific and academic debate.

63. It is possible in certain circumstances that Part 2 qualified privilege may already apply to academic and scientific conferences more generally (either where they fall within the description of a public meeting, or where findings or decisions are published by a scientific or academic association). However, we consider that a specific provision would be helpful, and subsection (7) of clause 5 inserts a new paragraph in Schedule 1 to this effect. We have considered whether a definition of "scientific and academic conferences" could be framed in a way which would capture precisely what type of events would and would not be covered by the provision, so that qualified privilege could not be claimed inappropriately. However, a clear and comprehensive definition would be very difficult to achieve, and any definition used could in practice cause more problems than it would solve. It may therefore be preferable for the courts to be able to consider in a flexible way whether the defence should be available in particular circumstances. We would however welcome views on this issue.

The international dimension

64. Currently qualified privilege under Part 1 of Schedule 1 extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. Concerns have been expressed by non-governmental organisations that Part 2 should extend more widely to cover proceedings in other countries. They have indicated that many instances arise in which they are threatened with libel proceedings for quoting from or citing public documents, for example relating to corrupt activity in other countries, and that extending the scope of qualified privilege would be in the public interest and help to protect them from such threats. We believe that a provision of this nature would be helpful. A number of the amendments in clause 5 make this change in relation to the different types of publication to which qualified privilege is extended.

Public companies: reports of proceedings at meetings etc

65. Currently Part 2 qualified privilege extends only to fair and accurate reports of proceedings at general meetings and documents circulated by UK public companies. In our discussions with interested parties, representatives of the regional and national press suggested that this should be extended to public companies elsewhere in the world. An example given on this issue was that criticisms of named British executives made at a general meeting of a Hong Kong registered public company with substantial interests in the UK could not be reported because they fell outside the ambit of Part 2. Some lawyers working in the field identified the need to ensure that adequate standards apply to what can be said in public company statements in other countries to avoid untrue information being published which could be damaging to UK business interests. However, the view was also expressed that in the internet age it is illogical for the rest of the world to be able to know about and comment on a matter while it cannot be safely reported in the UK.

66. On balance we consider that a provision extending qualified privilege to reports relating to public companies elsewhere in the world would be appropriate, and subsection (5) of clause 5 makes this change. It extends the provision to "quoted companies" within the meaning of section 385(2) of the Companies Act 2006 with a view to ensuring that broadly the same types of companies are covered by the provision in the UK and abroad. However, we would welcome views on whether this definition captures all the bodies that would be appropriate or whether it is too narrow.

Press Conferences: reports of proceedings

67. There have also been calls from interested parties in the media for it to be made clear that Part 2 qualified privilege extends to fair and accurate reports of proceedings at press conferences. However, it appears that press conferences already fall within the scope of a "public meeting" under the existing provisions of paragraph 12 of Schedule 1[20]. In the light of this, a specific provision has not been included in the draft Bill. However, we would welcome views on whether such a provision is needed and on any problems that have arisen in relation to the current position.

Archives – copies, reports etc of material held

68. It has also been suggested that qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired. However, there is no generally agreed definition of what constitutes an archive, and this would potentially cover a very wide range of material. It is difficult to see a clear rationale for extending qualified privilege to archives generally, given that it is unclear that it would be in the public interest to offer protection for fair and accurate reports of all forms of archive material. We would welcome views on whether a provision relating to archives is appropriate, and if so, how an archive should be defined for these purposes.

Protection for those responsible for archives?

69. The National Archives (which has responsibility for preserving official documents and allowing public access to those documents) has raised the concern that it is potentially open to a defamation action in relation to previously unpublished material that it makes available to the public, and has suggested that it could perhaps be granted some form of qualified privilege in view of the fact that its publications relate to matters of public interest. However, as the publications are original documents this would not sit readily with the focus of the defence on copies, extracts and summaries of material. We would welcome views on whether this issue affects any other form of archive and has caused any problems in practice, and on whether it would be right to create a new form of qualified privilege in this area.

[20] see *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 HL

Q13. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular:

a) do you agree that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed? If not, what extension (if any) would be appropriate?

b) Would it be helpful to define the term "contemporaneous" in relation to absolute privilege for reports of court proceedings? If so, how should this be defined?

c) Alternatively, should the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports be removed? If so, which form of privilege should apply?

d) Do you agree that Part 2 qualified privilege should be extended to summaries of material? If so, do you have any views on the approach taken?

e) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of scientific and academic conferences? If so, should definitions of these terms be included in the Bill, and how should any definitions be framed?

f) Do you agree that Part 2 qualified privilege should be extended to cover proceedings in other countries? If so, do you have any views on the approach taken?

g) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of proceedings at general meetings and documents circulated by public companies anywhere in the world? If so, do you have any views on the approach taken?

h) Do you agree that no action is needed to include a specific reference to press conferences? If not, please give reasons and indicate what problems are caused by the absence of such a provision.

i) Do you consider that qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired? If so, how should an archive be defined for these purposes to reflect the core focus of the qualified privilege defence?

Q14. Do you consider that any further rationalisation and clarification of the provisions in schedule 1 to the 1996 Act is needed? If so, please indicate any particular aspects which you think require attention.

Q15. Does the specific issue raised by the National Archives affect any other forms of archive, and have problems arisen in practice? If so, would it be right to create a new form of qualified privilege in this situation?

Clause 6: a single publication rule

70. It is a longstanding principle of the civil law that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the "multiple publication rule"). Issues in relation to the multiple publication rule have become more prominent in recent years as a result of the development of online archives. The effect of the multiple publication rule in relation to online material is that each "hit" on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed.

71. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication. This is also the case with offline archive material (for example a library archive), but the accessibility of online archives means that the potential for claims is much greater in respect of material accessed online.

72. We do not believe that the current position where each communication of defamatory matter is a separate publication giving rise to a separate cause of action is suitable for the modern internet age. Widespread support for change has been expressed by interested parties in a number of different contexts. For example, the majority of those responding to a consultation on the issue by the previous Government in 2009 indicated that a single publication rule should be introduced, and this was also recommended by the Culture Media and Sport Committee and by the Ministry of Justice Libel Working Group in their reports published in early 2010.

73. Clause 6 of the draft Bill therefore makes provision for a single publication rule. The effect of this will be that a claimant will be prevented from bringing an action in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public has passed. If the claimant had not brought an action within that one year period (which is prescribed in section 4A of the Limitation Act 1980), there will be discretion for the court to allow him or her to bring an action at a later date in respect of that article. However, the claimant would still be allowed to bring a new claim if the original material was republished by a new publisher, or if the manner of publication was otherwise materially different from the first publication.

74. The clause provides for the single publication rule to apply if a person publishes a statement to the public and subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same. Publication to the public has been selected as the trigger point because it is from this point on that problems are generally encountered with internet publications and in order to stop the new provision catching limited publications leading up to publication to the public at large.

75. In this context, “publication to the public” is defined as including publication to a section of the public. This is intended to ensure that publications to a limited number of people are covered (for example where a blog has a small group of subscribers or followers). The formulation of the rule means that some publications of statements would fall outside its scope, for example if the first publication is to one person only. We would welcome views on whether the scope of this rule is right or whether additional situations should be covered.

76. Our aim in making these provisions applicable where a statement is “the same or substantially the same” is to ensure that it catches publications which have the same content or content which has changed very little so that the essence of the defamatory statement is not substantially different from that contained in the earlier publication. It may be that the question of whether a publication is or is not “substantially the same” will be the subject of uncertainty in some cases and the courts would determine how it should be interpreted in particular circumstances through case law. However, it would be impractical to attempt to provide a definition in legislation which would capture all the situations that might arise. On balance we believe that the provision in the draft Bill is the clearest that can realistically be achieved, but we would welcome any alternative suggestions.

77. The draft clause also provides that the single publication rule should not apply where the manner of the subsequent publication of the material is "materially different" from the manner of the first publication. Subsection (5) of the clause indicates that in deciding this issue the circumstances to which the court may have regard include the extent of the subsequent publication and the level of prominence given to the statement. A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives. We recognise, however, that it might also possibly catch a situation where an article is initially published in a subscription based scientific journal with a small readership which is subsequently made available on a free access basis. This is an area in which it appears impractical to attempt a precise definition of all the possible situations which might arise, and interpretation by the courts will be necessary to establish how the provision should apply in particular circumstances. However, we would welcome views on whether a different approach on this point would be appropriate.

78. The courts have a discretion under section 32A of the Limitation Act 1980 to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. This is a broad discretion which requires the court to have regard to all the circumstances of the case. We anticipate that this should provide a safeguard against any injustice in relation to the application of any limitation issue which may arise. However, we would welcome views on whether any additional provision is needed.

Q16. Do you agree with the inclusion of a clause in the Bill providing for a single publication rule?

Q17. Do you have any views on the substance of the draft clause? In particular,

a) do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope?

b) do you agree that the single publication rule should not apply where the manner of the subsequent publication of the material is materially different from the manner of the first publication? If not, what other test would be appropriate?

Q18. Do you consider that any specific provision is needed in addition to the court's 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?

Clause 7: libel tourism

79. Significant concerns have been raised over the need for changes to address problems relating to libel tourism (where cases with a tenuous link to England and Wales are brought in this jurisdiction). This reflects a widespread perception that the English courts have become the forum of choice for those who wish to sue for libel and that this is having a chilling effect on freedom of expression throughout the world (for example in the USA where legislation (The Securing the Protection of our Enduring and Established Constitutional Heritage Act - known as the SPEECH Act) was introduced in 2010 to prevent foreign libel judgments being enforced there).

80. In our discussions with interested parties, there were mixed views as to how far libel tourism is a real problem. Research which was conducted in the context of the consideration of this issue by the Ministry of Justice's Libel Working Group did not show any significant number of actual cases involving foreign litigants in the High Court in 2009, and did not find any evidence of the type of libel tourism cases that are of most concern (those where both the claimant and defendant come from outside the EU). However, NGOs have indicated that a major problem arises from the threat of libel proceedings by wealthy foreigners and public figures which is used to stifle investigative journalism, regardless of whether actual cases are ultimately brought, and hence that the number of cases alone may not accurately reflect the extent of the problem. Certain of the other provisions which have been included in the draft Bill or on which we are consulting should assist in making this jurisidiction less attractive to defamation litigants (eg the substantial harm test). However, on balance we believe that there is also a need to take focused and proportionate action specifically to address this issue.

81. In this context, there is relevant European legislation (in particular the Brussels I Regulation on jurisdictional matters) with which we need to ensure compliance. The basic principle contained in Article 2 of the Brussels I Regulation is that jurisdiction is to be exercised by the Member State in which the defendant is domiciled (so where the defendant is domiciled in England and Wales, the court has no discretion to refuse jurisdiction). However, Article 5(3) also enables a person domiciled in a Member State to be sued in another Member

State in matters relating to tort, in the courts for the place where the harmful event occurred (the question of what amounts to a harmful event is determined by domestic law). In *Shevill v Presse Alliance*[21] it was clarified that the act of publication of defamatory material in this jurisdiction is a "harmful event" for the purposes of Article 5(3) and in such cases the claim must be limited to publications occurring here.

82. In cases where the defendant is not domiciled in a Member State, English courts currently have at common law a broad inherent discretion to decline to assume jurisdiction on the basis of *forum non conveniens*, namely that another jurisdiction is available for the trial of the claim and that the other jurisdiction is clearly the more appropriate forum.

83. The provisions included in the draft Bill aim to avoid any possible conflict arising with the European legislation, and focus on cases where an action is brought against a person who is not domiciled in the UK or an EU Member State (or a state which is a party to the Lugano Convention). We believe that this will help to address concerns about the purest forms of libel tourism cases which do not involve defendants domiciled in Europe.

84. Clause 7 changes the law so that a court does not have jurisdiction to hear and determine a claim to which the clause applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate jurisdiction in which to bring an action in respect of the statement.

85. This approach is intended to ensure that, in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England. It is important to bear in mind however, that there will be a range of factors to take into account including, for example, whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

[21] [1996] AC 959 & [1995] ECR I-415, ECJ

86. We believe that this will help to ensure that the court considers all the circumstances in a holistic way and will stop the fact that a wrong has been committed within the jurisdiction from outweighing other relevant considerations (for example that there may have been a much greater level of publication elsewhere and the claim may be entirely about foreign matters on which the English court may not be best placed to adjudicate).

87. The draft Bill does not include a detailed list of factors for the courts to take into consideration in applying these provisions, as the range of circumstances are diverse and this would appear more appropriate to secondary legislation where a more flexible approach could be taken.

88. It is the intention that this new rule will be capable of being applied within the existing procedural framework for defamation claims. For example, if a person applied under CPR rule 6.36 for permission to serve a claim form out of the jurisdiction, the court would refuse to exercise its discretion to grant permission if it thought that it would not have jurisdiction to hear the claim as a result of this clause. If permission to serve a claim form out of the jurisdiction was granted under rule 6.36 and the claim form was served, it would be open to the defendant to make an application under CPR rule 11(1)(a) disputing the court's jurisdiction relying on this clause and the court, if satisfied that it has no jurisdiction to hear the claim, would make an order to set aside the claim form and service of it.

89. We envisage that vexatious and unfounded actions would be ruled out at the permission to serve out stage. However, in respect of more complex cases, a consideration on which we would welcome views is the evidence which a court would need before it in order to apply the new test. In this context, it is relevant to bear in mind that the application to serve out is done on an *ex parte* basis and the defendant does not play a part in this. Following a Part 11 application there would be an opportunity for both sides to present their arguments on the point.

90. For the avoidance of doubt, we consider that this new provision would effectively make the doctrine of *forum non conveniens* redundant in this context because it is relevant where a defendant is seeking a stay in a situation where the court has jurisdiction. The effect of clause 7 is such that a defendant is likely to argue that the court does not have jurisdiction such that he or she would apply for an order to set aside under Part 11 as described above.

91. We would propose to ask the Civil Procedure Rule Committee in due course to consider procedural guidelines to support any provisions which

are introduced. We would welcome views on whether the new test will be workable in practice.

92. The European Commission has recently published a legislative proposal to revise the Brussels I Regulation. We will of course ensure that any issues arising from this review are taken into account in taking forward the provisions in the draft Bill.

Q19. Do you agree that the proposed provisions on libel tourism should be included in the draft Bill?

Q20. Do you have any views on the substance of the draft clause?

Clause 8: removal of the presumption in favour of trial with a jury

93. Currently section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 provide for a right to trial with a jury in defamation proceedings on the application of any party, "unless the court considers that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury". The right to jury trial is a rarity in civil proceedings, and apart from defamation proceedings is currently only available in relation to civil cases involving the quasi-criminal issues of false imprisonment, malicious prosecution and fraud.

94. The Government is firmly committed to maintaining the right to jury trial in criminal proceedings. We also understand the view that issues in relation to a person's reputation should be considered by their peers. However, in practice, few defamation cases actually involve juries, and the substantial majority are heard by judges alone. There are widespread concerns that the existence of the right for either party to opt for jury trial and the role which juries (if used) have to play, for example in determining the meaning of allegedly defamatory material, means that issues which could otherwise have been decided by a judge at an early stage cannot be resolved until trial. Concerns about these difficulties have also been raised by members of the senior judiciary, including most recently by the President of the Supreme Court, Lord Phillips, in the judgment in *Spiller v Joseph* (relating to the defence of fair/honest comment) in which he said:

"Finally, and fundamentally, has not the time come to recognise that defamation is no longer a field in which trial by jury is desirable? The issues are often complex and jury trial simply invites expensive interlocutory battles, such as the one before this court, which attempt to pre-empt issues from going before the jury."

95. As well as adding to the complexity of cases, this has a major impact in impeding settlements, as if issues such as meaning could be resolved at an early stage it is likely that many points in dispute would often fall away, enabling the case to be settled quickly and cheaply. The difficulties that exist in relation to determining meaning were highlighted by the report of the Early Resolution Procedure Group chaired by Sir Charles Gray in December 2010[22]. For these reasons, it appears that retention of the right to trial with a jury adds significantly to the cost of cases and the time taken to resolve them. This raises particular difficulties for individuals and small organisations in defending defamation proceedings, and views have been expressed to us by non-governmental organisations that the threat of jury trial and the attendant costs can be used by wealthy claimants to force defendants with lesser resources to give in and allow publications in the public interest to be stifled. Set against this, a number of lawyers working in the field have argued that it is important for the principle to be upheld that a jury of one's peers should be able to decide issues relating to reputation, and that this is vital for maintaining public confidence in the outcome of cases.

96. In our discussions with interested parties there was widespread support for a provision which removes the existing presumption in favour of jury trial, and retains the court's discretion to order trial with a jury where it considers it in the interests of justice. We believe on balance that this approach is appropriate. An additional consideration in our reaching this view is that if a provision of this nature were not introduced the beneficial impact of our other proposed reforms would be substantially reduced. For example, not taking action on this issue would in particular mean that the effectiveness of our proposals for a new procedure to resolve key preliminary issues at an early stage (see paragraph 123 et seq below) would be significantly undermined, because the meaning of an allegedly defamatory statement could not be determined at an early stage under the new procedure by a judge alone, and consequently this would continue to cause extensive delay and costs.

