

# Defamation Bill 2010

## Explanatory Notes

### INTRODUCTION

1. These explanatory notes relate to the Defamation Bill 2010 introduced by Lord Lester of Herne Hill QC and read a first time on 26 May 2010. Their purpose is to assist understanding of the Bill against the background of existing law, and to explain the nature of the changes the Bill seeks to make in reforming the law, and the reasons for those changes.
2. The following abbreviations are used in these notes:
  - 1) “the 1952 Act” and “the 1996 Act” refer respectively to the Defamation Act 1952 and the Defamation Act 1996;
  - 2) “the Joint Committee” refers to the Joint Committee on Parliamentary Privilege whose Report was published on 30 March 1999;
  - 3) “the Porter Report” refers to the report of the Committee on the Law of Defamation, chaired by Lord Porter, Cmd 7536/48 (1948);
  - 4) “the Faulks Report” refers to the report of the Committee on Defamation, chaired by Mr Justice Faulks, Cmnd. 5909 (1975);
  - 5) “the Neill Report” refers to the report of the Supreme Court Committee, chaired by Lord Justice Neill, on Practice and Procedure in Defamation (1991);
  - 6) “the CMSC Report” refers to the report of the House of Commons Select Committee on Culture, Media and Sport, chaired by Sir John Whittingdale MP, on Press Standards, Privacy and Libel, Second Report of Session 2009-10 HC 362-1, February 2010;
  - 7) “the Libel Working Group Report” refers to the report of a working group, convened by the Secretary of State for Justice, published in March 2010;
  - 8) “Duncan and Neill” refers to the textbook Duncan and Neill on Defamation (3<sup>rd</sup> ed., 2009);
  - 9) “Gatley” refers to the textbook Gatley on Libel and Slander (11<sup>th</sup> ed., 2008);
  - 10) “the EEA” means the European Economic Area, established on 1 January 1994, which allows Iceland, Lichtenstein and Norway to participate in the European Union’s single market without conventional EU membership;
  - 11) “the Convention rights” refer to Articles 10 and 8 of the European Convention on Human Rights, which protect the right to freedom of expression and the right to respect for private and family life, home and correspondence, and the jurisprudence of the European Court of Human Rights relating to them;

- 12) “the Directive on electronic commerce” means Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market;
- 13) “the Electronic Commerce Regulations” means the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.
- 14) “the Brussels Convention” means the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended.

### *Characteristics of the present law*

3. The common law of defamation restricts free speech by protecting the public interest in personal reputation. It is based upon the civil and private right of every individual to the unimpaired possession of his or her reputation and good name. The general rule is that no one may speak falsely of his or her neighbour, and that it is in the public interest that “the law should provide an effective means whereby a man can vindicate his reputation against calumny”.<sup>1</sup>
4. Because of the unique characteristics of the tort of defamation, English law gives very strong protection to the civil right to reputation at the expense of the enjoyment of the right to freedom of expression, including the right to receive and impart information and ideas without unnecessary interference.
5. The relevant characteristics of the tort include the following:
  - (i) The claimant is presumed to have and to enjoy an unblemished reputation. Once the claimant has proved publication and that the words are defamatory, the law presumes in the claimant’s favour that the words are false. As falsity and damage are presumed, it is then for the defendant to establish a defence.<sup>2</sup>
  - (ii) Anyone who takes part in the process of publication can be liable for defamatory statements made in that publication.<sup>3</sup> What the publisher intended to convey is irrelevant in deciding whether what is published is defamatory or what it means.<sup>4</sup> Liability does not depend on the intention of the publisher, but on the fact that defamatory material has been published. Nor does liability depend on how the words were actually understood: the law proceeds on the basis that a publication has a ‘single

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<sup>1</sup> *Horrocks v Lowe* [1975] AC 135 (HL), *per* Lord Diplock, at 149C-D.

<sup>2</sup> *Gatley*, paragraph 11.3; *Duncan and Neill*, paragraph 12.05.

<sup>3</sup> *Duncan and Neill* paragraph 8.10.

<sup>4</sup> *Hulton v Jones* [1910] AC 20 (HL), *per* Lord Loreburn LC, at 23-24; *Duncan and Neill*, paragraph 5.22.

meaning', worked out by reference to what the ordinary reasonable person would, reasonably, have understood the publication to mean.