97. Clause 8 of the draft Bill therefore provides for the removal of the current presumption so that the court will retain a discretion to order jury trial where it is in the interests of justice. We have considered the question of whether it would be helpful for there to be any guidelines on the face of the Bill to assist the judge in exercising this discretion (as was envisaged in Lord Lester's Private Member's Bill). It appears desirable if possible to provide guidelines to assist the courts in these situations. We have not included any guidelines in the draft Bill, but would welcome views on

[22] http://www.5rb.com/newsitem/Procedure-Group-calls-for-defamation-reform

what factors or criteria would be appropriate, and any examples of types of case which it is considered ought to be decided by a jury.

98. Whether or not the presumption in favour of jury trial is removed, unless juries are abolished altogether in defamation proceedings the question of what their role should be in the cases in which they are used remains. This is an issue where concerns have been raised at the complexity of the way in which issues are divided between the judge and the jury. The current position is as follows:

- In relation to meaning it is for the judge to rule whether the words are capable of defamatory meaning; for the jury to decide what meaning the words bear; and for the jury to decide whether the words are in fact defamatory.
- In relation to the defence of justification, it is for the judge to determine questions of law relating to whether a statement is justified, but what meaning the publication in fact bears and whether or not the claimant has successfully proved it to be substantially true is a question of fact for the jury.
- In relation to honest opinion, all contested issues are treated as questions of fact for the jury, apart from whether the subject matter is a matter of public interest, which is treated as a question of law for the judge.
- It is for the judge to determine whether the publication attracts either absolute or qualified privilege, but disputed facts relevant to the existence of privilege are for the jury, in particular whether a report is fair and accurate.
- In the case of the *Reynolds* defence, the question of whether the subject matter of the publication was in the public interest is for the judge to decide, but disputed issues of fact are a matter for the jury. There has been judicial criticism of the use of juries in cases where this defence arises because of the difficulty of determining what are factual issues for the jury and what are matters for the judge.
- Whether the publication is malicious is a question of fact for the jury.
- The assessment of damages is currently a matter for the jury, having been directed by the judge on relevant background circumstances, including the amount of damages that is appropriate.
- In addition, other issues may arise as a result of provisions in the draft Bill where a decision will be needed as to whether they are properly a matter for the judge or a jury (for example, in relation to proposals for a single publication rule, whether the manner of a subsequent publication is materially different from the manner of the first publication).

99. The division of roles in relation to determining meaning has in particular been identified as creating real difficulties (for example in the Early Resolution Procedure Group report), as where juries are used their role in deciding the meaning of the words complained of prevents this issue from being determined by a judge at an early stage and can seriously impede the chances of early settlement. For that reason we would welcome views on whether legislation should provide that the determination of meaning is a matter for the judge alone, whether or not it is decided that a jury trial is appropriate in relation to other issues. This issue is also of relevance in the context of the new preliminary procedure discussed later in this consultation paper.

100. More generally, we would also welcome views on whether it would be appropriate for any provisions to be included in the substantive Bill to clarify which issues should be for the judge to decide and which for the jury (where there is one), and whether any changes are needed to the existing role of the jury on any particular issue.

Q21. Do you agree that the presumption in favour of jury trial in defamation proceedings should be removed?

Q22. Do you have any views on the substance of the draft clause? In particular:

a) do you consider that guidelines on the circumstances governing the courts' exercise of its discretion to order jury trial should be included on the face of the Bill? If so, what factors or criteria do you consider would be appropriate? Please provide examples.

b) would it be appropriate for any provisions to be included in the Bill to clarify which issues should be for the judge to decide and which for the jury (where there is one)? If so, do you consider that any changes are needed to the role of the jury on any particular issue (in particular in relation to determining meaning)?

Issues for Consultation

Responsibility for Publication on the Internet

Introduction

101. Concerns have been raised about the need to clarify the law as it operates in relation to material published on the internet. This is a complex area of the law, and we consider that it would benefit from further consultation before legislative provisions are drafted. This section of the consultation paper therefore seeks evidence on the problems that are currently faced and suggestions as to how the law could best be clarified so that appropriate provisions could be included in the substantive Defamation Bill. It also seeks views on whether there should be any change to the law to give greater protection against liability.

102. Section 1 of the Defamation Act 1996 contains a defence which is available to people who are not the author, editor or commercial publisher of a defamatory statement. Under this defence, secondary publishers such as internet service providers (ISPs) and booksellers will not be liable for third party defamatory material which they have made available, if they can show that they took reasonable care in relation to its publication and that they did not know, or have reason to believe, that what they did caused or contributed to the publication of a defamatory statement.

103. The growth of the internet and the increase in the use of user generated content has raised concerns that the section 1 provisions may be unclear and may not sufficiently protect secondary publishers engaging in multimedia communications. In addition, the Electronic Commerce (EC Directive) Regulations 2002[23] have implemented the E-Commerce Directive[24]. This provides protection along broadly similar lines to section 1 to certain types of online intermediary services (namely hosting, caching and mere conduits). The Directive appears to indicate the circumstances not only in which ISPs should not be liable, but also those where they should be liable (for example where they have knowledge of the material and do not act expeditiously to remove it), and we have been unable to find any evidence that any other Member State has removed liability from ISPs or failed to apply the exemptions on liability provided for in the Directive.

[23] SI 2002/2013
[24] European Council and Parliament Directive 2000/31/EC, OJ 2000 L178 p1

104. As well as services which merely provide a connection to the internet, numerous services are available online, either as subscription services for a fee or free of charge to the public at large, ranging from email accounts and website hosting to newsgroups and discussion forums. In addition, some ISPs also provide content from third parties such as online news, videos and music, user-generated content such as that on blogs and discussion forums, and links to other providers' material.

105. The variety of internet services which are now available means that a wide range of people and organisations can potentially be affected by issues relating to defamatory material, from large scale internet service providers such as Google and Yahoo and social networking sites such as Facebook and Twitter, to smaller scale discussion boards such as Mumsnet, local forums on specific issues of local interest, and individual bloggers.

106. ISPs and discussion boards that make available material supplied by other people often have no control over the content of the material prior to transmission. Material is usually provided by customers and third parties, without being read or monitored by the ISP. However, in some instances, the nature of the technology involved and the services provided mean that an ISP which provides a connection cannot always be said to be a mere carrier of information. For example, liability may arise where discretion is exercised over how long material is stored and remains accessible or where an ISP has the power to remove material, as with news groups or websites that they host.

107. The leading case in this area is *Godfrey v Demon Internet Ltd*[25]. In that case it was held that, as a service provider who transmitted or facilitated the transmission of a posting received and stored by it via the internet to its subscribers, the defendant was the publisher of that statement at common law. It could not be said that the defendant was merely the passive owner of electronic equipment automatically transmitting the material, as it had actively chosen to store the material and also had control over the length of time it was stored. Thus, it could be said that an ISP is in the same position as other "hard copy" secondary publishers, and may have a defence under section 1 of the 1996 Act, as it was not a primary publisher within the meaning of sections 1(2) and (3). However, the defendant could not avail itself of the section 1 defence, as once it had been informed of the defamatory nature of the content and did nothing to remove it, it could no longer satisfy the requirements that it had taken reasonable care in relation to the

[25] [1999] 4 All ER 342

publication and had no reason to believe that its actions did not cause or contribute to the publication. The defendant was therefore held liable for the defamatory posting.

108. The question of how a court should approach a case where an ISP had truly fulfilled no more than a passive role as owner of an electronic device through which defamatory postings were transmitted was considered in the case of *Bunt* v *Tilley and Others*[26]. The ruling in *Bunt* confirms that for liability to be imposed, it is essential to demonstrate that the ISP has a degree of awareness or an assumption of general responsibility, such as that recognised in the context of editorial responsibility. Whilst to be liable for defamatory publication it is not always necessary to be aware of the defamatory content of material, knowing involvement in the process of publication of that material is sufficient to impose liability. It is not however enough that a person has played a merely passive instrumental role in the process.[27]

109. The legal position in relation to defamatory material in blogs and discussion forums is less well-established in case law. However, in most circumstances a blog owner or discussion board owner may be viewed in the same way as an ISP, as he or she would have editorial control over the content of the postings and hence the opportunity to remove any material considered to be potentially defamatory.

Issues for Consideration

110. In our discussions with interested parties prior to the formulation of provisions in the draft Bill, concerns were expressed from two main perspectives. Representatives of ISPs and discussion board owners argued that the current law should be changed to provide greater protection for them against liability for material posted on their sites. Others in the media and legal profession considered that legislation to update and clarify (but not change) the civil law would be helpful to address uncertainty over how it applies to the various different forms of online activity and the interrelationship with the E-Commerce Directive. As a subsidiary point, there was also some support for greater clarity relating to “notice and takedown” procedures for the removal of defamatory material from websites. The following sections consider each of these issues in turn.

[26] [2006] EWHC 407 (QB)
[27] *Ibid,* see para 23

Should there be a new approach?

111. ISPs and blog and discussion board owners have expressed concern that they are not normally in a position to be able to verify whether content being stored, hosted or transmitted is defamatory, and that upon receipt of a complaint about allegedly defamatory material they are faced with the choice of either removing the material immediately or defending proceedings on the basis of potentially worthless assurances or indemnities from the person or organisation responsible for the posting. In these circumstances they have little option but to remove the material.

112. They consider that this has a damaging effect on freedom of expression, as it means that material which is not genuinely defamatory may often be removed from circulation. In addition, they have indicated that it is costly and burdensome to monitor postings and to deal with complaints, both in the time and resources involved in trying to ascertain whether a posting is defensible, and in the identification and removal of the material itself, as it will often be necessary to locate and remove other items that might appear in response to a posting that refer to or copy the original material. The impact of this was particularly strongly felt by smaller organisations and discussion boards.

113. The nature of complaints will often differ according to the type of service involved. For example, complaints about newsgroups or local discussion forums will often concern people who know each other and may focus on relatively minor and specific issues and be made on a personal basis to the forum organiser. On the other hand, complaints about websites are more likely to be made by companies, typically about sites that have been set up to criticise their products or services, or where there has been criticism of this nature in discussion forums. These complaints are likely to take the form of solicitors' letters, and recipients particularly in smaller organisations understandably feel that they would rather remove the material than face litigation by a well-resourced claimant.

114. In the light of these concerns, it has been suggested that the law should be changed to protect ISPs and other secondary publishers against liability, and a number of possible approaches have been suggested:

    - One would be to remove liability altogether, so that claimants would only be able to pursue a defamation action against the person who has posted the material. However, offering complete immunity to secondary publishers would present a serious impediment to claimants attempting to protect their reputation and secure the removal of defamatory material online. It may often be difficult to identify and contact the original poster of the material, and the defamatory material could potentially remain accessible for a

significant period until it was possible to secure a court order for its removal. Granting a blanket exemption might also weigh too heavily in favour of protection of rights under Article 10 of the European Convention on Human Rights at the expense of rights under Article 8 of that Convention.

- Another possible approach would be to introduce a statutory system akin to that which currently applies in relation to copyright disputes in the USA. This would involve the ISP or discussion board owner acting as a liaison point between the person complaining about a defamatory posting and the person who had posted the material. If after an initial exchange of correspondence the issue remained in dispute, the complainant would be required to initiate legal proceedings against the poster to secure removal of the material, and could not pursue an action against the ISP. However, this approach would encourage recourse to litigation, and would in particular be likely to disadvantage claimants who were individuals or had limited resources, as a defendant with greater resources could afford to dispute the removal of defamatory material in the knowledge that the claimant could not afford the cost of proceedings, and leave the claimant with no other means of securing its removal.
- Another possible approach would be for the claimant to be required to obtain a court order for removal of the allegedly defamatory material before any obligation could be placed on the ISP or web content host to remove it. This would have the merit that as ISPs are not normally in a position to know whether material is defamatory, postings would only be removed where this has been specifically required by the courts. However, this could be costly for claimants and could add significantly to the volume of urgent applications for injunctions brought before the courts.
- A further option (to address specific concerns that the current law may affect the extent to which people are willing to establish and run local discussion forums) might be to develop separate provisions to provide a greater degree of protection to small scale forums and blogs than is available to larger corporate ISPs with greater resources. For example the complainant could be required to take action against the individual poster in these circumstances, as they would be more likely to be readily identifiable in these situations. However, there would be considerable difficulty in defining exactly what types of situation would and would not fall within such a provision, and it could be open to accusations that it discriminates unfairly against a particular group of claimants.
- As noted above, section 1 of the 1996 Act is also applicable in an offline context to secondary publishers such as booksellers. The Booksellers Association has expressed the view that section 1

reduced the scope of the defence of innocent dissemination that was previously available under the common law, and has drawn attention to the problems which booksellers experience when actions are brought against them to remove publications from their shelves rather than against the author, editor or publisher of the material. They have suggested that the law should be changed to require claimants, before issuing proceedings against a secondary publisher, to bring an action against the author, editor or publisher unless these defendants are not within the jurisdiction of the court or it is otherwise impractical or unreasonable to do so. An approach of this nature could perhaps be workable in practical terms in relation to offline publications. However, there may be greater difficulties in applying it to online publications. For example, the difficulties noted above for the claimant in identifying and contacting the original poster of online material could mean that the defamatory material could remain accessible for a significant period, with the claimant prevented from securing its removal until he or she could establish through court proceedings that it is impractical and unreasonable for it to pursue the original poster. It would not appear appropriate to have differing provisions depending on whether the defamation had taken place online or offline.

115. We consider that proposals, like those above, which would change the law to make it more difficult for claimants to bring an action, need to be closely scrutinised to ensure that they strike a fair balance between the interests of freedom of expression and the right of individuals to protect their reputations. However, we would welcome views on the options discussed above and any alternative suggestions.

Q23. Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?

Q24. If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who are defamed on the internet be protected? Do you have any alternative suggestions?

Should section 1 of the 1996 Act be updated and clarified?

116. The main argument for amending or replacing section 1 of the 1996 Act with provisions to update and clarify the law is that it is unclear how the current law applies in relation to the range of different internet related activity that now exists and that clarification would be beneficial in providing greater certainty.

117. We recognise the need to ensure that the law is fully up to date and are keen to make sure that it can readily be understood and applied in the

many different circumstances that can arise in relation to internet-based publication. Attempting to formulate provisions which would be clear, fair and comprehensive would be far from straightforward, and we would welcome views on how the difficulties involved could best be overcome. There would be a need to avoid the use of complicated technical provisions that could add to any uncertainty which does currently exist. For example, the provisions in the E-Commerce Directive would remain in force and to introduce further provisions and terminology could lead to confusion. At the same time, terminology which replicated the Directive would fail to catch a range of areas which it does not cover. We would welcome views on how the difficulties involved could best be overcome.

118. Clause 9 of Lord Lester's Private Member's Bill suggested a new overarching framework and terminology based on the current law to govern the circumstances in which different types of publisher (both online and offline) would be liable either as primary publishers or as intermediaries, and situations where no liability arises. Among other things, this envisaged renaming people concerned only with the transmission or storage of material without any other influence or control over it as "facilitators". In discussions with interested parties, there was some confusion over this terminology and the way in which the provisions would work (for example as to what particular types of publication would fall under the definition of facilitators). Lord Lester's clause is reproduced at Annex C, and we would welcome further views on its approach.

119. More generally, to assist us in considering how best to formulate new statutory provisions in a way which would be clear and helpful, we would be grateful if consultees with experience in the field could provide specific evidence of any practical problems that are being experienced as a result of difficulties arising from the interpretation of the existing provisions of section 1 of the 1996 Act and from the interrelationship between that section and the provisions in the Electronic Commerce Directive and Regulations. We would also welcome any other suggestions as to how any statutory provisions could best be framed to avoid the difficulties identified above.

Q25. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?

Q26. Do you consider that clause 9 of Lord Lester's Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?

Q27. If Lord Lester's approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?

Should there be a statutory procedure for notice and takedown?

120. Currently most ISPs operate voluntary notice and takedown arrangements in relation to the removal of defamatory material from websites. Views have been expressed by ISPs and others that in the absence of a change to the law in relation to their liability in this area, it would be helpful for a notice and takedown procedure to be codified in statute, in order to provide greater certainty and to clarify what they are required to do in order to protect themselves from liability.

121. In this context, clause 9 of Lord Lester's Bill contained provisions for a notice and takedown procedure. Key elements in this were that the substance of the complaint must be communicated in writing, identifying the words or matters complained of, where they were published, why the claimant considers them to be defamatory and harmful, and whether any aspects are considered to be untrue. The defendant would then have a period of 14 days from receipt of this information within which to take down the material or forfeit their defence. The parties would have the option of applying for a court order to amend the notice period.

122. We would be grateful for evidence and views from consultees on this issue.

Q28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.

Q29. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?

A new procedure for defamation cases

123. In our discussions with interested parties a major area of concern was the extent to which defamation proceedings can become mired in disputes over preliminary issues. This contributes substantially both to the time taken to resolve cases and to the costs involved. For example, in *British Chiropractors Association v Singh*[28] proceedings in relation to whether the words complained of were matters of fact or opinion took

[28] [2010] EWCA Civ 350

almost two years to resolve. When a ruling was ultimately given on the issue by the Court of Appeal the claim was withdrawn, but by this point substantial costs had been incurred and the defendant had been placed in a position of considerable uncertainty and stress over an extended period.

124. As noted elsewhere in this consultation paper, it is envisaged that the provisions in the draft Bill to remove the existing presumption in favour of jury trial in defamation cases will help significantly in enabling preliminary issues to be considered by a judge at an earlier stage in the proceedings. In the light of this, we have considered the possibility of introducing a formal new procedure in the High Court to channel all cases where proceedings are issued through a process whereby early rulings can be given on key issues which currently contribute substantially to the length and cost of the proceedings. This would help to clarify the issues in dispute and the defences which may be available and should assist in encouraging settlement in many cases. We have discussed the practical implications of this proposal with members of the senior judiciary with experience in defamation cases and have taken their views into account.

125. The main preliminary issues which we would envisage being determined under the new procedure are:

- Whether the claim satisfies the substantial harm test where this is disputed. This would enable claims failing that test to be struck out as early as possible.
- What the actual meaning of the words complained of is and whether that meaning is defamatory.
- Whether the words complained of are a statement of fact or an opinion.

126. The procedure would be automatic in all cases where any of these issues needed to be resolved.

127. In addition, other issues which could potentially be determined if relevant are:

- Whether the publication is on a matter of public interest. As discussed elsewhere in this paper, the new public interest defence in clause 2 of the draft Bill has two limbs – whether the publication is on a matter of public interest and if so, whether the defendant acted responsibly in relation to the publication. An early decision on whether a matter is or is not in the public interest could help to determine whether there is any scope for the defendant to use this defence, and (where it isn't) could obviate the need to provide detailed evidence on the second

limb. It might also be appropriate to consider this point in the context of the honest opinion defence.

- Whether the publication falls within the categories of publication in Schedule 1 to the Defamation Act 1996 for which the defence of qualified privilege is available. This would help to clarify whether it is open to the defendant to use this defence.
- Consideration of costs budgeting in appropriate cases (depending on the outcome of the costs budgeting pilot which is currently taking place)[29].

128. For the procedure to operate effectively, it would be necessary for the judge to consider at an early stage whether the case (if it proceeds) would be suitable for jury trial and to decide that it should be for a judge alone.

129. A detailed note including other key aspects of the proposed new procedure is at Annex D. We would welcome views on whether a procedure of this nature would be helpful, on what issues it should cover, and on how it should operate in practical terms. In the light of the views expressed, we would envisage including key provisions to establish the procedure in the substantive Bill, with the Civil Procedure Rule Committee being asked to consider appropriate procedural changes through secondary legislation to support the new approach.

130. The need for action to help resolve preliminary issues has also been considered recently by Sir Charles Gray and Alastair Brett, who have suggested that a voluntary scheme could be established to determine preliminary issues in media disputes. This scheme would be funded by defendant publishers and would involve determination of key issues by an expert legal panel through a binding arbitration or mediation process under the umbrella of the Civil Mediation Council or the Institute of Arbitrators. The Government welcomes this idea in principle subject to the further development of detailed proposals. In the event that we decide to proceed with the new procedure outlined above, we consider that a voluntary approach of this type could complement the new procedure and be available as an alternative to court proceedings for the parties to use to settle their dispute if they wished.

Q30. Do you consider that a new court procedure to resolve key preliminary issues at an early stage would be helpful?

[29] CPR PD 51D – Defamation Proceedings Costs Management Scheme. The pilot will end on 31 March 2011. Under the pilot arrangements, all defamation claims made at the Royal Courts of Justice or Manchester District Registry are subject to costs budgeting

Q31. If so, do you agree that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute?

Q32. Do you consider that the issues identified in paragraph 127 above should also be determined (where relevant) under the new procedure? Please give your reasons.

Q33. Are there any other issues that could usefully be determined under the new procedure? Please give your reasons.

Q34. Do you have any comments on the procedural issues raised in the note at Annex D and on how the new procedure could best operate in practice?

The summary disposal procedure

131. Sections 8 and 9 of the Defamation Act 1996 provide for the summary disposal of claims by a judge alone where the court is satisfied either that the claimant's case has no realistic prospect of success, or that the defendant has no defence with a realistic prospect of success, and that in either situation there is no other reason why the claim should be tried. A list of factors is provided for consideration in deciding whether a claim should be tried, including whether all the persons who are or might be defendants are before the court; the extent to which there is a conflict of evidence; and the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication).

132. Where the court is satisfied that summary judgment should be given in favour of a claimant, it can grant summary relief in a number of forms, including a declaration that the statement in question was false and defamatory of the claimant; an order that the defendant publish or cause to be published a suitable correction and apology; damages not exceeding £10,000 (or such other amount as may be prescribed by order of the Lord Chancellor); and an order restraining the defendant from publishing or further publishing the matter complained of.

133. In our discussions with interested parties, reference was made to the fact that the summary disposal procedure is seldom used in practice, but it was unclear exactly why this is the case. It may be that there are ways in which the procedure could usefully be improved (for example whether it would be appropriate for the Lord Chancellor to exercise the power given to him by the 1996 Act to increase the amount of damages payable). Alternatively, it may be questionable as to whether there is any longer a need for the summary disposal procedure. There is already

some degree of overlap between the procedure under the 1996 Act and the general summary judgment procedure in Part 24 of the Civil Procedure Rules, and further amendments to the summary disposal procedure may be needed in the light of proposals in the draft Bill (for example, the introduction of a substantial harm requirement). We would welcome views on this issue so that any procedure which is retained can operate as effectively as possible.

Q35. Do you consider that the summary disposal procedure under sections 8 and 9 of the 1996 Act should be retained?

Q36. If so, do you consider that any amendments could be made to the procedure to make it more useful in practice, and if so, what? In particular, should the Lord Chancellor exercise his power to amend the level of damages which can be ordered under the summary procedure? If so, what level should be set?

Extending the power of the court to order publication of its judgment

134. As noted above the relief that can be granted under the summary procedure includes an order that the defendant publish or cause to be published a suitable correction and apology. If agreement cannot be reached between the parties on the content of the correction and apology, the court can order publication of a summary of its judgment. If agreement cannot be reached on the time, manner, form or place of publication the court can direct the defendant to take such reasonable and practicable steps as it considers appropriate.

135. In our discussions with interested parties, it was suggested that the court should be given the power to order publication of an apology in defamation proceedings generally. In view of the fact that under its Code of Practice the Press Complaints Commission can already order the publication of an apology and ensure that it is published in a sufficiently prominent position, we do not believe that it is appropriate for an additional power of this nature to be given to the court. However, we would welcome views on whether the power of the court under the summary procedure to order publication of a summary of its judgment could potentially be made available in defamation proceedings more generally.

Q37. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?

The ability of corporations to bring a defamation action

136. The present position in England and Wales is that a corporation[30] can sue in respect of a defamatory publication that harms its trading or business reputation. A corporation cannot sue for injury to feelings (as in principle it has no feelings capable of being injured), although individual officers or employees may be able to do so in respect of their personal reputations. The Culture Media and Sport Committee suggested in its report on Press Standards, Privacy and Libel[31] that it should be made more difficult for corporations to sue, and Lord Lester's Private Member's Bill contained a provision requiring corporations to show that publication of the words or matters complained of had caused, or was likely to cause, them substantial financial loss. Corporations would still have access to other forms of recourse. For example, in some cases they might be able to sue in malicious falsehood; in other cases the directors might be able to sue for defamation in their own names.

137. However, it should be recognised that corporations do have reputations which deserve protection against defamatory allegations. The damage caused by such allegations can have wide-ranging effects on the employees and shareholders of the company, and on wider society (for example through pension fund investments). Some lawyers working in the field have indicated that case law has established that the limits of what should be regarded as "acceptable criticism" are wider for companies than for individuals, and damages are usually lower as they do not cover injury to feelings.

138. From discussions with interested parties it appears that the main concerns in this area relate to cases where a trading corporation or company sues either an individual or a non-governmental organisation, where there may be an "inequality of arms" between the claimant and the defendant which is used to stifle criticism of the company's behaviour and activities through the threat of costly and protracted legal proceedings. Far less concern was expressed about cases where one trading corporation or company is suing another in a competitive business situation, or about cases involving such corporations or companies suing the major media (although some concerns were expressed by representatives of the regional press). Nevertheless we recognise that the existing arrangements mean that even large media concerns can find the costs of defending a libel case prohibitive, with a consequent chilling effect on public interest reporting.

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[30] Except for organs of government and political parties (see paragraph 146 below)

[31] http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36202.htm

139. We believe that the introduction of a new procedure for determining key preliminary issues discussed earlier in this paper would reduce considerably the cost and length of proceedings and the likelihood of any attempt being made by either corporate or wealthy individual claimants to intimidate defendants with limited resources. In addition, other provisions proposed in the draft Bill such as the introduction of a substantial harm requirement should also help to adjust the balance and deter trivial and speculative litigation by corporations and others.

140. More generally, the package of proposals for reform of civil litigation funding and costs contained in Lord Justice Jackson's report have recently been the subject of separate consultation in the consultation paper, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales.* The consultation closed in February 2011 and the Government intends to publish its response shortly. If implemented the proposals should have the effect of making costs in defamation proceedings fairer and more proportionate. In particular, the proposal to abolish recoverability of CFA success fees and ATE insurance premiums will provide greater protection for defendants against excessive cost burdens should they lose a case.

141. The consultation paper also contained proposals to introduce qualified one way costs shifting and a 10% increase in general damages to help claimants deal with the consequences of abolishing recoverability of success fees and ATE insurance premiums. While the proposals on one way costs shifting will mean that claimants will not normally have to pay the defendant's costs if they lose, this protection would be forfeited in cases where the claimant has acted unreasonably and/or is sufficiently and conspicuously wealthy. Action to control costs is also being considered in the context of the current costs budgeting pilot. In the context of defamation proceedings these developments should help to address concerns about cases involving an inequality of arms and ensure that claimants such as large corporations with significant resources do not unjustly benefit from protection against costs.

142. There would also be practical difficulties in introducing a provision requiring corporations to prove financial loss as proposed in Lord Lester's Bill. In particular, it is likely that this would lead to corporate claimants frontloading costs in assembling detailed evidence of financial loss (which could ultimately add to the costs burden on an unsuccessful defendant). It could also lead to delays in bringing proceedings as evidence of loss is accumulated, which could in turn add to that loss (and hence to any damages awarded) by discouraging prompt action to avoid the defamatory material spreading. We are also concerned that other approaches that have been suggested, such as requiring corporations to provide proof of malice, would make it much more

difficult for a corporation which has been defamed to bring a successful claim and may not adequately protect their interests.

143. The Culture Media and Sport Select Committee recommended that consideration should be given to whether the burden of proof should be changed in cases involving corporations, and to the Australian approach whereby companies with over 10 employees are prevented from bringing an action. In relation to the latter, a bar on claims based on the size of the corporation would raise a number of issues. It would be difficult to fix on an appropriate figure without the risk of appearing arbitrary (for example, why should a company with 15 employees be prevented from suing when one with 10 employees could). On balance we do not consider that an approach of this nature would be viable.

144. In relation to the Committee's other suggestion, reversing the burden of proof in cases brought by corporations would effectively mean that the corporation would have to prove that the allegation made against it was not true. It may not be fair to place the burden entirely on a corporate claimant and absolve the defendant of the need to show that the defamatory publication was justified (or to substantiate another defence if appropriate). Proving a negative is always difficult, and it may be unduly onerous on a corporate claimant to require them to prove the falsehood of the allegations. We therefore do not consider that any formal reversal of the burden of proof is appropriate. However, a number of the actions which we propose in other areas should help to minimise any difficulties that may be experienced by defendants. As noted above, the introduction of a substantial harm test will help to prevent trivial claims, and the removal of the presumption in favour of trial with a jury will make it easier for courts to determine the meaning of allegedly defamatory material at an early stage.

145. In the light of these considerations, we believe that introduction of the new procedure and other provisions in the draft Bill and the broader proposals on civil costs should make defamation proceedings far less susceptible to manipulation by those with greater resources, whether they are companies or individuals. This will have benefits in all types of proceedings including cases involving corporations. However, we would welcome views on whether any further provisions would be helpful to address situations where an inequality of arms exists.

Q38. Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases brought by corporations or more generally)? If so, what provisions would be appropriate?

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

146. In the 1993 case of *Derbyshire County Council v. Times Newspapers Ltd*[32] the House of Lords held that a local authority could not bring an action for libel in respect of its governmental and administrative functions (although it is still possible for individual members or officers of the authority to sue in relation to their own reputation).The same principle applies to organs of central Government.

147. Lord Keith expressed the ratio of the decision in *Derbyshire* thus:

> "There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically-elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech... "

148. Case law suggests that similar provisions may apply to agencies and companies exercising some form of governmental function (such as privatised utility suppliers), but this may depend on the specific factual circumstances of the case. It appears, however, that it is still possible for individual members or officers of a public authority covered by the *Derbyshire* principle to bring an action in respect of their own personal reputation. In *McLaughlin and others v London Borough of Lambeth*[33] a defendant local authority applied to strike out a claim brought by individuals who were managers of a school in respect of allegations of mistreatment. Mr Justice Tugendhat refused to strike out the claim.

149. It has been suggested that the principle established in the *Derbyshire* case could usefully be placed in statute and that it should be extended so that it applies to public authorities within the meaning of section 6 of the Human Rights Act 1998, so that any such body could not sue in relation to an alleged libel concerning the manner in which it has performed or failed to perform its public functions.

150. However, the scope of section 6 has been the subject of considerable uncertainty and litigation**.** Linking any restriction on the ability to bring a

[32] [1993] AC 534
[33] [2010] EWHC 2726 (QB)

defamation action to the provisions in the 1998 Act would therefore seem likely to create uncertainty and increase the likelihood of satellite litigation over whether particular bodies or acts fell within scope of the provision. To avoid this uncertainty, an alternative approach might be to formulate a list of public authorities and functions similar to that in Schedule 1 to the Freedom of Information Act 2000. However, that list is extremely lengthy and extensive and it would be difficult and cumbersome to maintain and update a list of this nature.

151. In any event, it would appear that the range of persons and bodies which would fall within the scope of either Act would be much broader than the types of case which are considered in the *Derbyshire* judgment, and removal of the ability to bring a defamation action from all such bodies would represent a significant restriction on the right of a wide range of organisations to defend their reputation. It has also been suggested that it should not be possible for individual members or officers of a public authority to bring a defamation action. However, this would go much further than the current position under *Derbyshire*, and a bar on the ability of individuals to protect their own reputations would not appear to strike an appropriate balance between the interests of claimants and defendants.

152. An alternative approach would be simply to place the *Derbyshire* principle in statute in a way which reflects the nature and scope of the principle as articulated in the case law. This could have the benefit of providing clarity and certainty in the law. However, we are unaware of any evidence that the absence of a statutory provision has caused any difficulties in practice, and so this may be considered superfluous. In the light of this discussion, we are not minded to include any provisions on these issues in the substantive Bill. However, we would welcome the views of consultees.

Q39. Do you agree that it would not be appropriate to legislate to place the Derbyshire principle in statute? If not, please give reasons and provide evidence of any difficulties that have arisen in practice in this area.

Q40. Do you agree that it would not be appropriate to legislate to extend the Derbyshire principle to restrict the ability of public authorities or individuals more generally to bring a defamation action? If not, please give reasons and indicate how any such provisions should be defined.

Questionnaire

Issues in draft Bill

Clause 1

Q1. Do you agree with the inclusion of a substantial harm test in the Bill?

Q2. Do you have any views on the substance of the clause?

Q3. Do you agree that the Slander of Women Act 1891 and the common law rule referred to in paragraph 6 should be included among the measures for repeal in the Repeals Bill?

Clause 2

Q4. Do you agree with the inclusion of a new public interest defence in the Bill? Do you consider that this is an improvement on the existing common law defence?

Q5. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that it would not be appropriate to attempt to define "public interest"? If not, what definition would you suggest?

b) Do you consider that the non-exhaustive list of circumstances included in subsection (2) of the clause should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines?

c) Do you consider that the nature of the publication and its context should be given greater weight than the other circumstances in the list?

d) do you agree that the defence should apply to inferences and opinions as well as statements of fact, but that specific reference to this is not required? If so, are any difficulties likely to arise as a result of the overlap between this defence and the new honest opinion defence?

e) do you agree with the approach taken on the issue of "reportage"?

Clause 3

Q6. Do you agree that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth?

Q7. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Q8. Do you have any views on the substance of the draft clause?

Q9. Do you consider that the current law is producing unfair results where there is a single defamatory imputation with different shades of meaning? If so, how could this best be addressed?

Clause 4

Q10. Do you agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence, and that this should be called a defence of honest opinion?

Q11. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Q12. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that condition 1 adequately reflects the current law that the statement must be recognisable as comment?

b) do you consider that the requirement in condition 2 that the matter in respect of which the opinion is expressed must be a matter of public interest should be retained?

c) do you agree with the approach taken in relation to condition 3 that the opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or an earlier privileged statement?

d) do you consider that the defendant should be allowed to rely on the honest opinion defence where they have made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong?

e) **do you agree that the new defence should not apply to statements to which the public interest defence in clause 2 of the Bill applies?**

f) **do you agree that an objective test of whether an honest person could have held the opinion should apply? If not, would a subjective test of whether the defendant believed that his or her opinion was justified be appropriate?**

Clause 5

Q13. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular:

a) **do you agree that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed? If not, what extension (if any) would be appropriate?**

b) **Would it be helpful to define the term "contemporaneous" in relation to absolute privilege for reports of court proceedings? If so, how should this be defined?**

c) **Alternatively, should the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports be removed? If so, which form of privilege should apply?**

d) **Do you agree that Part 2 qualified privilege should be extended to summaries of material? If so, do you have any views on the approach taken?**

e) **Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of scientific and academic conferences? If so, should definitions of these terms be included in the Bill, and how should any definitions be framed?**

f) **Do you agree that Part 2 qualified privilege should be extended to cover proceedings in other countries? If so, do you have any views on the approach taken?**

g) **Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of proceedings at general meetings and documents circulated by public companies anywhere in the world? If so, do you have any views on the approach taken?**

h) **Do you agree that no action is needed to include a specific reference to press conferences? If not, please give reasons and indicate what problems are caused by the absence of such a provision.**

i) **Do you consider that qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired? If so, how should an archive be defined for these purposes to reflect the core focus of the qualified privilege defence?**

Q14. Do you consider that any further rationalisation and clarification of the provisions in schedule 1 to the 1996 Act is needed? If so, please indicate any particular aspects which you think require attention.