- (iii) The law does not recognise that people might, reasonably, interpret a publication differently. A defence of justification should succeed if the defendant proves that what is published is 'substantially true'. At present, the defence fails if there is a gap between the defamatory meaning alleged by the claimant and the defamatory allegation proved by the defendant to be true. There are often disputes about the level of gravity of the defamation.
- (iv) Traditionally, the media have not been regarded as having any special duty to inform the public so as to create a separate head of common law qualified privilege.<sup>5</sup>
- (v) There is no common law defence of "fair reporting on a matter of public interest".<sup>6</sup>
- (vi) The common law defence of so-called '*Reynolds* privilege', developed by the House of Lords,<sup>7</sup> has not been as useful to publishers as had been hoped.<sup>8</sup>
- (vii) There is uncertainty in existing case law about the effects of the advent of the wide range of means of electronic communication on liability for defamatory publication, and a failure to reformulate the relevant principles or to recognise technology-specific exceptions.<sup>9</sup>
- (viii) "The principle that each communication is a separate publication means that for limitation purposes, time starts to run again whenever the defamatory matter is communicated afresh. This gives rise to special difficulties for defendants who publish material on the Internet, which may remain easily accessible many years after it was first made available."<sup>10</sup> There is widespread concern about the effect of this 'multiple publication rule', as reflected by the responses to the recent Ministry of Justice consultation on the subject.<sup>11</sup>

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<sup>5</sup> Gatley, paragraph 14.8; Duncan and Neill, paragraph 17.04.

<sup>6</sup> Gatley, paragraph 15.2.

<sup>7</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL); as interpreted in *Jameel v Wall Street Journal* [2007] 1 AC 359 (HL). See generally, Duncan and Neill, Chapter 17.

<sup>8</sup> As the CMSC Report, amongst others, recognised, for further discussion see paragraphs 38-39 and 47-55.

<sup>9</sup> Duncan and Neill, paragraph 8.02.

<sup>10</sup> Duncan and Neill, paragraph 8.07.

<sup>11</sup> For further details see paragraph 33.

- (ix) Uncertainty about the scope of the defence of ‘fair comment’ also has a chilling effect on freedom of speech, including academic and scientific discussion and debate; and the Court of Appeal has suggested<sup>12</sup> describing the defence in a way that would lend greater emphasis to its importance as “an essential ingredient of the right to free expression.” While the European Court of Human Rights has afforded strong protection to the expression of value judgments, domestic case law has developed a defence beset by onerous and unnecessary technicalities.<sup>13</sup>
- (x) The statutory defences of qualified privilege for reports of various proceedings and matters are out-of-date and too restrictive.
- (xi) The ‘chilling effect’ upon the right to free expression, induced by the threat of civil actions for libel, has been repeatedly recognised by senior judges.<sup>14</sup>
- (xii) That chilling effect has been increased by uncertainty about the state of the law, the effect of conditional fee agreements in permitting claimants’ lawyers to be unjustly enriched at the expense of defendants, the ability of claimants to bring cases even where a publication has caused no significant harm, the reluctance of claimants and their lawyers to settle cases expeditiously and at low cost, and the outdated state of the law as regards libel via the internet.
- (xiii) Claimants have been able to pursue defamation claims in English courts where the publication has caused no substantial harm.<sup>15</sup> This has caused

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<sup>12</sup> *British Chiropractic Association v Dr Singh* [2010] EWCA Civ 350. The Court of Appeal observed (paragraph 22) that “It is one thing to defame somebody in terms that can only be defended by proving their truth, even if this ineluctably casts the court in the role of historian or investigative journalist. It is another thing to evaluate published material as giving no evidential support to a claim and, on the basis of this evaluation, to denounce as irresponsible those who make the claim.” The Court also referred (paragraph 34) to *Underwager v Salter* 22 Fed. 3d 730 (1994), a US federal case about a libel action over a scientific controversy, where Judge Easterbrook stated that “Scientific controversies must be settled by the methods of science rather than by the methods of litigation ... More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path towards superior understanding of the world around us.”

<sup>13</sup> The Supreme Court is to hear an appeal in a fair comment case in *Joseph v Spiller* on 26 July 2010; the case illustrates some of the (unnecessary) technicalities presently involved in the defence.

<sup>14</sup> *Derbyshire C.C. v Times Newspapers* [1993] AC 534 (HL), at 548D-E, *per* Lord Keith of Kinkel; *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), at 192H, *per* Lord Nicholls of Birkenhead, and at 210, *per* Lord Steyn; *British Chiropractic Association v Dr Singh* [2010] EWCA Civ 350, at paragraph 11, *per* Lord Judge, LCJ.

<sup>15</sup> Although the power exists to strike out claims as an abuse of process, as recognised in *Jameel v Dow Jones* [2005] EWCA Civ 75, this power could be used more effectively by the courts to strike out cases where there is nothing at stake. In *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB), Tugendhat J stated at paragraph 89, that any definition of “defamatory” “must include a qualification or threshold of

widespread criticism, especially as regards so-called 'libel tourism' by foreign claimants in respect of publications overseas.

- (xiv) Trading corporations which have reputations in this country may sue for defamation and recover general damages without the need to prove any financial loss.

### *The Bill's main object and purposes*

- 6. The Bill is primarily concerned with the English civil law of libel and slander (defamation) - the torts which protect a person's reputation. The common law offences of criminal libel, seditious libel, blasphemous libel, and obscene libel - relics from the Court of Star Chamber - were abolished by the last Parliament.<sup>16</sup>
- 7. The Bill is designed to -
  - 1) strike a fair balance between private reputation and public information as protected by the common law and constitutional right to freedom of expression;
  - 2) modernise the defences to defamation proceedings of privilege, fair comment, justification, and innocent dissemination, in accordance with the overriding requirements of the public interest;
  - 3) require claimants to demonstrate that they have suffered or are likely to suffer real harm as a result of the defamatory publication of which they complain;
  - 4) require corporate claimants to prove financial loss (or the likelihood of such loss) as a condition of establishing liability;
  - 5) encourage the speedy resolution of disputes;
  - 6) make the normal mode of trial, trial by judge alone rather than by judge and jury;
  - 7) enable the Speaker of either House of Parliament to waive Parliamentary privilege as regards evidence concerning proceedings in Parliament; and
  - 8) modernise statutory privilege.
- 8. The Bill does not deal with
  - 1) the regulation of costs in defamation proceedings, for which statutory powers already exist<sup>17</sup>;

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seriousness, so as to exclude trivial claims". This is a first instance decision which, although based on a detailed analysis of cases, is likely to be the subject of review.

<sup>16</sup> Criminal Justice and Immigration Act 2008, section 79, and Coroners and Justice Act 2009 section 73.

<sup>17</sup> Under section 58(4) of the Courts and Legal Services Act 1990, the Lord Chancellor can designate proceedings which are subject to an enforceable conditional fee agreement. The Conditional Fee Agreements Order 2000 (SI 2000/823) specifies the proceedings to which a conditional fee agreement must relate if it is to provide for a success fee, and the maximum amount of that fee.

- 2) the award of damages, as to which the principles now established by the courts give sufficient guidance to ensure reasonable legal certainty and proportionality;<sup>18</sup> and
- 3) questions about misuse of private information, breach of confidence, or data protection, which are beyond its scope.

### *Statement of Compatibility*

9. For the reasons summarised in paragraphs 173 to 186, Lord Lester is of the view that the Bill is compatible with the Convention rights.

### **LEGISLATIVE HISTORY**

10. The legislative history is a history of piecemeal and incomplete reform of this area of the law, over the course of seventy years. The following summary is necessarily selective and focuses upon matters of relevance to the preparation of the Bill.

#### *The Porter Committee*

11. In 1938, Sir Alan (“AP”) Herbert MP and others presented a Law of Libel (Amendment) Bill in the House of Commons. The Bill was withdrawn upon the Government undertaking to set up a committee to consider the reform of defamation law. The Committee was chaired by Lord Porter, the eminent Lord of Appeal, and it included Lord Justice Birkett, Mr Justice Slade, EM Forster, the novelist, Professor ECS Wade, the constitutional law scholar, and others with special knowledge of the subject, such as Sir Valentine Holmes. The Committee’s work was interrupted by the Second World War, and several members did not survive the War. The Committee resumed their work in 1945, and took a large body of evidence. Kenneth Diplock KC (later Lord Diplock) acted as Secretary to the Committee and played a key role in drafting the Report.
12. The Porter Report was published in 1948. It summarised the general criticism of the existing law of defamation as follows<sup>19</sup>:

“The law and practice in actions for defamation are said to be :-  
(a) unnecessarily complicated;  
(b) unduly costly;

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<sup>18</sup> Following *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 (CA) (which acknowledged that damages should be proportionate and no more than was required to compensate the claimant); and *John v MGN* [1997] QB 586 (CA) (which permitted reference to personal injury awards by way of comparison) and changes to the damages regime brought about by the Courts and Legal Services Act 1990, section 8 of which enabled the Court of Appeal to substitute its own award, rather than have to remit to another jury.

<sup>19</sup> Paragraph 6.

- (c) such as to make it difficult to forecast the result of an action both as to liability and as to the measure of damages;
- (d) liable to stifle discussion upon matters of public interest and concern;
- (e) too severe upon a defendant who is innocent of an intention to defame; and
- (f) too favourable to those who, in colloquial language, may be described as 'gold-digging' plaintiffs."