Q15. Does the specific issue raised by the National Archives affect any other forms of archive, and have problems arisen in practice? If so, would it be right to create a new form of qualified privilege in this situation?

Clause 6

Q16. Do you agree with the inclusion of a clause in the Bill providing for a single publication rule?

Q17. Do you have any views on the substance of the draft clause? In particular,

a) **do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope?**

b) **do you agree that the single publication rule should not apply where the manner of the subsequent publication of the material is materially different from the manner of the first publication? If not, what other test would be appropriate?**

Q18. Do you consider that any specific provision is needed in addition to the court's 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?

Clause 7

Q19. Do you agree that the proposed provisions on libel tourism should be included in the draft Bill?

Q20. Do you have any views on the substance of the draft clause?

Clause 8

Q21. Do you agree that the presumption in favour of jury trial in defamation proceedings should be removed?

Q22. Do you have any views on the substance of the draft clause? In particular:

a) do you consider that guidelines on the circumstances governing the courts' exercise of its discretion to order jury trial should be included on the face of the Bill? If so, what factors or criteria do you consider would be appropriate? Please provide examples.

b) would it be appropriate for any provisions to be included in the Bill to clarify which issues should be for the judge to decide and which for the jury (where there is one)? If so, do you consider that any changes are needed to the role of the jury on any particular issue (in particular in relation to determining meaning)?

Issues for consultation

Responsibility for publication on the internet

Q23. Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?

Q24. If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who are defamed on the internet be protected? Do you have any alternative suggestions?

Q25. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?

Q26. Do you consider that clause 9 of Lord Lester's Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?

Q27. If Lord Lester's approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?

Q28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.

Q29. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?

A new procedure for defamation cases

Q30. Do you consider that a new court procedure to resolve key preliminary issues at an early stage would be helpful?

Q31. If so, do you agree that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute?

Q32. Do you consider that the issues identified in paragraph 127 above should also be determined (where relevant) under the new procedure? Please give your reasons.

Q33. Are there any other issues that could usefully be determined under the new procedure? Please give your reasons.

Q34. Do you have any comments on the procedural issues raised in the note at Annex D and on how the new procedure could best operate in practice?

Summary disposal procedure

Q35. Do you consider that the summary disposal procedure under sections 8 and 9 of the 1996 Act should be retained?

Q36. If so, do you consider that any amendments could be made to the procedure to make it more useful in practice, and if so, what? In particular, should the Lord Chancellor exercise his power to amend the level of damages which can be ordered under the summary procedure? If so, what level should be set?

Power of court to order publication of its judgment

Q37. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?

Ability of corporations to bring a defamation action

Q38. Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases

brought by corporations or more generally)? If so, what provisions would be appropriate?

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

Q39. Do you agree that it would not be appropriate to legislate to place the Derbyshire principle in statute? If not, please give reasons and provide evidence of any difficulties that have arisen in practice in this area.

Q40. Do you agree that it would not be appropriate to legislate to extend the Derbyshire principle to restrict the ability of public authorities or individuals more generally to bring a defamation action? If not, please give reasons and indicate how any such provisions should be defined.

Impact assessment and equality impact assessment

Q41. Do you have any comments on the costs and benefits analysis as set out in the Impact Assessment?

Q42. Do you have any information that you believe would be useful in assisting us in developing a more detailed Impact Assessment?

Q43. Do you consider that any of the proposals could have impacts upon the following equality groups?

Age
Disability
Gender Reassignment
Married and Civil Partnership
Pregnancy and Maternity
Race
Religion and Belief
Sex
Sexual Orientation

Annex A – The draft Bill

Defamation Bill

CONTENTS

A

B I L L

TO

Amend the law of defamation

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Requirement of substantial harm

1 Substantial harm

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

Defences

2 Responsible publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of is, or forms part of, a statement on a matter of public interest; and

(b) the defendant acted responsibly in publishing the statement complained of.

(2) In determining whether a defendant acted responsibly in publishing a statement, the matters to which the court may have regard include (amongst other matters)—

(a) the nature of the publication and its context;

(b) the seriousness of any imputation about the claimant that is conveyed by the statement;

(c) the extent to which the subject matter of the statement is of public interest;

(d) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;

(e) whether the defendant sought the claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;

(f) whether the defendant took any other steps to verify the accuracy of the statement;

(g) the timing of the publication and whether there was reason to think it was in the public interest for the statement to be published urgently;

(h) the tone of the statement (including whether it draws appropriate distinctions between suspicions, opinions, allegations and proven facts).

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

3 Truth

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

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

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

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

(5) In section 8 of the Rehabilitation of Offenders Act 1974 (defamation actions)—

(a) in subsection (3) for "any defence of justification or" substitute "a defence under section 3 of the Defamation Act 2011 (truth) which is available to him or any defence of";

(b) in subsection (5) for "the defence of justification" substitute "a defence under section 3 of the Defamation Act 2011 (truth)";

(c) in subsection (8)(c) for "the defence of justification" substitute "a defence under section 3 of the Defamation Act 2011".

4 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that Conditions 1, 2 and 3 are met.

(2) Condition 1 is that the statement complained of is a statement of opinion.

(3) Condition 2 is that the opinion is on a matter of public interest.

(4) Condition 3 is that an honest person could have held the opinion on the basis of—

(a) a fact which existed at the time the statement complained of was published;

(b) a privileged statement which was published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

5 Privilege

(1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

"(3) This section applies to—

(a) any court in the United Kingdom,

(b) any court established under the law of a country or territory outside the United Kingdom,

(c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) "court" includes any tribunal or body exercising the judicial power of the State."

(2) Schedule 1 to that Act (qualified privilege) is amended as follows.

(3) For paragraphs 9 and 10 substitute—

"9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature or government anywhere in the world;

(b) an authority anywhere in the world performing governmental functions;

(c) an international organisation or international conference.

(2) In this paragraph "governmental functions" includes police functions.

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court."

(4) In paragraph 12(1) (report of proceedings at public meetings) for "in a member State" substitute "anywhere in the world".

(5) In paragraph 13 (report of proceedings at meetings of public company)—

(a) in sub-paragraph (1), for "UK public company" substitute "company which is a quoted company within the meaning of section 385(2) of the Companies Act 2006 (a "quoted company")";

(b) for sub-paragraphs (2) to (5) substitute—

"(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a quoted company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a quoted company which relates to the appointment, resignation, retirement or dismissal of directors of the company."

(6) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for "in the United Kingdom or another member State" substitute "anywhere in the world".

(7) After paragraph 14 insert—

"14A A fair and accurate—

(a) report of proceedings of a scientific or academic conference, or

(b) copy of, extract from or summary of matter published by such a conference."

(8) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

"15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament."

(9) For paragraphs 16 and 17 (general provision) substitute—

"16 In this Schedule—

"court" includes any tribunal or body exercising the judicial power of the State;

"international conference" means a conference attended by representatives of two or more governments;

"international organisation" means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;

"legislature" includes a local legislature; and

"member State" includes any European dependent territory of a member State."

Single publication rule

6 Single publication rule

(1) This section applies if a person—

(a) publishes a statement to the public ("the first publication"), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) "publication to the public" includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

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

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies—

(a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and

(b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

Jurisdiction

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

(1) This section applies to an action for defamation against a person who is not domiciled—

(a) in the United Kingdom;

(b) in another Member State; or

(c) in a state which is for the time being a contracting party to the Lugano Convention.

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

(3) For the purposes of this section—

(a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(4) In this section—

"the Brussels Regulation" means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended

from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L229 16.11.2005 at p 62);

"the Lugano Convention" means the Convention on judgments and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Ireland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

Trial by jury

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

(1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen's Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit "libel, slander,".

(2) In section 66(3) of the County Courts Act 1984 (certain actions in the county court to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit "libel, slander,".

General provisions

9 Meaning of "publish" and "statement"

In this Act—

"publish" and "publication", in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

"statement" means words, pictures, visual images, gestures or any other method of signifying meaning.

10 Short title, commencement and extent

(1) This Act may be cited as the Defamation Act 2011.

(2) The provisions of this Act, apart from this section, come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to England and Wales only.

Annex B – Explanatory Notes

DEFAMATION BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Defamation Bill as published in draft on 15 March 2011. They have been provided by the Ministry of Justice in order to assist the reader of the draft Bill and to help inform debate on it. They do not form part of the draft Bill and have not been endorsed by Parliament. References to “the Bill” in these explanatory notes are to the draft Bill.

2. The Notes are to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a clause or part of a clause does not seem to require any explanation or comment, none is given.

OVERVIEW

3. The draft Defamation Bill will reform aspects of the law of defamation. The Bill is made up of 10 clauses.

TERRITORIAL EXTENT AND APPLICATION

4. The Bill extends to England and Wales only. It does not contain provisions which fall within the legislative competence of the National Assembly for Wales and so a Legislative Consent Motion will not be necessary; neither does it affect the competence of the Welsh Ministers.

5. The subject matter of this Bill is devolved in relation to Scotland and Northern Ireland. Clauses 3, 4 and 5 amend in relation to England and Wales provisions in the Defamation Act 1952 and the Defamation Act 1996 which also extend to Scotland and Northern Ireland.

COMMENTARY ON CLAUSES

Clause 1: Substantial harm

6. This clause provides that a statement is not defamatory unless its publication has caused or is likely to cause substantial harm to the reputation of the claimant. The provision extends to situations where publication is likely to cause substantial harm in order to cover situations where the harm has not yet occurred at the time the action is commenced.

7. The clause builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is *Thornton v Telegraph Media Group Ltd*[34] in which an earlier House of Lords decision in *Sim v Stretch*[35] was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In *Jameel v Dow Jones & Co*[36] it was established that there needs to be a real and substantial tort.

Clause 2: Responsible publication on matter of public interest

8. This clause creates a new statutory defence to an action for defamation of responsible publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers*[37]. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of is, or forms part of, a statement on a matter of public interest and that he or she acted responsibly in publishing the statement.

9. In relation to the first limb of this test, the clause does not attempt to define what is meant by "the public interest". This is a concept which is well-established in the English common law and, in view of the very wide range of matters which are of public interest, attempting to define it in statute would not be straightforward. It is made clear that the defence applies if the statement complained of "is, *or forms part of*, a statement on a matter of public interest" to ensure that either the words complained of may be on

[34] [2010] EWHC 1414 (QB)
[35] [1936] 2 All ER 1237
[36] [2005] EWCA Civ 75
[37] [2001] 2 AC 127

a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

10. In relation to the second limb, *subsection (2)* sets out a non-exhaustive list of matters to which the court may have regard in determining whether a defendant acted responsibly in publishing a statement. These are broadly based on the factors established by the House of Lords[38] in *Reynolds* and subsequent case law[39]. However, the clause seeks to address particular problems such as lack of real clarity as to the scope of the defence. For example, reference is included at *subsection (2)(a)* to "the nature of the publication and its context" to reflect the flexible way in which the clause is to be applied and the need to bear in mind the circumstances in which the publisher was operating (e.g. the context of a national newspaper is likely to be different from the context of a non-governmental organisation or scientific journal).

11. The factors listed at *subsection (2)* are not intended to be interpreted as a checklist or set of hurdles for defendants to overcome, and the draft Bill adopts the approach of setting them out in an illustrative and non-exhaustive way for the courts to consider as appropriate within the overall circumstances of each case.

12. *Subsection (3)* has the effect of ensuring that a defendant will be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person. This is intended to encapsulate the core of the law in relation to the "reportage" doctrine (which has been described by the courts as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[40]). In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture.

13. Clause 2 covers statements of fact and opinion (including inferences).

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[38] Now the Supreme Court
[39] In particular, *Jameel v Wall Street Journal* [2006] UKHL 44
[40] Per Simon Brown in *Al-Fagih* [2001] All ER (D) 48

Clause 3: Truth

14. This clause replaces the common law defence of justification with a new statutory defence of truth.

15. *Subsection (1)* provides for the new defence to apply where the defendant can show that the imputation conveyed by the statement complained of is substantially true. This subsection reflects the current law as established in the case of *Chase v News Group Newspapers Ltd*[41], where the Court of Appeal indicated that in order for the defence of justification to be available "the defendant does not have to prove that every word he or she published was true. He or she has to establish the "essential" or "substantial" truth of the sting of the libel".

16. There is a long-standing common law rule that it is no defence to an action for defamation for the defendant to prove that he or she was only repeating what someone else had said (known as the "repetition rule"). Subsection (1) focuses on the imputation conveyed by the statement in order to incorporate this rule.

17. In any case where the defence of truth is raised, there will be two issues: i) what imputation (or imputations) are actually conveyed by the statement; and ii) whether the imputation (or imputations) conveyed are substantially true. The defence will apply where the imputation is one of fact.

18. *Subsections (2) and (3)* replace section 5 of the Defamation Act 1952 (the only significant element of the defence of justification which is currently in statute). Their effect is that where the statement complained of contains two or more distinct imputations, the defence does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not materially injure the claimant's reputation. These provisions are intended to have the same effect as those in section 5 of the 1952 Act, but are expressed in more modern terminology to improve their clarity.

19. *Subsection (4)* abolishes the common law defence of justification and repeals section 5 of the 1952 Act. This means that where a defendant

[41] [2002] EWCA Civ 1772 at para 34

wishes to rely on the new statutory defence the court would be required to apply the words used in the statute, not the current case law. In cases where uncertainty arises the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

20. *Subsection (5)* makes consequential amendments to section 8 of the Rehabilitation of Offenders Act 1974 to reflect the new defence. Section 8 of the 1974 Act provides that if a rehabilitated person brings a defamation action based on the publication of a matter imputing that he or she has committed or been convicted of an offence for which there is a spent conviction, other provisions in the Act restricting the evidence admissible in respect of a spent conviction do not restrict the defence of justification (now truth) which is available to the defendant.

Clause 4: Honest opinion

21. This clause replaces the common law defence of fair comment[42] with a new statutory defence of honest opinion.

22. *Subsections (1) to (4)* provide for the defence to apply where the defendant can show that three conditions are met. These are condition 1: that the statement complained of is a statement of opinion; condition 2: that the opinion is on a matter of public interest; and condition 3: that an honest person could have held the opinion on the basis of a fact which existed at the time the statement complained of was published or a privileged statement published before the statement complained of.

23. Condition 1 (in *subsection (2))* is intended to reflect the current law and embraces the requirement established in *Cheng v Tse Wai Chun Paul*[43] that the statement must be recognisable as comment as distinct from an imputation of fact. It is intended to be implicit in this condition that this will mean that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence.

24. Condition 2 (in *subsection (3))*, that the opinion must be on a matter of public interest, has been included because the requirement for the

[42] Recently the Supreme Court in *Spiller v Joseph* [2010] UKSC 53 referred to this as honest comment.
[43] (2000) 10 BHRC 525

comment/opinion to be on a matter of public interest is a well-established element of the current defence of fair comment[44].

25. Condition 3 (in *subsection (4))* aims to simplify the law by providing a clear and straightforward test. It is intended to retain the broad principles of the current law as to the necessary basis for the opinion expressed but avoids the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue, comments made on a social network, a view about a contractual dispute, or a review of a restaurant or play will differ substantially.

26. Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of a fact which existed at the time the statement was published (in *subsection (4)(a))*. The subsection refers to “a fact” so that any relevant fact or facts will be enough. The existing case law on the sufficiency of the factual basis is covered by the requirement that “an honest person” must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it.

27. The second element of condition 3 (in *subsection (4)(b))* is whether an honest person could have formed the opinion on the basis of a statement which is protected by privilege and which was published before the statement complained of. It is intended that this will mean that an honest opinion may be formed on the basis of a report or other statement which is protected by absolute or qualified privilege (for example a report of Parliamentary proceedings).

[44] See *Cheng*.

28. *Subsection (5)* provides for the defence to be defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test. This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.

29. *Subsection (6)* makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). S*ubsection (6)* provides that in these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.

30. *Subsection (7)* formally abolishes the common law defence of fair comment. This means that where a defendant wishes to rely on the new statutory defence of honest opinion the court would be required to apply the words used in the statute, not the current case law. In cases where uncertainty arises the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

31. *Subsection (7)* also repeals section 6 of the 1952 Act. Section 6 provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This provision is no longer necessary in light of the new approach set out in *subsection (4)*. A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.

Clause 5: Privilege

32. This clause amends the provisions contained in the Defamation Act 1996 relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.

33. *Subsection (1)* replaces subsection (3) of section 14 of the 1996 Act, which concerns the absolute privilege applying to fair and accurate contemporaneous reports of court proceedings. Subsection (3) of section 14 currently provides for absolute privilege to apply to fair and accurate

reports of proceedings in public before any court in the UK; the European Court of Justice or any court attached to that court; the European Court of Human Rights; and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. *Subsection (1)* replaces this with a new subsection, which extends the scope of the defence so that it also covers proceedings in 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.