13. The Porter Report examined the scope of the existing law of defamation, the substantive law, and the current practice and procedure, in order to ascertain the real basis of the complaints, the extent to which they were justified, and the way in which those complaints which were justified and capable of being remedied might be remedied by changes in the existing law, practice or procedure.

14. As regards complaints of press invasions of privacy, the Porter Report recognised<sup>20</sup> that there were great difficulties in formulating an extended definition of libel which, "while effective to restrain improper invasion of privacy, would not interfere with the due reporting of matters which are of public interest." The Committee referred to the possibility of action by the press itself from dealing with the problem as being

"one of internal discipline to be regulated by an understanding between the proprietorial and journalistic organisations. The offence is primarily one against good taste, and if a legal remedy has to be created, it must, we think, lie in a sphere which is outside our terms of reference."

15. Because neither Labour nor Conservative post war administrations brought forward legislation to give effect to its recommendations, Harold Lever MP introduced a Private Member's Bill which became the Defamation Act 1952. Lord Porter said, during the Second Reading debate in the Lords<sup>21</sup>, with regard to the proposals on unintentional defamation that "the recommendations which the Committee made have been watered down to a very great extent, and I feel that that is a pity". Harold Lever failed in his attempt<sup>22</sup> to include a clause to give effect to the Porter Committee's proposal that, in cases where authors and publishers were not guilty of any negligence or malice in a case of unintentional defamation, the appropriate remedy would be full vindication of the person injured rather than damages." Earl Jowitt, the former Lord Chancellor, said<sup>23</sup> that he had

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<sup>20</sup> Paragraph 26.

<sup>21</sup> 15 July 1952, col. 1107.

<sup>22</sup> 9 May 1952, col. 723.

<sup>23</sup> 29 October 1952, col. 1088.

“never attempted to conceal the fact that I think this a very disappointing Bill, and to my mind there would be some attraction in losing it, because, as things are, I know quite well what will happen. When there is a Bill passed dealing with the law of libel, it means that for the next thirty years or so everybody will be saying that the topic has been dealt with, and that it cannot be dealt with again. And as I think this is a disappointing Bill, I am a little sorry that it is going to appear on the statute book. On the other hand, it is a question of compromise, and perhaps it is better than nothing.”

16. The provisions of the 1952 Act remain in force as regards slander, and some aspects of the defences of justification and fair comment, and other procedural matters.

*The Faulks Committee*

17. In 1971 a committee chaired by Mr Justice Faulks was appointed to consider whether, in light of the working of the 1952 Act, any changes were desirable in the law, practice and procedure relating to actions for defamation. The review was the result of criticisms of the operation of the law of defamation since the enactment of the 1952 Act. These included the view that cases were unduly long and unnecessarily costly; that their results both as to liability and damages were unpredictable; and, that the complexity of this body of law meant that appeals were likely.
18. The Faulks Report was presented to Parliament in March 1975. It recommended, amongst other things, that the defences of justification and fair comment should be renamed as defences of truth and of comment; and that trials by jury in defamation cases should not be abolished but should become the exception rather than the rule.
19. Faulks proposed no change in the special defence of innocent dissemination to grant greater freedom from liability to distributors, for three main reasons:
  - 1) the existing defence afforded considerable protection to distributors; and
  - 2) the requirement to check whether a publication contains anything defamatory did not face distributors with an unduly onerous or expensive task; and
  - 3) a claimant defamed by publications whose proprietors were not worth suing, ought not to be left without redress because distributors had complete immunity.
20. The Faulks Report contained a draft Bill of some 40 clauses. Like the proposal by the Royal Commission on the Press on innocent dissemination, it did not result in legislative reform.



21. The Royal Commission on the Press recommended<sup>24</sup> that a distributor should be able to handle a publication notwithstanding that it was of a character likely to contain a libel, unless the distributor knew, or was negligent in not knowing that the issue in question contained the specific libel complained of. Distributors would be at risk if they distributed after the person who thought he or she was being libelled notified them that the issue contained the libel.

*The Neill Committee*

22. Lord Justice Neill chaired a working group in response to the invitation of the Lord Chancellor, Lord Mackay of Clashfern, to the Supreme Court Procedure Committee to examine the rules and practice for pleadings in defamation cases, and to propose reforms. The terms of reference were much more restrictive than those of the Porter Committee and did not include an examination of the substantive law. The Neill Report was published in 1991, and Lord Justice Neill and other members of the group assisted in the preparation of what became the Defamation Bill 1996.