34. *Subsections (2)* to *(8)* make amendments to Part 2 of Schedule 1 to the 1996 Act in a number of areas, with the aim of extending the circumstances in which the defence of qualified privilege is available on the basis that there is a strong public interest element to the type of information concerned. Section 15 of and Schedule 1 to the Defamation Act 1996 currently provide for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.

35. Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. of local authorities) general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).

36. In addition to the protection already offered to fair and accurate copies of or extracts from the different types of publication to which the defence is extended, amendments are made in *subsections (3), (5), (7)* and *(8)* to extend the scope of qualified privilege to cover fair and accurate summaries of the material. For example, *subsection (3)* extends the defence to summaries of notices or other matter issued for the information of the public by a number of governmental bodies, and to summaries of documents made available by the courts.

37. Currently qualified privilege under Part 1 of Schedule 1 extends to fair and accurate reports of proceedings in public of a legislature; before a court; and in a number of other forums anywhere in the world. However, qualified privilege under Part 2 only applies to publications arising in the UK and EU member states. *Subsections (3), (4), (5),* and *(6)* extend the scope of the defence to cover the different types of publication to which the defence extends anywhere in the world. For example, *subsection (4)* does this for reports of proceedings at public meetings, and *subsection (6)* for reports of certain kinds of associations.

38. Currently Part 2 qualified privilege extends only to fair and accurate reports of proceedings at general meetings and documents circulated by UK public companies. *Subsection (5)* extends this to reports relating to public companies elsewhere in the world. It achieves this by extending the provision to "quoted companies" within the meaning of section 385(2) of the Companies Act 2006 with a view to ensuring that broadly the same types of companies are covered by the provision in the UK and abroad.

39. *Subsection (7)* inserts a new paragraph into Schedule 1 to the 1996 Act to extend Part 2 qualified privilege to fair and accurate reports of proceedings of a scientific or academic conference, and to copies, extracts and summaries of matter published by such conferences. It is possible in certain circumstances that Part 2 qualified privilege may already apply to academic and scientific conferences (either where they fall within the description of a public meeting in paragraph 12, or where findings or decisions are published by a scientific or academic association (paragraph 14)). *Subsection (7)* will however, help to ensure that there is not a gap.

40. *Subsection (9)* substitutes new general provisions in Schedule 1 to reflect the changes that have been made to the substance of the Schedule. It also removes provisions allowing for orders to be made by

the Lord Chancellor identifying "corresponding proceedings" for the purposes of paragraph 11(3) of the Schedule, and "corresponding meetings and documents" for the purposes of paragraph 13(5). The provision relating to paragraph 13(5) no longer has any application in the light of the amendments made to that paragraph by *subsection (5)*, while the power in relation to paragraph 11(3) has never been exercised and the amendment leaves the provision to take its natural meaning.

Clause 6: Single publication rule

41. This clause introduces 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 the first publication of that material to the public or a section of the public. This replaces 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 "multiple publication rule").

42. *Subsection (1)* indicates that the provisions apply where a person publishes a statement to the public (defined in *subsection (2)* as including publication to a section of the public), and subsequently publishes that statement or a statement which is substantially the same. The aim is to ensure that the provisions catch publications which have the same content or content which has changed very little so that the essence of the defamatory statement is not substantially different from that contained in the earlier publication. Publication to the public has been selected as the trigger point because it is from this point on that problems are generally encountered with internet publications and in order to stop the new provision catching limited publications leading up to publication to the public at large. The definition in *subsection (2)* is intended to ensure that publications to a limited number of people are covered (for example where a blog has a small group of subscribers or followers).

43. *Subsection (3)* has the effect of ensuring that the limitation period in relation to any cause of action brought in respect of a subsequent publication within scope of the clause is treated as having started to run on the date of the first publication.

44. *Subsection (4)* provides that the single publication rule does not apply where the manner of the subsequent publication of the statement is

"materially different" from the manner of the first publication. *Subsection (5)* provides that in deciding this issue the matters to which the court may have regard include the level of prominence given to the statement and the extent of the subsequent publication. A possible example of this could be where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.

45. *Subsection (6)* confirms that the section does not affect the court's discretion under section 32A of the Limitation Act 1980 to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. It also ensures that the reference in subsection (1)(a) of section 32A to the operation of section 4A of the 1980 Act (section 4A concerns the time limit applicable for defamation actions) is interpreted as a reference to the operation of section 4A together with clause 6. Section 32A provides a broad discretion which requires the court to have regard to all the circumstances of the case, and it is envisaged that this will provide a safeguard against injustice in relation to the application of any limitation issue arising under this clause.

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

46. This clause aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction). *Subsection (1)* focuses the provision on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention. This is in order to avoid conflict with European jurisdictional rules (in particular the Brussels Regulation on jurisdictional matters[45]). *Subsection (3)* describes the meaning of "domicile" for these purposes and *subsection (4)* provides the full definitions of the Brussels Regulation and the Lugano Convention.

[45] Council Regulation (EC) 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters.

47. *Subsection (2)* provides that a court does not have jurisdiction to hear and determine an action to which the clause applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. This approach is intended to ensure that, in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in this jurisdiction only. This would mean that, for example, if a statement was published 100,000 times in Australia and only 5,000 times in England that would be a good basis on which to conclude that the most appropriate jurisdiction in which to bring an action in respect of the statement was Australia rather than England. There will however be a range of factors to take into account including, for example, whether there is reason to think that the claimant would not receive a fair hearing elsewhere.

48. It is the intention that this new rule will be capable of being applied within the existing procedural framework for defamation claims. For example, if a person applied under CPR rule 6.36 for permission to serve a claim form out of the jurisdiction, the court would refuse to exercise its discretion to grant permission if it thought that it would not have jurisdiction to hear the claim as a result of this clause. If permission to serve a claim form out of the jurisdiction was granted under rule 6.36 and the claim form was served, it would be open to the defendant to make an application under CPR rule 11(1)(a) disputing the court's jurisdiction relying on this clause and the court, if satisfied that it has no jurisdiction to hear the claim would make an order to set aside the claim form and service of it.

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

49. This clause removes the presumption in favour of jury trial in defamation cases.

50. Currently section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 provide for a right to trial with a jury in certain civil proceedings (namely malicious prosecution, false imprisonment, fraud, libel and slander) on the application of any party, "unless the court considers that the trial requires any prolonged examination of documents

or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

51. *Subsection (1)* and *subsection (2)* respectively amend the 1981 and 1984 Acts to remove libel and slander from the list of proceedings where a right to jury trial exists. The result will be that defamation cases will be tried without a jury unless a court orders otherwise.

Clause 9: meaning of "publish" and "statement"

52. This clause sets out definitions of the terms "publish", "publication" and "statement" for the purposes of the Bill. Broad definitions are used to ensure that the provisions of the Bill cover a wide range of publications in any medium, reflecting the current law.

FINANCIAL EFFECTS OF THE BILL

53. Implementation of the provisions of the Bill is not expected to impose any significant additional burden on the Consolidated Fund or the National Loans Fund or to increase significantly any other public expenditure.

EFFECTS OF THE BILL ON PUBLIC MANPOWER

54. No significant change in the workload of any Government department or agency is anticipated on implementation of this Bill.

SUMMARY OF THE IMPACT ASSESSMENT

55. The impact assessment attached to the consultation paper on the draft Bill indicates that those likely to be particularly affected by the proposals are potential claimants in defamation proceedings; potential defendants in defamation proceedings; and members of the legal profession working in the area.

56. The impact assessment analyses the detailed costs and benefits of implementing any combination of the proposals included in both the Bill and the accompanying consultation paper. Many of the proposals cannot be monetised, and therefore the impact assessment focuses on the non-monetised costs and benefits and considers how the proposals impact differently on particular groups of society and on any resulting changes in

equity and fairness. At this stage the indications are that the options analysed in the impact assessment are likely to be largely cost neutral.

COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

57. There are several aspects of the Convention which are relevant to the provisions in this Bill, most notably Article 10 ECHR and Article 8 ECHR.

58. Article 10(1) protects the right to freedom of expression. The right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.

59. Defamation law is relevant to anyone expressing opinions, reporting matters or otherwise imparting information, some of which may be defamatory of others. Freedom of expression, as secured by Article 10(1) is "applicable not only to "ideas" and "information" that are favourably received or regarded as inoffensive … but also to those that offend, shock or disturb." This is necessary in a democratic society but is subject to respect for the rights of others.[46]

60. The Article 10 right is qualified by the exceptions and limitations contained in Article 10(2). This provides that the exercise of those freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, including (amongst other things) for the protection of reputation.

61. Different forms of expression attract different levels of protection under the Convention. For example, political speech is of the "highest importance" and "restrictions on this freedom need to be examined rigorously by all concerned."[47]

62. Article 8 of the ECHR provides that everyone has a right to respect for his private life, his home and his correspondence. This right is also qualified. Interference is permitted if it is in accordance with the law and

[46] *Lingens v Austria* at [40]
[47] Lord Nicholls in *R v BBC, ex p Pro-Life Alliance* [2003] UKHL 23 at [6]. See also *Lingens v Austria* (Application no. 9815/82) at [42].

is necessary in a democratic society, including (amongst other things) for the protection of the rights and freedoms of others.

63. There has been some debate, arising from recent case law of the European Court of Human Rights (the European Court), in particular *Karako v Hungary*[48], as to whether protection of reputation is something which is within the scope of Article 8. The Supreme Court has recently considered this issue in *Ahmed and others*[49] however, and concluded that it is quite clear that the protection of reputation is a right which, as an element of private life, falls within the scope of the Article.[50] In *Pfeifer v Austria*[51] for example, the European Court said that "a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity…".[52]

64. Given that this Bill will apply in a very wide range of contexts, we have proceeded on the basis that a fair balance needs to be struck between both Article 10 and Article 8 rights. In *Von Hannover v Germany*[53] the European Court of Human Rights held there is a need to ensure such a balance where both Articles 8 and 10 are engaged. [54]

65. Rights under Articles 6 and Article 13 are also relevant.[55] Article 6(1) guarantees, in the determination of civil rights and obligations, a right to a fair and public hearing by an independent and impartial tribunal. Actual and potential claimants in defamation actions will fall within the scope of Article 6. Article 13 ECHR guarantees the right to an effective remedy where Convention freedoms have been violated.

66. It is considered that this Bill allows due flexibility for courts, when considering cases, to ensure that Convention rights are respected according to the extent to which the relevant rights are in play.

67. It is considered that this Bill is compatible with Convention rights.

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[48] Application no 39311/05.
[49] [2010] UKSC 1
[50] [39]
[51] (2007) 48 EHRR 175
[52] [35]
[53] (2005) 40 EHRR 1
[54] In *Ahmed* at [43] the Supreme Court restates the well established principle that where both Articles 8 and 10 are in play the court must weigh the competing rights.
[55] However, Article 13 has not been incorporated into English law by the Human Rights Act 1998.

COMMENCEMENT

68. The Bill will come into force on such day as the Secretary of State may specify by order (clause 10(2)).

Annex C – Private Member's Bill introduced by Lord Lester of Herne Hill - Clause 9: responsibility for publication

(1) Any defendant in an action for defamation has a defence if the defendant shows that the defendant's only involvement in the publication of the words or matters complained of—

(a) is as a facilitator; or

(b) is as a broadcaster of a live programme in circumstances in which it was not reasonably foreseeable that those words or matters would be published.

(2) Any defendant in an action for defamation, apart from a primary publisher, has a defence unless the claimant shows that—

(a) the notice requirements specified in subsection (3) have been complied with;

(b) the notice period specified in subsection (4) has expired; and

(c) the words or matters complained of have not been removed from the publication.

(3) The notice requirements are that the substance of the claimant's complaint must be communicated in writing to the defendant, specifying—

(a) the words or matters complained of and the person (or persons) to whom they relate;

(b) the publication that contains those words or matters;

(c) why the claimant considers the words or matters to be defamatory;

(d) the details of any matters relied on in the publication which the claimant considers to be untrue; and

(e) why the claimant considers the words or matters to be harmful in the circumstances in which they were published.

(4) The notice period is—

(a) the period of 14 days starting with the date of receipt by the defendant of all the information required by subsection (3); or

(b) such other period as the court may specify (whether of its own motion or on an application by any party to the action).

(5) Employees or agents of a primary publisher, or other person who publishes the words or matters complained of, are in the same position as their principal to the extent that they are responsible for the content of what is published or the decision to publish it.

(6) In this section—

"facilitator" means a person who is concerned only with the transmission or storage of the content of the publication and has no other influence or control over it; and

"primary publisher" means an author, an editor or a person who exercises effective control of an author or editor.

(7) For the purposes of the definition of "primary publisher" in subsection (6)—

"author" means—

(a) a person who originates the words or matters complained of; but

(b) does not include a person who does not intend that they be published; and

"editor", in relation to a publication, means a person with editorial or equivalent responsibility for the content of the publication or the decision to publish it.

(8) This section does not apply to any cause of action which arose before the section came into force.

Annex D - New Procedure for Defamation Cases

The proposal is to create a new High Court procedure for defamation cases to be channelled through a process whereby key issues can be determined at as early a stage in the proceedings as possible.

Core elements in the new procedure would be as follows:

- Key preliminary issues would include:
  - Whether the claim satisfies the new substantial harm test where this is disputed
  - What the actual meaning of the words complained of is and whether that meaning is defamatory
  - Whether the words complained of are a statement of fact or an opinion
- The procedure would be automatic in all cases where any of these issues needed to be resolved.
- Other issues which could potentially be determined if relevant are:
  - Whether the publication is on a matter of public interest
  - Whether the publication falls within the categories of publication in Schedule 1 of the Defamation Act 1996 for which the defence of qualified privilege is available
  - Consideration of costs budgeting in appropriate cases (depending on the outcome of the costs budgeting pilot which is currently taking place)
- For the procedure to operate effectively, it would be necessary for the judge to consider at an early stage whether the case (if it proceeds) would be suitable for jury trial and to decide that it should be for a judge alone
- The procedure would be court-based, and hearings would need to take place in the High Court in view of the need for judicial specialism/expertise. Because of the issues involved, an oral hearing would normally be required.
- The procedure would need to be fitted into the overall process at as early a stage as possible once proceedings have been issued to avoid unnecessary delays in the preliminary issues being decided.

- There would need to be a link between the procedure and the summary disposal procedure (if retained), so that the court could dispose of the case if satisfied on deciding the preliminary issues that there was no prospect of the claim succeeding, or alternatively of the defendant successfully defending it.

- There would also need to be a link to existing case management provisions, so that the court could give case management directions for the future conduct of the case if appropriate (as is the case under CPR 24.6 and Para 10 of the accompanying Practice Direction in relation to the summary procedure).

- There would need to be provision for appeal to the Court of Appeal against any decision reached by the High Court on these preliminary issues.

- Costs could be treated as costs in the cause if the claim is proceeding, or the powers on costs under the summary disposal procedure in para 9 of the Practice Direction to CPR Part 24 could be exercised if the case is disposed of.

- As the procedure would only deal with preliminary issues, there would be no powers of redress beyond those available under the summary disposal procedure (if this is appropriate).

- There would be no formal requirement for mediation, but this would be available as an option for the parties to use if they wished to agree a settlement in the light of the court's preliminary rulings.

- Consideration could be given to strengthening the Pre-Action Protocol on Defamation (for example to require the parties to provide more information on the meaning(s) which they attribute to the words complained of) in order to provide as much clarity as possible and enable the parties to formulate arguments to be used in relation to preliminary issues under the new procedure.

Annex E - Impact Assessment

The Government recognises the importance of assessing the impact of these proposals, and has published the attached Impact Assessment which analyses the costs and benefits of implementing any combination of the proposals included in both the Bill and the consultation paper. The Government is continuing to gather data on the recommendations during the course of the consultation and is seeking the assistance of those responding in doing so. This Impact Assessment will be updated in light of any evidence received in response to this consultation, in order that a more detailed Impact Assessment can be developed alongside any legislative proposals being taken forward.

Q41. Do you have any comments on the costs and benefits analysis as set out in the Impact Assessment?

Q42. Do you have any information that you believe would be useful in assisting us in developing a more detailed Impact Assessment?

Title: **Draft Defamation Bill** **Lead department or agency:** Ministry of Justice **Other departments or agencies:**	Impact Assessment (IA) **IA No:** MoJ 072 **Date:** 09/02/2011 **Stage:** Development/Options **Source of intervention:** Domestic **Type of measure:** Other **Contact for enquiries:** Paul Norris - 0203 334 3220

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

Significant concerns have been raised about the detrimental effects that the law on defamation is having on freedom of expression, particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism, and the extent to which England and Wales have become a magnet for libel claimants from other jurisdictions. These factors have led to many people arguing that a "chilling effect" exists on freedom of expression in England and Wales.

What are the policy objectives and the intended effects?

The Government's core aim is to ensure that responsible journalism, academic and scientific debate, and the valuable work of non-governmental organisations are properly protected and that defamation law enables a fair balance to be struck between freedom of expression and the protection of reputation. We want to make sure that the right balance is achieved, so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech is not unjustifiably impeded.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

Option 1 (reforms to defences): Any combination of the reforms to defences set out in the draft Bill and the further proposal in the consultation paper concerning responsibility for publication on the internet.
Option 2 (reforms to the ability to claim): Any combination of the reforms to the ability to claim in the draft Bill and possible action on the two further issues raised in the consultation paper.
Option 3 (reforms to legal processes): Any combination of the reform to the process of hearing defamation cases included in the draft Bill and the two further proposals in the consultation paper
Option 4: Any combination of some or all of the reforms included in the draft Bill and the issues raised in the consultation paper.

A preferred Option will be developed following consultation and pre-legislative scrutiny.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?	It will be reviewed post consultation and pre-legislative scrutiny
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes

SELECT SIGNATORY Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: ..... Date: 14 February 2011 .....

Summary: Analysis and Evidence

Policy Option 1

Description: Improved defences against defamation claims

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Transitional costs for claimants and defendants as new legal provisions bed down (including legal advice costs and litigation)
Costs to claimants from reduced protection from reputational damage
Possible costs relating to reduced legal flexibility

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Gains to defendants from greater freedom of expression
Average case costs might be lower due to increased legal certainty and clarity
Gains to equity and fairness from better balance between freedom of expression and right to reputation
Gains to society from improved underlying behaviour stemming from increased transparency
Gains to society from increased exchange of information and views

Key assumptions/sensitivities/risks **Discount rate (%)**

Assume court fees adjust to any change in court costs to leave court position financially neutral
Overall impact on judicial system efficiency is unclear
Overall impact on court case volumes is unclear
Impact on legal services profession depends upon ability to adjust to changing pattern of demand
Assume no redistributional gains from shifting balance away from claimants (who may be wealthy individuals, businesses) towards defendants (who may be the media, academic and scientific bodies)

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB:	**AB savings:**	**Net:**	**Policy cost savings:**	Yes/No

Summary: Analysis and Evidence

Policy Option 2

Description: Restrictions on ability to make defamation claims

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Transitional costs for claimants and defendants as new legal provisions bed down (including legal advice costs and litigation)
Costs to claimants from reduced protection from reputational damage as some cases could not be brought in future
Possible reduced equity and fairness due to reduced access to the court

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Gains to defendants from greater freedom of expression
Savings from reduced overall volume of cases (outweighing cost increases from more preliminary hearings)
Gains to equity and fairness from better balance between freedom of expression and right to reputation and from addressing 'equality of arms' issues, i.e. financial imbalance between claimant and defendant
Gains to society from improved underlying behaviour stemming from increased transparency
Gains to society from increased exchange of information and views

Key assumptions/sensitivities/risks **Discount rate (%)**

Assume court fees adjust to any change in court costs to leave court position financially neutral
Overall impact on judicial system efficiency is unclear
Impact on legal services profession depends upon ability to adjust to changing pattern of demand
Assume no redistributional gains from shifting balance away from claimants (who may be wealthy individuals, businesses) towards defendants (who may be the media, academic and scientific bodies)

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB:	**AB savings:**	**Net:**	**Policy cost savings:**	Yes/No

Summary: Analysis and Evidence

Policy Option 3

Description: Presumption of trial by judge not trial by jury

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Transitional costs (e.g. familiarisation) from new procedures bedding down
Some people may prefer trial by jury instead of trial by judge and might not favour the move to trial by judge
Possible costs relating to reduced legal flexibility

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Some people may prefer trial by judge instead of trial by jury and might favour the move to trial by judge
Average case costs are likely to be lower
Improved consistency and certainty and expertise in application of law
Improved understanding and certainty from publication of more judgments

Key assumptions/sensitivities/risks **Discount rate (%)**

Assume court fees adjust to any change in court costs to leave court position financially neutral
Overall impact on judicial system efficiency is unclear but efficiency may rise if anything
Overall impact on court case volumes is unclear but demand may rise due to lower costs
Impact on legal services profession depends upon ability to adjust to changing pattern of demand
No distributional impacts are anticipated

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB:	**AB savings:**	**Net:**	**Policy cost savings:**	Yes/No

Summary: Analysis and Evidence

Policy Option 4

Description: Implement all reforms

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	**High:** Optional	**Best Estimate:**

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

Transitional costs for claimants and defendants as new legal provisions bed down
Costs to claimants from reduced protection from reputational damage
Possible costs relating to reduced legal flexibility

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	**Optional**
High	Optional		Optional	**Optional**
Best Estimate				

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Gains to defendants from greater freedom of expression
Average case costs might be lower and overall case volumes might if anything be lower
Gains to equity and fairness from better balance between freedom of expression and right to privacy
Gains to society from improved underlying behaviour stemming from increased transparency
Gains to society from increased exchange of information and views

Key assumptions/sensitivities/risks **Discount rate (%)**

Assume court fees adjust to any change in court costs to leave court position financially neutral
Overall impact on judicial system efficiency is unclear but efficiency may rise if anything
Impact on legal services profession depends upon ability to adjust to changing pattern of demand
Assume no redistributional gains from shifting balance away from claimants (who may be well known individuals, businesses) towards defendants (who may be the media, academic and scientific bodies)

Impact on admin burden (AB) (£m):			Impact on policy cost savings (£m):	In scope
New AB:	**AB savings:**	**Net:**	**Policy cost savings:**	Yes/No

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			Options		
From what date will the policy be implemented?			01/01/2010		
Which organisation(s) will enforce the policy?					
What is the annual change in enforcement cost (£m)?					
Does enforcement comply with Hampton principles?			Yes/No		
Does implementation go beyond minimum EU requirements?			Yes/No		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:**		**Non-traded:**
Does the proposal have an impact on competition?			Yes/No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:**		**Benefits:**
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	**Micro**	**< 20**	**Small**	**Medium**	**Large**
Are any of these organisations exempt?	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No

Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	Yes/No	
Economic impacts		
Competition Competition Assessment Impact Test guidance	Yes/No	
Small firms Small Firms Impact Test guidance	Yes/No	
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	Yes/No	
Wider environmental issues Wider Environmental Issues Impact Test guidance	Yes/No	
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	Yes/No	
Human rights Human Rights Impact Test guidance	Yes/No	
Justice system Justice Impact Test guidance	Yes/No	
Rural proofing Rural Proofing Impact Test guidance	Yes/No	
Sustainable development Sustainable Development Impact Test guidance	Yes/No	

[1] Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	
2	
3	
4	

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Evidence Base (for summary sheets)

Introduction

1. The civil law on defamation has developed through the common law over hundreds of years, periodically being supplemented by statute, most recently by the Defamation Acts of 1952 and 1996.

2. Defamation is the collective term for libel and slander, the torts which protect a person's reputation. Defamation occurs when a person communicates material to a third party, in words or any other form, containing an imputation against the reputation of the claimant. Material is libellous where it is communicated in a permanent form, or broadcast, or forms part of a theatrical performance. If the material is spoken or takes some other transient form, then it is classed as slander.

3. Whether material is defamatory is a matter for the courts to determine. The main tests established by the courts in deciding whether material is defamatory are; (1) would the imputation "tend to lower the plaintiff [claimant] in the estimation of right-thinking members of society generally"; (2) would the words, without justification or lawful excuse, tend to expose the claimant to "hatred, contempt, or ridicule"; or (3) would the imputation tend to make the claimant "be shunned and avoided and that without any moral discredit on [the claimant's] part."

4. The burden of proving that the material is defamatory lies with the claimant. However, the claimant is not required to show that the material is false; there is a rebuttable presumption that this is the case and it is for the defendant to prove otherwise. In England and Wales, for an action to be successful, not only does the meaning of the material complained of have to be defamatory, the claimant must also show that it refers to him or her and that it has been communicated to a third party.

5. Under English law, each communication of a defamatory statement is a separate publication and gives rise to a separate cause of action (the 'multiple publication rule').

6. A defendant will be liable if the material meets the criteria above, and the defendant is the primary publisher of the material and does not succeed in establishing that any of the available defences are applicable;

   - justification i.e. that the material is true;
   - that the words were fair comment on a matter of public interest;
   - that the publication was absolutely privileged e.g. statements made in Parliamentary and court proceedings;
   - that the publication was made in good faith and without malice on a privileged occasion (forms of qualified privilege);
   - that the publication was on a matter which was the subject of legitimate public interest and the defendant complied with the standards of 'responsible journalism' (*Reynolds* privilege);
   - the defendant did not know and had no reason to believe that the words were false and defamatory of the claimant and the defendant has made an offer of amends for the purposes of section 2 of the Defamation Act 1996 which has not been accepted by the claimant.

7. There are also a number of general tort defences which are available (e.g. that the publication was authorised by the claimant or took place with his or her consent).

8. There are also defences applying to those who have a more limited role in publication of defamatory material. At common law there is a special defence applying to distributors who succeed in showing (1) that he or she did not know that the publication contained the libel complained of (2) that he or she did not know that the publication was of a character likely to contain a libel; and (3) that such want of knowledge was not due to negligence on the distributor's part. Section 1 of the Defamation Act 1996 also provides that a defendant will not be liable where he or she:

   - was not the author, editor or publisher of the statement complained of
   - took reasonable care in relation to its publication, and
   - did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

9. The primary remedy of the common law is damages. The court also has jurisdiction to grant an injunction restraining any further or future publication of the words complained of (or similar defamatory matter). Cases can be dealt with under the summary disposal procedure in sections 8 and 9 of the 1996 Act where the court is satisfied that one of the other party's case has no realistic prospect of success, and the court has power in these cases to award damages not exceeding £10,000 and other remedies such as the publication of a correction and apology.

10. Currently it is possible for defamation cases with a tenuous link to England and Wales to be brought in this jurisdiction. For example, a person who is based overseas may be able to bring a defamation action in a court in England and Wales against a defendant who is also based overseas when the level of publication in England and Wales has been small in comparison with elsewhere. This is often referred to as "libel tourism." Cases involving defendants who are domiciled in EU Member States are governed by European rules (in particular the Brussels I Regulation on jurisdictional matters). The basic principle contained in Article 2 of Brussels I is that jurisdiction is to be exercised by the Member State in which the defendant is domiciled (so where the defendant is domiciled in England and Wales, the court has no discretion to refuse jurisdiction). Article 5(3) of Brussels I also enables a person domiciled in another Member State to be sued in matters relating to tort in the courts where the harmful event occurred (the act of publication of defamatory material in this jurisdiction is a harmful event). However, significant concerns have been raised in relation to cases that fall outside of the European legislation.

11. Many defamation cases are funded through 'Conditional Fee Arrangements' (CFAs), also known as 'no win no fee' arrangements. CFAs tend to be used more often by claimants rather than by defendants, although this is not always the case. In simple terms, under a CFA the client is not liable to pay their lawyer's costs if they lose the case. Clients also often take out 'after the event' (ATE) insurance which covers them against the costs of the other party. As such CFA clients may not be exposed to any costs from pursuing a case and losing it.

12. If successful the CFA client would secure damages from the losing party and the losing party would also be liable to pay the CFA lawyer's costs, plus a 'success fee' which may be up to 100% of the CFA lawyer's base costs, plus the ATE insurance premium. In practice these costs can be very significant, and greater than the size of damages involved, and can have a significant bearing on the inclination to settle a case.

Problem under consideration

13. Significant concerns have been raised about the detrimental effects that the law on defamation is having on freedom of expression, particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism, and the extent to which England and Wales have become a magnet for libel claimants from other jurisdictions. These factors have led to many people arguing that a "chilling effect" exists on freedom of expression in England and Wales.

14. The Government's Coalition Agreement gave a commitment to reviewing the law of defamation, and on 9 July 2010 the Government announced its intention to publish a draft Defamation Bill for consultation and pre-legislative scrutiny. The proposals in this Impact Assessment relate to the full range of measures that have been included in the draft Bill.

15. Problems in part relate to the way cases are funded and to the significant legal costs involved, exposure to which can also have an impact on the inclination to pursue cases and to defend them. Lord Chief Justice Jackson's review of civil litigation costs considered these funding issues, and the Ministry of Justice has issued a separate consultation[2] on related reforms, which are likely to have an impact on the problem under consideration. This Impact Assessment does not consider these funding issues.

Policy objective

16. The Government's core aim is to ensure that responsible journalism, academic and scientific debate, and the valuable work of non-governmental organisations are properly protected and that a fair balance is struck between freedom of expression and the protection of reputation. We want to

[2] ://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf

make sure that the right balance is achieved, so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech is not unjustifiably impeded. The proposals included within the draft Bill, and considered in this Impact Assessment are aimed at achieving this objective. There are also a number of proposals included in the consultation paper that do not feature in the draft Bill. These proposals are at a less developed stage, but their effects are nonetheless considered in this Impact Assessment.

Economic rationale for intervention

17. The conventional economic approach to Government intervention is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate, e.g. monopolies overcharging consumers, or if there are strong enough failures in existing government interventions, e.g. outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity or fairness and for redistributional reasons (e.g. reallocating resources from one group in society to another).

18. In this instance one rationale for intervention may be for equity and fairness reasons. In particular, in some respects, the balance of the law on defamation may have moved too far towards protection of reputation and too far away from freedom of expression. Rebalancing the law may improve equity and fairness from society's perspective.

19. There would also be redistributional implications from rebalancing the law, especially if the impact is that one group of bodies (e.g. journalists, academics, scientists) might gain at the expense of another group (e.g. persons with an international reputation, corporations). Another rationale for intervention may be if society places a positive value on these redistributional impacts.

20. The proposals might also be associated with gains in productive efficiency. This may occur if cases are resolved more quickly or resolved with the use of fewer resources, with case outcomes remaining the same.

21. Other resource efficiency gains might stem from other reforms. Efficiency might be improved if a better balance was struck between legal certainty and legal flexibility. Resource efficiency may improve if claims which involve significant resources to settle, but which relate to only very minor harm to reputation, are not pursued. An overall resource analysis should also consider the transitional costs associated with changing the current framework.

22. In summary the economic rationale for the reforms would relate to how the redistributional impacts, the impacts on equity/fairness, and the resource efficiency impacts all weigh up against each other. Some of these impacts might not be directly comparable, especially if they cannot be monetised, hence this overall assessment may be a matter of judgement.

23. The Government is aware of the wide range of views held on the effectiveness of the current defamation laws. As a result we considered that in order to give the necessary consideration to all of the issues that reform of the law in this area raises it is appropriate to publish a Bill in draft form for consultation and pre-legislative scrutiny in the first session, with a view to a substantive Bill as soon as Parliamentary time allows. This approach, rather than introducing a substantive Bill in the first session, should ensure that any proposals that are eventually taken forward have been fully debated and are proportionate and measured.

Proposals

24. This Impact Assessment considers the effect of the proposals included in the draft Defamation Bill, and those included in the accompanying consultation document. There are eight policy areas where proposals have been included in the draft Bill and a further five that do not feature in the draft Bill, but are being consulted on. These are summarised below. The reforms have been grouped into three categories in order to simplify the analysis. The individual proposals in each category might not necessarily all be adopted, nor indeed might each category.

Group 1: Reforms to defences

25. These reforms in effect clarify the boundaries of the defences to provide clearer and more robust defences for persons or bodies accused of defamation.

(i) A new statutory defence on matters of public interest

Introduce a new statutory defence which would build on the principles established by the common law defence in *Reynolds v Times Newspapers* (which provides the defendant with a defence where the publication was on a matter which was the subject of legitimate public interest and the defendant complied with the standards of 'responsible journalism'). This would be expressed in more flexible terms, and would clearly be widely applicable to forms of publication beyond mainstream journalism.

This reform would also provide a defence for "reportage" situations by making clear that a defendant need not verify information presented where this is an account of a dispute between two or more parties, which is on a matter of legitimate public interest, and is presented in a neutral and unembellished way.

(ii) A new statutory defence of "honest opinion"

Introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of "fair comment" (very recently renamed "honest comment" by the Supreme Court). The defence would be renamed "honest opinion" and may have a wider scope than the current common law defence. The common law defence would be abolished but existing case law could be used to interpret the new defence where relevant.

(iii) A new statutory defence of "truth"

Introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of "justification". The defence would be renamed "truth" and may have a wider scope than the current common law defence. As with (ii), the common law defence would be abolished but existing case law could be used to interpret the new defence where relevant.

(iv) Privilege

Update and extend the circumstances in which the defences of qualified privilege and absolute privilege are available in order to improve the protection given to NGOs and others.

26. There is one further proposal that does not appear in the draft Bill, but is included in the consultation paper and also relates to a reform of the defences available in defamation cases.

(v) Responsibility for publication on the internet

It is proposed that measures could be taken to change the law to provide greater protection against liability to internet service providers and other secondary publishers, particularly in relation to online publishers who are responsible for 'hosting' third party content.

Group 2: Reforms to the ability to claim

27. These reforms in effect reform the circumstances in which a defamation claim may be brought and be successful.

(i) Substantial harm requirement

Discourage trivial claims by introducing a new test so that claimants are required to demonstrate that the defamatory publication has substantially harmed their reputation.

(ii) A single publication rule

Provide for the removal of the threat of open-ended liability caused by multiple publications (known as "the multiple publication rule"), by introducing a single publication rule which allows only one claim in respect of a publication by the same publisher, which must be brought within one year of the date of the original publication (unless a court exercises its discretion to extend the limitation period in exceptional circumstances).

(iii) Libel tourism

Provide that when considering whether to grant permission for a claim to be served outside England and Wales the court should always be satisfied that it is clearly more appropriate for the

claim to be brought in England and Wales than elsewhere and the court should treat all instances of publication anywhere in the world as if they constituted and gave rise to a single cause of action.

28. There are two further issues that do not appear in the draft Bill, but are included in the consultation paper and also relate to the circumstances in which a defamation case may be pursued.