*The 1996 Act*

23. The 1996 Act gave effect to their recommendations, and to those of Lord Hoffmann who had suggested that a special regime should be set up for the summary hearing of defamation claims. The Act contains an innocent dissemination defence, which followed from the Lord Chancellor's consultation paper on that subject published in July, 1990. It also created a new defence of "offer to make amends", providing a defence to a defendant who is willing to admit a mistake in publication, providing the defendant agrees to publish an appropriate correction and apology and pay compensation (if any) assessed by a judge. The limitation period in actions for libel and slander and malicious falsehood was reduced to one year, except where the court uses its discretion to disapply the strict limitation period. It prevents a claimant from recovering damages for injury to reputation going beyond what he or she would be entitled to if everything likely to affect the claimant's reputation were public knowledge. And it brought up to date existing statutory privileges, extending to a wider category of reports, and in particular recognising the need to give reports of proceedings of European institutions protection equivalent to that already given to those in this country.

*The Parliamentary privilege amendment*

24. The 1996 Bill was amended in the House of Lords by including section 13 to deal with the problem which arose in 1995 in a libel action brought by a member of Parliament, Mr. Neil Hamilton, and a political lobbyist, Mr. Ian Greer, against *The Guardian* newspaper over allegations that Mr. Hamilton had made corrupt

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<sup>24</sup> Final Report, Cmnd.6810, July 1977, paragraph 19.46.

use of his right to ask questions of ministers and had received money via Mr. Greer's company ("cash for questions"). In its defence, the newspaper sought to justify what it had written by calling evidence about Mr. Hamilton's conduct and motives in tabling Parliamentary Questions and early day motions. The judge found this was contrary to Article 9 of the Bill of Rights 1689, which provides "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Mr Hamilton did not appeal against the judgment.

25. As the Joint Committee on Parliamentary privilege noted in its Report,<sup>25</sup>

"This had the effect of denying the plaintiff a forum for establishing that *The Guardian* allegations were untrue and, if untrue, receiving financial recompense. In other words, unlike any other citizen, a member of either House could not sue to clear his name if he was alleged to have acted dishonestly in connection with his parliamentary duties."

26. Section 13 of the 1996 Act therefore permits a person, who may be a member of either House or of neither House, to waive parliamentary privilege so far as he is concerned, for the purposes of defamation proceedings. The essential protection of members against legal liability for what they have said or done in Parliament remains and cannot be waived.

27. However, the Joint Committee on Parliamentary privilege observed<sup>26</sup> that

"Unfortunately the cure that section 13 seeks to achieve has severe problems of its own and has attracted widespread criticism, not least from our witnesses. A fundamental flaw is that it undermines the basis of privilege: freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example, where two members, or a member and a non-member, are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous; it is available only in defamation proceedings. No similar waiver is available for any criminal action, or any other form of civil action."

28. The Joint Committee stated<sup>27</sup> that it considered that

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<sup>25</sup> HL Paper 43-1, HC214-I, paragraph 63, 30 March 1999. The chairman of the Joint Committee was Lord Nicholls of Birkenhead.

<sup>26</sup> Report, paragraph 68.

<sup>27</sup> Report, paragraph 69.

“these criticisms are unanswerable. The enactment of section 13, seeking to remedy a perceived injustice, has created indefensible anomalies of its own which should not be allowed to continue. The Joint Committee **recommends** that section 13 should be repealed.”

29. The Joint Committee recommended<sup>28</sup> that

“the mischief sought to be remedied by section 13 should be replaced by a short statutory provision empowering each House to waive article 9 for the purpose of any court proceedings, whether relating to defamation or any other matter, where the words spoken or the acts done in proceedings in Parliament would not expose the speaker or the words or the doer of the acts to any legal liability. Each House would need to consider appropriate machinery once the section had been repealed.”

30. The Joint Committee also considered the Parliamentary Papers Act 1840 which was passed to reverse the decision in *Stockdale v Hansard*.<sup>29</sup> The Joint Committee observed<sup>30</sup> that it “was drafted in a somewhat impenetrable early Victorian style”. It considered<sup>31</sup> that

“the statutory protection would be more transparent and accessible if it were included in a modern statute, whose language and style would be easier to understand than the 1840 Act. We **recommend** that the 1840 Act, as amended, should be replaced by a modern statute.”

31. The Joint Committee’s recommendations have not been implemented.

#### *Law Commission Scoping Studies*

32. The Law Commission published two scoping studies in 2002: *Aspects of Defamation Procedure*<sup>32</sup> and *Defamation and the Internet*<sup>33</sup>. The former was undertaken in response to a request from the Lord Chancellor’s Department to investigate perceived abuses of defamation procedure. In particular the Lord Chancellor’s Department was concerned to find out, firstly, whether “gagging” writs and letters cause a problem in practice, and secondly, whether claimants routinely target those secondary publishers of a defamatory publication who are less able to establish a defence. The study concluded that there was no evidence

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<sup>28</sup> Report, paragraph 89.