(iv) The ability of corporations to bring a defamation action

The consultation paper raises the question as to whether specific provisions are required to address situations where an 'inequality of arms' exists between the parties, particularly in relation to cases brought by corporations (i.e. one party is in a significantly stronger position financially to pursue the case and this has an impact on how the case is settled).

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

The consultation paper seeks views as to whether it would be appropriate to legislate to place the principle established in *Derbyshire County Council v Times Newspapers* (which is that a local authority cannot bring a libel action in respect of its governmental and administrative functions) into statute.

Group 3: Reforms to legal processes

29. This proposal reforms the way in which cases are heard.

(i) Trial with a jury

Provide for the reversal of the current presumption in favour of trial with a jury in defamation proceedings so that the normal mode of trial is by judge alone.

30. There are two further proposals that do not appear in the draft Bill, but are included in the consultation paper and also relate to reforms of the way in which defamation cases are heard.

(ii) A new procedure for defamation cases

The consultation paper proposes setting up a new formal procedure in the High Court to channel all cases where proceedings are issued through a process of early resolution of key issues which currently contribute substantially to the length and cost of the proceedings.

(iii) The summary disposal procedure

The consultation paper seeks views on whether, under the summary disposal procedure, the power of the court to order publication of its judgment should be made available in defamation proceedings more generally.

Main affected groups

31. The following key groups are likely to be affected:

- **Potential defendants in defamation actions:** These proposals seek to rebalance the law in defamation cases between the right of freedom of expression and the right to protect reputation. This will affect defendants' ability to successfully defend defamation actions. Defendants in defamation cases are generally publishers, in particular the media. Publishers may include national and regional newspapers, magazines, book publishers, internet service providers, non-departmental public bodies, academic/scientific bodies, charities, individuals (particularly those undertaking scientific and academic research) and any other organisation publishing reports or information.
- **Potential claimants in defamation actions:** These proposals seek to rebalance the law in defamation cases between the right of freedom of expression and the right to protect reputation. This will affect claimants' ability to bring successful defamation actions.
- **The legal profession:** There will be an impact on both claimant and defendant lawyers working in the defamation field, as the rebalancing of the law is likely to affect the number of people seeking to bring defamation actions. The reforms may also affect the nature of court cases. A number of solicitors firms specialising in this area of law are small and medium sized businesses.

Costs and benefits

32. This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing the options considered. For each policy proposal the costs and benefits are compared to the base case.

33. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, in this case many of the aspects considered cannot sensibly be monetised, and therefore it is important to consider how the proposals impact differently on particular groups of society or changes in equity and fairness.

Option 0: Base Case (do nothing)

Description

34. If the do nothing option is pursued then the law would continue to be balanced in favour of protection of reputation and against freedom of expression. Some defendants would continue to find it difficult to offer a strong defence to defamation claims, including against weaker claims, and the effect may be to restrict freedom of expression. It is likely that the justice system would continue to see the same number of defamation cases in the High Court as now.

35. Because the 'do nothing' option is compared against itself its costs and benefits are necessarily zero.

Option 1: Implement reforms to defences

Description

36. This Option would involve implementing any of the reforms to defences included in the draft Bill and/or in the consultation paper (see paragraphs 25 and 26). The costs and benefits of implementing any one of these reforms are likely to be similar, hence the following generic assessment could be applied to each of them. The impacts would be reinforced if more than one of the reforms was implemented. The reforms involve providing wider defences to claims of defamation, and providing increased certainty and clarity in relation to the defences themselves.

Costs of Option 1

Costs to claimants

37. In terms of initial costs claimants may incur increased transitional costs from involvement in cases which establish and interpret the new legislation. These transitional costs may include the cost of getting legal advice on the new law – for both claimants and defendants.

38. On an ongoing basis claimants are likely to incur losses in terms of reduced potential to obtain remedies for damage to reputation as a result of clearer boundaries having been established, and as a result of boundaries moving in favour of the defence.

39. On an ongoing basis the impact on claimants' inclination to pursue a case is unclear. The fact that the boundaries of the defences have moved does not in itself necessarily imply that there will be a change in court case volumes, although this is possible given the direction of movement. Improved legal certainty and clarity might lead to fewer cases as boundaries would be clearer hence there may be less to contest.

Costs to defendants

40. In terms of initial costs defendants may also incur increased transitional costs from involvement in cases which establish and interpret the new legislation.

41. On an ongoing basis the impact on case volumes is unclear, as explained above.

Costs to judicial system

42. There may be an initial period of increased court case volumes as the interpretation of the new legislation is established.

43. The ongoing impact on court case volumes is unclear. The fact that the boundary is now clearer and more certain may lead to cases being quicker and simpler to conduct.

44. It is assumed that court fees would adjust to any changes in court costs to ensure that total court costs remain recoverable overall. Under this assumption there would be no net financial costs from the proposals. Depending upon the nature of the court cost base, a change in the volume of court cases and in the nature of cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. For example there may be wider judicial system efficiency losses if fixed resources were subject to much lighter usage in future.

Costs to the legal profession

45. The impact on the legal services profession would depend upon how the overall volume of defamation business changes, on how the nature of defamation business changes, and on any substitution possibilities between defamation business and other types of business. The legal services profession may experience adjustment costs relating to any changing pattern of demand.

46. In general any reduced efficiencies for the legal services profession from the reforms could be expected to be mirrored by increased costs for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any increased overall legal costs to claimants and defendants e.g. from pursuing more cases would in effect amount to providing the legal profession with increased business and hence would be a benefit for the legal services profession (although this would be a second round effect and hence would not be scored as a benefit as such).

Distributional costs

47. Claimants are expected to lose out in favour of defendants. Claimants might be wealthy individuals and might also be businesses.

Wider social and economic costs

48. There may be costs to society if society places a wider value on maintaining reputation.

Costs of equity/fairness

49. It is possible that the increased certainty and clarity of the boundary may be associated with reduced flexibility, and that this may be associated with reduced equity and fairness.

Benefits of Option 1

Benefits to claimants

50. Claimants may benefit from increased legal clarity, certainty and transparency associated with the new legislation. Such changes may also be associated with reduced legal costs in pursuing cases.

Benefits to defendants

51. Defendants may also benefit from increased legal clarity, certainty and transparency associated with the new legislation. As above such changes may also be associated with reduced legal costs in pursuing cases.

52. Defendants would gain from the boundary being moved in their direction. They would be likely to feel less inhibited by the threat of legal proceedings, which may lead them to publish more material than they do currently which would result in increased freedom of expression. In relation to the media this may generate direct financial benefits. Academic and scientific bodies may also benefit from any increased exchange of information and opinion.

Benefits to judicial system

53. It is assumed that court fees would adjust to any changes in court costs to ensure that total court costs remain recoverable overall. Under this assumption there would be no net financial benefits from the proposals. Depending upon the nature of the court cost base, a change in the volume of court cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. In particular there may be wider judicial system efficiency gains if fewer weaker cases are not brought in future and also if the costs of settling a case are more proportionate to the level of damages involved.

Benefits to the legal profession

54. As above, the impact on the legal services profession is unclear. In general any increased efficiencies for the legal services profession from the reforms could be expected to be mirrored by increased benefits for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any benefits to clients from reduced overall legal costs to claimants and defendants e.g. from pursuing fewer cases would in effect amount to providing the legal profession with less business and hence would be a cost for the legal services profession (although this would be a second round effect and hence would not be scored as a cost as such).

Distributional benefits

55. The media and other bodies involved in investigative reporting or in other forms of inquiry on matters of public interest should benefit from the reforms. This may include bodies conducting scientific and academic research.

Wider social and economic benefits

56. Stronger defences against claims of defamation may lead to an increase in the amount of published material, with possible wider benefits to society. These may include learning from other people's experiences, more information exchange, and benefits relating to more questioning, discussing and debating of issues.

57. The prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

Benefits of equity/fairness

58. The proposals are considered to find a fairer balance between safeguarding reputation and allowing freedom of expression.

Option 2: Implement reforms to the ability to claim

Description

59. This Option would involve implementing any of the reforms to the ability to claim included in the draft Bill and/or in the consultation paper, as outlined above in paragraphs 27 and 28. The costs and benefits of implementing any one of these reforms are likely to be similar, hence the following generic assessment could be applied to each of them. The impacts would be reinforced if more than one of the reforms was implemented. The reforms involve restricting the ability of claimants to pursue a defamation case.

Costs of Option 2

Costs to claimants

60. In terms of initial costs claimants may incur increased transitional costs from involvement in cases which establish and interpret the new legislation.

61. On an ongoing basis claimants may find it more difficult to bring some types of case and as such may incur losses in terms of damaged reputation (albeit at the more minor end of the spectrum).

62. The requirement on claimants to prove substantial harm could add costs to defamation hearings as it might lead to claimants frontloading costs at the outset of a case in gathering the necessary evidence, and would possibly lead to a preliminary hearing to determine whether there is sufficient harm to establish a claim or whether it should be struck out. In addition what may appear at the outset of a case not to be substantial harm, may become so if the defamation is allowed to spread, and if a claimant has already been prevented from bringing an action, this would have a potential cost to the claimant's reputation.

63. In relation to libel tourism the costs to claimants is not taken into account in this Impact Assessment if the claimants are not from the UK and hence out of scope of this assessment (in accordance with standard Impact Assessment methodology).

Costs to defendants

64. In terms of initial costs defendants may also incur increased initial transitional costs from involvement in defending cases which establish and interpret the new legislation.

Costs to judicial system

65. There may be an initial period of increased court case volumes as the interpretation of the new legislation is established.

66. On an ongoing basis these reforms may lead to fewer court cases overall as they restrict access to the court. However, the requirement to prove substantial harm may lead to an increase in preliminary hearings, as outlined above.

67. It is assumed that court fees would adjust to any changes in court costs to ensure that total court costs remain recoverable overall. Under this assumption there would be no net financial costs from the proposals. Depending upon the nature of the court cost base, a change in the volume of court cases and in the nature of cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. For example there may be wider judicial system efficiency losses if fixed resources were subject to much lighter usage in future.

Costs to the legal profession

68. The impact on the legal services profession would depend upon how the overall volume of defamation business changes, which is likely to be lower, on how the nature of defamation business changes, for example more preliminary hearings, and on any substitution possibilities between defamation business and other types of business. The legal services profession may experience adjustment costs relating to any changing pattern of demand.

69. In general any reduced efficiencies for the legal services profession from the reforms could be expected to be mirrored by increased costs for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any increased overall legal costs to claimants and defendants e.g. from pursuing more cases would in effect amount to providing the legal profession with increased business and hence would be a benefit for the legal services profession (although this would be a second round effect and hence would not be scored as a benefit as such).

Distributional costs

70. Claimants are expected to lose out in favour of defendants. Claimants might be wealthy individuals and might also be businesses.

Wider social and economic costs

71. There may be costs to society if society places a wider value on maintaining reputation.

Costs of equity/fairness

72. It is possible that restricting access to the court may be associated with reduced equity and fairness as the claimant may have no other means of addressing their dispute.

Benefits of Option 2

Benefits to claimants

73. The anticipated reduced number of court cases may in aggregate benefit claimants who would otherwise incur costs from pursuing a case, especially an unsuccessful case.

Benefits to defendants

74. As above the anticipated reduced number of court cases may in aggregate benefit defendants who would otherwise incur costs from defending a case, especially an unsuccessful case.

75. Defendants would gain from claimants being less able to bring cases by being able to publish more material than currently, with increased freedom of expression. In relation to the media this may generate direct financial benefits. Academic and scientific bodies may also benefit from any increased exchange of information and opinion, as may non-governmental organisations.

76. Defendants may also gain from incurring fewer costs in determining whether they are at risk of litigation. The substantial harm reform may lessen the potential for threats of proceedings. Web

publishers would no longer have to invest so much time and effort monitoring archives and dealing with complaints related to potentially defamatory material once the one year limitation period for that material has ended.

77. In relation to libel tourism, defendants may gain from cases being heard in more appropriate jurisdictions. This benefit would only be scored in this Impact Assessment if it related to UK defendants (in accordance with standard Impact Assessment methodology).

Benefits to judicial system

78. It is assumed that court fees would adjust to any changes in court costs to ensure that total court costs remain recoverable overall. Under this assumption there would be no net financial benefits from the proposals. Depending upon the nature of the court cost base, a reduction in the volume of court cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. In particular there may be wider judicial system efficiency gains if fewer weaker cases are brought in future and also if the costs of settling a case are more proportionate to the level of damages involved.

Benefits to the legal profession

79. As above, in general any increased efficiencies for the legal services profession could be expected to be mirrored by increased benefits for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any benefits to clients from reduced overall legal costs to claimants and defendants e.g. from pursuing fewer cases would in effect amount to providing the legal profession with less business and hence would be a cost for the legal services profession (although this would be a second round effect and hence would not be scored as a cost as such).

Distributional benefits

80. The media and other bodies involved in investigative reporting or in other forms of inquiry on matters of public interest should benefit from the reforms. This may include bodies conducting scientific and academic research.

Wider social and economic benefits

81. Restrictions on the ability to bring a claim of defamation may lead to an increase in the amount of published material. Increased transparency may be associated with wider benefits to society. These may include learning from other people's experiences, more information exchange, and benefits relating to more questioning, discussing and debating of issues.

82. The prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

Benefits of equity/fairness

83. The proposals are considered to find a fairer balance between safeguarding personal reputation and allowing freedom of expression.

Option 3: Implement reforms to legal processes

Description

84. This Option would involve implementing any or all of the proposed reforms to legal processes included within the draft Bill and/or in the consultation paper (paragraphs 29 and 30). The costs and benefits of implementing any one of these reforms are likely to be similar, hence the following generic assessment could be applied to each of them. The impacts would be reinforced if more than one of the reforms was implemented. The reforms involve changing the way in which cases are heard.

Costs of Option 3

Costs to claimants

85. Claimants may consider that trial by jury provides for the law to be implemented in a more flexible way and that there is more legitimacy in trial by jury.

86. There may be initial familiarisation costs associated with the new procedure on preliminary issues.

Costs to defendants

87. The same types of costs may apply to defendants, in particular they may feel that trial by jury provides the ruling with greater legitimacy and enables the legislation to be applied with more flexibility.

88. As above, there may be initial familiarisation costs associated with the new procedure on preliminary issues.

Costs to judicial system

89. The impact on overall case volumes is unclear but reductions in legal costs from the reformed procedures might lead to increased demand for cases. This might be countered to some extent by any reduced flexibility or certainty in the way the law is applied and by any increased transparency of court judgments. At the same time variable costs per case are expected to be lower.

90. It is assumed that court fees would adjust to any changes in court costs to ensure that total court costs remain recoverable overall. Under this assumption there would be no net financial costs from the proposals. Depending upon the nature of the court cost base, a change in the volume of court cases and in the nature of cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. For example there may be wider judicial system efficiency losses if fixed resources were subject to much lighter usage in future.

Costs to the legal profession

91. The impact on the legal services profession would depend upon how the overall volume of defamation business changes, on how the nature of defamation business changes, and on any substitution possibilities between defamation business and other types of business. The nature of business may change if cases are handled differently without a jury. If cases are significantly shorter then the overall volume of legal work may be lower. The legal services profession may experience adjustment costs relating to any changing pattern of demand.

92. In general any reduced efficiencies for the legal services profession could be expected to be mirrored by increased costs for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any increased overall legal costs to claimants and defendants e.g. from pursuing more cases would in effect amount to providing the legal profession with increased business and hence would be a benefit for the legal services profession (although this would be a second round effect and hence would not be scored as a benefit as such).

Distributional costs

93. This reform is not expected to benefit claimants at the expense of defendants or vice versa.

Wider social and economic costs

94. Wider social and economic costs are not anticipated

Costs of equity/fairness

95. The proposals might be associated with reduced equity and fairness if it is considered that trial by jury provides for more flexibility in the way the law is applied.

Benefits of Option 3

Benefits to claimants

96. Claimants may benefit from cases being resolved more quickly at lower cost, from more judicial expertise being applied to the resolution of cases, and from there being greater consistency, predictability and certainty in relation to rulings themselves.

Benefits to defendants

97. As above, defendants may benefit from cases being resolved more quickly at lower cost, from more judicial expertise being applied to the resolution of cases, and from there being greater consistency, predictability and certainty in relation to rulings themselves.

Benefits to judicial system

98. As explained, the total volume of cases might be higher and variable costs per case are expected to be lower. It is assumed that court fees would adjust to any changes in court costs to ensure that

total court costs remain recoverable overall. Under this assumption there would be no net financial costs or benefits from the proposals. Depending upon the nature of the court cost base, a reduction in the volume of court cases and in the nature and duration of each case may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. In particular there may be increased judicial system efficiency if fewer resources are required to resolve a case to the same standard.

Benefits to the legal profession

99. As above, in general any increased efficiencies for the legal services profession could be expected to be mirrored by increased benefits for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any reduced overall legal costs to claimants and defendants e.g. from pursuing fewer cases would in effect amount to providing the legal profession with less business and hence would be a cost for the legal services profession (although this would be a second round effect and hence should not be scored as a cost as such).

Distributional benefits

100. This reform is not expected to benefit claimants at the expense of defendants or vice versa.

Wider social and economic benefits

101. There may be wider benefits from the increased transparency associated with more judgments being published.

Benefits of equity/fairness

102. The proposals might be associated with greater equity and fairness if cases are resolved more consistently with the use of more judicial expertise in place of juries.

Option 4: Implement all reforms

Description

103. This Option would involve implementing all of the reforms outlined under each of the three groupings above, including those that do not appear in the draft Bill, but do feature in the consultation paper.

Costs of Option 4

Costs to claimants

104. In terms of initial costs, claimants may incur transitional costs associated with the new legislation bedding down and with its interpretation and implementation becoming established.

105. On an ongoing basis claimants are likely to be worse off overall. Restrictions would be placed on their ability to pursue cases. A wider range of defences would also apply. As a result it is expected that there would be a shift away towards more freedom of expression, with a consequent loss in the ability of claimants to protect their reputations. It is possible that the increased certainty and clarity of the new legislation may be associated with reduced flexibility.

106. It is unclear whether the reforms would lead to an overall increase or reduction in the total number of court cases. On balance it is possible that there might be fewer cases overall. The costs per case might also be lower. As such an increase is not expected in the aggregate costs to claimants of pursuing cases, if anything the opposite might occur.

Costs to defendants

107. As for claimants, defendants may incur initial transitional costs associated with the new legislation bedding down and with its interpretation and implementation becoming established. It is possible that the increased certainty and clarity of the new legislation may be associated with reduced flexibility.

108. As for claimants, it is unclear whether the reforms would lead to an overall increase or reduction in the total number of court cases. On balance it is possible that there might be fewer cases overall. The costs per case might also be lower. As such an increase is not expected in the aggregate costs to defendants of defending cases, if anything the opposite might occur.

Costs to judicial system

109. The overall ongoing impact on court case volumes is unclear. Some of the reforms may lead to an increase in case volumes, others may lead to a reduction. It is likely that the overall costs per case might be lower.

110. It is assumed that court fees would adjust to any changes in court costs to ensure that costs remain recoverable. Under this assumption there would be no net financial costs from the proposals. Depending upon the nature of the court cost base, a change in the volume of court cases and in the nature of cases may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. For example there may be wider judicial system efficiency losses if fixed resources were subject to much lighter usage in future.

Costs to the legal profession

111. The impact on the legal services profession would depend upon how the overall volume of defamation business changes, on how the nature of defamation business changes, and on any substitution possibilities between defamation business and other types of business. The legal services profession may experience adjustment costs relating to any changing pattern of demand.

112. In general any reduced efficiencies for the legal services profession could be expected to be mirrored by increased costs for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any increased overall legal costs to claimants and defendants e.g. from pursuing more cases would in effect amount to providing the legal profession with increased business and hence would be a benefit for the legal services profession (although this would be a second round effect and hence should not be scored as a benefit as such).

Distributional costs

113. Overall the reforms are likely to leave claimants worse off. These may be wealthy individuals and also businesses.

Wider social and economic costs

114. Significant wider costs are not anticipated, although there may be wider costs if society places a greater value on maintaining reputation.

Costs of equity/fairness

115. Costs of reduced equity/fairness might arise if the proposals lead to an overall reduction in flexibility in the law and in the way the law is applied.

Benefits of Option 4

Benefits to claimants

116. Claimants may benefit from cases being resolved more quickly at lower cost, from more judicial expertise being applied to the resolution of cases, and from there being greater consistency, predictability and certainty in relation to rulings themselves.

117. As above, the overall impact on court case volumes is unclear but if anything there may be fewer cases and also reduced costs per case, leading to reduced aggregate costs for claimants.

Benefits to defendants

118. Defendants may benefit significantly from the balance being shifted in favour of greater freedom of expression. For the media this may include direct financial benefits. Academic and scientific bodies may also benefit from any increased exchange of information and opinion.

119. As for claimants, defendants may benefit from cases being resolved more quickly at lower cost, from more judicial expertise being applied to the resolution of cases, and from there being greater consistency, predictability and certainty in relation to rulings themselves. Although the overall impact on court case volumes is unclear if anything there may be fewer cases and also reduced costs per case, leading to reduced aggregate costs for defendants.

Benefits to judicial system

120. It is assumed that court fees would adjust to any changes in court costs to ensure that costs remain recoverable. Under this assumption there would be no net financial benefits from the proposals. Depending upon the nature of the court cost base, a reduction in the volume of court cases and in the nature and duration of each case may be associated with increased or reduced court operational efficiency and wider judicial system efficiency. In particular there may be increased judicial system efficiency if fewer resources are required to resolve a case to the same standard, and if fewer cases are heard where the costs of holding the case are disproportionately high compared to the level of damages.

121. On balance it is possible that the judicial system may become more efficient as a result of these reforms. The process reforms might lead to increases in productive efficiency as fewer resources might be required to achieve comparable outcomes. There might also be other efficiency improvements as a result of changes in the types of case which are heard in future.

Benefits to the legal profession

122. As above, in general any increased efficiencies for the legal services profession could be expected to be mirrored by increased benefits for their clients, i.e. for claimants and defendants, and hence should not be double counted. In addition any reduced overall legal costs to claimants and defendants e.g. from pursuing fewer cases would in effect amount to providing the legal profession with less business and hence would be a cost for the legal services profession (although this would be a second round effect and hence should not be scored as a cost as such).

Distributional benefits

123. The media and other bodies involved in investigative reporting or in other forms of inquiry on matters of public interest should benefit from the reforms. This may include bodies conducting scientific and academic research.

Wider social and economic benefits

124. Restrictions on the ability to bring a claim of defamation may lead to an increase in the amount of published material. Increased transparency may be associated with wider benefits to society. These may include learning from other people's experiences, more information exchange, and benefits relating to more questioning, discussing and debating of issues.

125. The prospect of increased transparency may lead to reductions in levels of the underlying behaviour which is now being exposed, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

Benefits of equity/fairness

126. The proposals are considered to find a fairer balance between safeguarding reputation and allowing freedom of expression. The proposals might be associated with greater equity/fairness if cases are resolved more consistently with the use of more judicial expertise.

Enforcement and Implementation

127. For the provisions in the draft Bill to be implemented would require primary legislation. The intention is for the draft Bill to undergo pre-legislative scrutiny alongside a public consultation process. The provisions in the Bill would then be considered and refined if necessary in order for a substantive Bill to be brought forward as soon as Parliamentary time allows. A full Post Implementation Review Plan will be developed to be published alongside a substantive Bill.

Specific Impact Tests

Competition Assessment

128. The markets affected by these proposals include the media, publishing, online publishing industries and the legal profession. None of the proposals under consideration are considered to have a significant adverse impact on competition.

Small Firms Impact Test

129. It is unclear at this stage what the impact on small firms might be, and there is no indication that small firms will be disproportionately impacted as against larger firms.

Carbon Assessment

130. We do not anticipate any significant direct carbon impacts as a consequence of these proposals.

Other Environment

131. We do not anticipate any significant direct environmental impacts as a consequence of these proposals.

Health Impact Assessment

132. We do not anticipate any direct health impacts from these proposals.

Human Rights

133. The law in this area is a delicate balance between two of the Articles in the European Convention on Human Rights - Article 8 (right to private and family life) and Article 10 (right to free expression). Our aim is to ensure these two rights are properly balanced, and therefore to ensure that these proposals are ECHR compliant.

Justice Impact Test

134. The impacts of these proposals on the Justice System are set out in the body of the evidence base.

Rural Proofing

135. We do not anticipate any specific or direct impact in rural areas as a result of these proposals.

Sustainable Development

136. These proposals are consistent with the principles of sustainable development.

Equality Impact Assessment (EIA)

137. The EIA is being conducted separately. A summary of the initial screening is included at Annex F. We are seeking further evidence on the impact of these proposals from the consultees.

Annexes

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added where the Specific Impact Tests yield information relevant to an overall understanding of policy options.

Annex 1: Post Implementation Review (PIR) Plan

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review:
Review objective:
Review approach and rationale:
Baseline:
Success criteria:
Monitoring information arrangements:
Reasons for not planning a PIR: There is no plan to carry out a Post Implementation Review at this stage, on the basis that nothing will be implemented as a result of the draft Bill. The draft Bill will be subject to full public consultation and pre-legislative scrutiny and then proposals will be developed for inclusion in a substantive Bill to be introduced as soon as Parliamentary time allows. A full Post Implementation Review plan will be developed in relation to the substantive Defamation Bill when it is introduced.

Annex F - Equality Impact Assessment (Initial Screening)

An initial Equality Impact Assessment screening has been included at Annex F. Following analysis of the available evidence we initially conclude that the proposed changes included within this consultation paper do not have any serious equality impacts. However, we will reconsider this should evidence to the contrary arise during the course of the consultation.

Q43. Do you consider that any of the proposals could have impacts upon the following equality groups?

Age
Disability
Gender Reassignment
Married and Civil Partnership
Pregnancy and Maternity
Race
Religion and Belief
Sex
Sexual Orientation

Ministry of JUSTICE

Equality Impact Assessment Initial Screening - Relevance to Equality Duties

The EIA should be used to identify likely impacts on:

- disability
- race
- sex
- gender reassignment
- age
- religion or belief
- sexual orientation
- pregnancy and maternity
- caring responsibilities (usually only for HR polices and change management processes such as back offices)

1. Name of the proposed new or changed legislation, policy, strategy, project or service being assessed.

Draft Defamation Bill.

This is a draft Bill which seeks to rebalance the substantive law on defamation. The issue of legal costs of defamation cases is out of scope for this Bill. The Bill will be published for consultation and undergo pre-legislative scrutiny, before a substantive Bill is brought forward as soon as parliamentary time allows.

Concerns have been raised about the detrimental effects that the current defamation laws are said to be having on freedom of expression, particularly in relation to academic and scientific debate, the work of non-governmental organisations and investigative journalism, and the extent to which this jurisdiction has become a magnet for libel claimants. These factors have led to critics of the law arguing that a "chilling effect" exists on freedom of expression in England and Wales.

Three main reports have recently been published in the context of the debate on these issues; The Culture, Media and Sport Committee's report on its inquiry into Press Standards, Privacy and Libel, English PEN and Index on Censorship's report "Free Speech is Not for Sale" and the report of the Ministry of Justice's Libel Working Group. These have have all made arguments in favour of reform.

2. Individual Officer(s) & unit responsible for completing the Equality Impact Assessment.

Paul Norris
Legal Policy Division
Legal Directorate
6.38
102 Petty France
SW1H 9AW

3. What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the intended outcomes?

Aims/objectives	**Outcomes**
Core Aim: • Our core aim is to ensure that responsible journalism, academic and scientific debate, and the valuable work of non-governmental organisations are properly protected and that a fair balance is struck between freedom of expression and the protection of reputation. The specific proposals are to: • Introduce a new statutory defence on matters of public interest defence which would build on the common law defence in Reynolds v Times Newspapers, but would be expressed in clearer and more flexible terms, and would be widely applicable to forms of publication beyond just mainstream journalism. • Clarifying the key elements of the "fair comment" defence and renaming this defence "honest opinion." • Clarifying the key elements of the "justification" defence and renaming this defence "truth." Substantial harm requirement • To discourage trivial claims by providing that claimants are required to demonstrate that the defamatory publication has substantially harmed their reputation. • Provide for the reversal of the current presumption in favour of trial with a jury in defamation proceedings so that the normal mode of trial is by judge alone. • Provide for the updating and extension of the circumstances in which the defences of qualified privilege and absolute privilege are available in order to improve the protection given to NGOs and others. • Provide for the removal of the threat of open-ended liability caused by multiple claims, by introducing a single publication rule which allows only one claim in respect of a publication by the same publisher, which must be brought within one year of the date of the original publication (unless a court grants a discretion to extend the limitation period in exceptional circumstances). • To provide that when considering whether to grant permission for a claim to be served outside England and Wales the court should have to be satisfied that it is clearly more appropriate for the claim to be brought in England and Wales than elsewhere, rather than the court having to be satisfied that the other jurisdiction is clearly more appropriate than that of England and Wales.	Intended outcome: The intended outcome of these proposals is that people who have been defamed are able to take action to protect their reputation where appropriate, but that free speech is not unjustifiably impeded.

4. What existing sources of information will you use to help you identify the likely equality on different groups of people?

   (For example statistics, survey results, complaints analysis, consultation documents, customer feedback, existing briefings, submissions or business reports, comparative policies from external sources and other Government Departments).

Annual Court statistics in relation to the number of Defamation cases brought. http://www.justice.gov.uk/publications/docs/judicial-court-statistics-2009.pdf

Findings of the Ministry of Justice's 2010 'Libel Law Working Group.'
http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf

Consultation on 'The Multiple Publication Rule'.
http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm

Outcomes of informal discussions with interested parties that took place during the summer of 2010 with a wide range of interest groups representing, claimant and defendant solicitors, internet service providers, the media and publishing organisations and non-Governmental Organisations.

5. Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people. If so what are the gaps in the information and how and when do you plan to collect additional information?

   Note this information will help you to identify potential equality stakeholders and specific issues that affect them - essential information if you are planning to consult as you can raise specific issues with particular groups as part of the consultation process. EIAs often pause at this stage while additional information is obtained.

The information that we are missing that would enable us to build a much clearer picture of who is likely to be affected by the proposals in the draft Bill, and therefore enable us to identify whether there are likely to be equality and/or diversity impacts, is a more accurate 'diversity profile' of the people who bring defamation actions.

However, it is open to anyone to bring an action for defamation, but due to the small number of annual defamation cases (298 in 2009), any trend analysis of diversity data would not be robust and collection/ analysis of this data is not currently felt proportionate, especially in light of the fact that our understanding is that defamation cases are generally not brought on the basis of equality or diversity issues.

Whilst early examination of the available evidence suggests that there would not be any specific equality impacts, the consultation will be used to test this assumption and contain a specific request for evidence of any potential equality impacts of the proposed changes.

6. Having analysed the initial and additional sources of information including feedback from consultation, is there any evidence that the proposed changes will have a **positive impact** on any of these different groups of people and/or promote equality of opportunity?

   Please provide details of who benefits from the positive impacts and the evidence and analysis used to identify them.

Following analysis of the available evidence we initially conclude that the proposed changes included within the draft Defamation Bill will not have any disproportionately positive equality impacts, pending further responses arising from the consultation.

7. Is there any feedback or evidence that additional work could be done to promote equality of opportunity?

   If the answer is yes, please provide details of whether or not you plan to undertake this work. If not, please say why.

Following analysis of the available currently available, there is no additonal work that it is immediately evident could be done to promote equality of opportunity. We will, however, revisit this in light of consultation responses.

8. Is there any evidence that proposed changes will have **an adverse equality impact** on any of these different groups of people?

   Please provide details of who the proposals affect, what the adverse impacts are and the evidence and analysis used to identify them.

Following analysis of the available evidence we initially conclude that the proposed changes included within the draft Defamation Bill will not have any disproportionately negative equality impacts, pending further responses arising from the consultation.

9. Is there any evidence that the proposed changes have **no equality impacts**?

   Please provide details of the evidence and analysis used to reach the conclusion that the proposed changes have no impact on any of these different groups of people.

Following analysis of the available evidence we initially conclude that the proposed changes included within the draft Defamation Bill do not have any serious equality impacts. however, we will reconsider this should evidence to the contrary arise during the course of the consultation.

10. Is a full Equality Impact Assessment Required? Yes ☐ No ☐

    If you answered 'No', please explain below why not?

    NOTE - You will need to complete a full EIA if:

    - the proposals are likely to have equality impacts and you will need to provide details about how the impacts will be mitigated or justified
    - there are likely to be equality impacts plus negative public opinion or media coverage about the proposed changes
    - you have missed an opportunity to promote equality of opportunity and need to provide further details of action that can be taken to remedy this

    If your proposed new or changed legislation, policy, strategy, project or service involves an Information and Communication Technology (ICT) system and you have identified equality impacts of that system, a focused full EIA for ICT specific impacts should be completed. The ICT Specific Impacts template is available from MoJ ICT or can be downloaded from the Intranet at: http://intranet.justice.gsi.gov.uk/justice/equdiv/equal-impact.htm, and should be referenced here.

11. Even if a full EIA is not required, you are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts. Please provide details of how you will monitor evaluate or review your proposals and when the review will take place.

We will review the equality impacts of our proposlas in light of responses to consultation.

12. Name of Senior Manager and date approved

You should now complete a brief summary (if possible, in less than 50 words) **setting out which policy, legislation or service the EIA relates to, how you assessed it, a summary of the results of consultation, a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA.** The summary will be published on the external MoJ website.
Name (must be grade 5 or above): Michelle Dyson
Department: Legal Policy Division
Date: 03 February 2011

About this consultation

To:	All parties with an interest in Defamation Law
Duration:	From 15/03/2011 to 10/06/2011
Enquiries (including requests for the paper in an alternative format) to:	Paul Norris Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 3220 Fax: 020 3334 4035 Email: defamation@justice.gsi.gov.uk
How to respond:	Please send your response by 10/06/2011 to: Paul Norris Legal Policy Team Ministry of Justice 6.38 102 Petty France London SW1H 9AJ Tel: 020 3334 3220 Fax: 020 3334 4035 Email: defamation@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published in Autumn 2011 at: http://www.justice.gov.uk

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 10/06/2011 to:

Paul Norris
Legal Policy Team
Ministry of Justice
6.38
102 Petty France
London SW1H 9AJ

Tel: 0203 334 3220
Fax: 0203 334 4035
Email: defamation@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested from Paul Norris at the above address.

Publication of response

A paper summarising the responses to this consultation will be published in Autumn 2011. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will

take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice Consultation Co-ordinator
Legal Policy Team
6.37, 6th Floor
102 Petty France
London SW1H 9AJ

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