<sup>29</sup> (1839) 112 ER 1160.

<sup>30</sup> Report, paragraph 342.

<sup>31</sup> Report, paragraph 374.

<sup>32</sup> *Aspects of Defamation Procedure: A Scoping Study* (2002) Law Commission.

<sup>33</sup> *Defamation and the Internet: A Preliminary Investigation Scoping Study No 2* (2002) Law Commission.

of such abuse but recommended that further consideration should be given to the position of internet service providers in relation to the innocent dissemination defence under section 1 of the 1996 Act.

33. The second study investigated potential problems with the way the law of defamation and contempt of court affect internet communications. The study identified four areas of concern which warranted further consideration: the liability of internet service providers (ISPs) for other people's material; the application of the limitation period to online archives; the exposure of internet publishers to liability in other jurisdictions; and the risk of prosecution for contempt of court.

*Ministry of Justice Consultations*

34. In September 2009, the Ministry of Justice published a consultation paper on *Defamation and the internet: the multiple publication rule*. It invited comments on whether there is a need for reform of the law in relation to the multiple publication rule in defamation proceedings, particularly in light of the development of online archives in the past few years. Following the consultation, the Ministry of Justice published their conclusions in March 2010, stating that:

“In the light of the responses received to this consultation, and the views expressed by the Select Committee and the Libel Working Group, the Government considers on balance that it is appropriate in principle to introduce a single publication rule (with discretion to the court to extend the period as necessary). Further consideration will be given to the detailed provisions to govern the operation of the single publication rule.”<sup>34</sup>

35. In January 2010, the Ministry of Justice published a consultation paper on *Controlling costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*. This consultation was prompted by concern about the impact of high legal costs in defamation proceedings on free speech. It invited comments on a proposal to reduce the maximum success fee that lawyers can charge in defamation cases conducted under Conditional Fee Agreements from 100% to 10%. The Ministry of Justice's response to the consultation concluded that the reduction of the maximum success fee should be implemented as an interim measure while further consideration was given to implementation of the more radical recommendations of the Jackson Report.<sup>35</sup>

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<sup>34</sup> Page 22.

<sup>35</sup> The Government was unsuccessful in its recent attempt to effect this change. The Jackson Report followed Lord Justice Jackson's Review of Civil Litigation Costs, published in December 2009. Justice Minister Lord McNally indicated recently that the new Government is currently considering the recommendations of the Jackson Report before deciding what action to take in relation to success fees in

*Libel Reform Campaign*

36. In 2009 the free speech NGOs English PEN and Index on Censorship, along with Sense About Science, published a joint report on the impact of English libel law on freedom of expression, entitled *Free Speech is not for Sale*, following a year long inquiry. The report concluded that English libel law has a negative impact on freedom of expression, both in the UK and around the world by imposing unnecessary and disproportionate restrictions on free speech. It made ten recommendations for reform in order to address these problems and suggested that these should be incorporated in a Libel Bill, which would simplify the existing law, restore the balance between free speech and the protection of reputation, and reflect the impact of the internet on the circulation of ideas and information.

*The CMSC Report*

37. In February 2010, the CMSC Report *Press Standards, Privacy and Libel* was published.<sup>36</sup> The CMSC Report considered the operation of libel law in England and Wales and its impact on press reporting, including important developments since the 1996 Act.

38. As regards the *Reynolds* defence, the CMSC Report expressed concern that<sup>37</sup>

“partly because of the lack of certainty of a *Reynolds* defence, many cases have to be settled before they come to court, and that as a result there are few opportunities for a body of case law based on Lord Hoffman’s judgment in *Jameel* to be developed. Indeed, it may take decades and we are of the view that the problem is more urgent than that, especially given the challenges facing smaller regional newspapers.”

39. It recommended<sup>38</sup> that the Government should launch a detailed consultation over “potentially putting such a defence, currently available in common law, on a statutory footing.”

40. As regards fair comment, the CMSC Report observed<sup>39</sup> that

“Much of the recent publicity given to the concerns of the medical and science community about the harmful effects of UK libel laws on their ability to comment has followed the court rulings to date in the Simon

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defamation cases, in response to an oral question tabled by Lord Lester: HL Hansard 21 June 2010, col 1164-1166.

<sup>36</sup> *Press Standards, privacy and libel* House of Commons Culture, Media and Sport Committee: Second Report of Session 2009-10 HC 362-1.

<sup>37</sup> Report, paragraph 162.

<sup>38</sup> Report, paragraph 163.

<sup>39</sup> Report, paragraph 141.

Singh case and media coverage of the case of the British cardiologist Peter Wilmhurst and the Danish radiologist Henrik Thomson, who have faced action from overseas commercial interests.”

41. On the basis of the evidence received from the charitable trust, Sense about Science, the Committee expressed its belief<sup>40</sup> that

“the fears of the medical and science community are well-founded, particularly in the internet age and with the growth of ‘libel tourism.’ We urge the Government, therefore, to take account of these concerns in a review of the country’s libel laws, in particular the issue of fair comment in academic peer-reviewed publications.”

42. As regards corporations and defamation, the CMSC Report found<sup>41</sup> that a mismatch of resources in a libel action, for example between a large corporation for which money may be no object and a small newspaper or NGO, has already led to a stifling effect on freedom of expression. Apart from tackling issues as to costs, it suggested<sup>42</sup> requiring a corporation to prove actual damage to its business before an action could be brought.

43. As regards the internet and the ‘repeat publication’ rule, the CMSC Report recommended<sup>43</sup> that

“the Government should introduce a one year limitation period on actions brought in respect of publications on the internet. The limitation period should be capable of being extended if the claimant can satisfy the court that he or she could not reasonably have been aware of the existence of the publication. After the expiry of the one year limitation period, and subject to any extension, the claimant could be debarred from recovering damages in respect of the publication. The claimant would, however, be entitled to obtain a court order to correct a defamatory statement. Correction of false statements is the primary reason for bringing a defamation claim. Our proposal would enable newspapers to be financially protected in some degree from claims against which the passage of time may make establishing a defence difficult.”

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<sup>40</sup> Report, paragraph 142.

<sup>41</sup> Report, paragraph 177.

<sup>42</sup> Report, paragraph 178.

<sup>43</sup> Report, paragraph 230.

*The Libel Working Group Report*

44. In December 2009, the Justice Secretary, the Rt. Hon. Jack Straw QC, MP, convened a working group consisting of members of the legal profession, the media, NGOs, academia and the scientific community to consider whether the law of libel is in need of reform and to make recommendations as to solutions. The Libel Working Group Report was published in March 2010, and made recommendations in relation to four principal areas about which the case for reform has been urged with particular emphasis in recent times:

- 'libel tourism';
- the role of public interest considerations in establishing a defence to a libel action;
- the rules about multiple publication, with particular reference to the internet; and
- procedural and case management issues relating to the conduct of libel litigation.

## EXPLANATION OF THE BILL

45. The Bill has been prepared with the advice and assistance of the Rt Hon Sir Brian Neill and Heather Rogers QC. It has been drafted by Stephanie Grundy, a former Parliamentary counsel. Its preparation has benefitted from an advisory group of members of English PEN, Index on Censorship, Article 19 and Sense About Science, together with senior lawyers for the BBC, The Guardian and The Times.

46. The Bill is divided into the following parts:

- **Clauses 1-5** Defences: responsible publication on matters of public interest, honest opinion, and truth.
- **Clauses 6-8** Statutory privilege: absolute privilege for reports of court and Parliamentary proceedings, and other reports protected by qualified privilege.
- **Clauses 9-10** Publication: responsibility for publication and the multiple publication rule.
- **Clauses 11-13** Cause of action: corporate claimants, trivial claims and publication outside the jurisdiction.
- **Clauses 14-15** Trial by jury: reversal of presumption and determining an application.
- **Clause 16** Evidence concerning proceedings in Parliament.
- **Clauses 17-19** Miscellaneous and supplementary provisions.

## DEFENCES

### *Clause 1: Responsible publication on matters of public interest*

#### *Background*

47. This clause builds on the common law defence developed in *Reynolds*.<sup>44</sup> Prior to *Reynolds*, common law qualified privilege was restricted to communications where it could be established that there was some special reciprocal duty or interest between the publisher and the recipient of the publication.<sup>45</sup>
48. The decision of the House of Lords in *Reynolds* altered this position and there is now greater protection for publications to the public at large where the matter is of sufficient public interest.<sup>46</sup> The Law Lords held that in certain circumstances a defence of qualified privilege was available to the press and other media in respect of the communication to the public of inaccurate information.
49. The House of Lords built on this decision in *Jameel v Wall Street Journal Europe Sprl*,<sup>47</sup> concluding that the lower courts had been interpreting Lord Nicholls' guidelines too strictly, and strengthening the defence by emphasising that the ten matters were guidelines and not hurdles to be overcome in turn.
50. However, the decision of the House of Lords in *Jameel* was explained differently in the various speeches, and in practice *Reynolds* privilege has not been as useful to publishers as had been hoped. In a recent lecture Lord Steyn, a member of the panel that decided *Reynolds*, said

“The idea was that over time a valuable corpus of case law would be built up. But the defence failed. Optimism about the practical utility of *Reynolds* privilege unfortunately proved misplaced. The great majority of *Reynolds* defences fail at first instance.”<sup>48</sup>

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<sup>44</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127.

<sup>45</sup> It was only in highly exceptional circumstances (such as urgently communicating a warning to the public) that privilege could protect publication to the public at large: *Blackshaw v Lord* [1984] QB 1 (CA).

<sup>46</sup> Lord Nicholls listed ten non-exhaustive matters to be taken into account in determining whether the defence is available: (i) the seriousness of the allegation; (ii) the nature of the information, and the extent to which the subject matter is a matter of public concern; (iii) the source of the information; (iv) the steps taken to verify the information; (v) the status of the information; (vi) the urgency of the matter; (vii) whether comment was sought from the plaintiff; (viii) whether the article contained the gist of the plaintiff's side of the story (ix) the tone of the article; (x) The circumstances of the publication, including the timing. The weight to be given to each factor was not explained.

<sup>47</sup> [2007] 1 AC 359 HL.

<sup>48</sup> 3<sup>rd</sup> Annual Boydell Lecture 26<sup>th</sup> May 2010.



51. The Libel Working Group and the CMSC both reported continuing difficulties with the *Reynolds* defence. Uncertainty, and the costs associated with the defence, were cited as particular problems.
52. In light of these concerns, the new clause builds on the decisions in *Reynolds* and *Jameel*, strengthening the protection afforded to the publication of matters of public interest whilst maintaining a robust standard of responsibility in publishing.
53. The clause emphasises the need for flexibility in taking account of the circumstances of publication. The factors listed are pointers which may or may not arise in a case and are not intended to be a checklist.
54. The clause also ensures that the defence can cover expressions of opinion as well as assertions of fact, meaning that it cannot be argued, relying on a technicality, that part of a publication falls outside the defence simply because it is not factual in nature (it is sometimes difficult to draw a clear distinction between fact and opinion).
55. It also makes clear that the defence applies to impartial reports on matters of public interest, where there is a public interest in their being reported, irrespective of whether the contents are true or false.

#### *Effect*

56. Clause 1 provides a defence to a publisher who is unable to prove the truth of a defamatory allegation published, but who has acted responsibly in publishing material on a matter of public interest.
57. The defence is not restricted to journalism and applies to any person publishing material of public interest in any medium.
58. The defence encompasses whatever is said to be the defamatory allegation, whether this is an expression of opinion or an assertion of fact.
59. The court must have regard to all the circumstances in deciding whether the defendant has acted responsibly. By way of guidance, clause 1(4) contains a non-exhaustive list of factors which the court may take into account in making this determination. These are not “hurdles”. The relevance of each factor will depend on the context and circumstances of the publication. It is not necessary for each (or any) of the factors listed to be addressed.
60. Clauses 1(5)-(6) clarify the position on what has been called “reportage” – this protects a publisher who reports impartially on a matter, such as an ongoing

dispute between two parties, where there is a public interest in that matter being reported (without the publisher having to verify what has been said). This means that, irrespective of the truth or falsity of what is being alleged by the parties to the dispute, the publisher who reports accurately and impartially will have acted responsibly.

### ***Clause 2 and 3: Honest Opinion***

#### *Background*

61. It is currently a defence to an action in libel or slander that the words complained of are what is described as “fair comment” on a matter of public interest. To succeed in the defence the defendant must show that the words are comment and not a statement of fact. An inference of fact from other facts referred to may amount to a comment. The defendant must also show that there is a basis for the comment, contained or referred to in the matter complained of.<sup>49</sup>
62. In practice, difficulty in distinguishing between comment and fact has been one obstacle to the use of the defence. Other difficulties, such as the extent to which the facts relied on must be stated or referred to in the publication, the effect of a factual error in undermining the defence, and the extent to which the defendant must prove knowledge of the facts prior to publication, have led to complex case law limiting the practical value of the defence.<sup>50</sup>
63. The Porter Report stated that “it is in relation to the defence of ‘fair comment’ that the common criticism that the law of defamation is unduly technical appears to us to be based upon the firmest ground.” They also expressed the view that  

“the primary defect in the existing substantive law lies in the rigidity with which the rule is applied that the plea of ‘fair comment’ must fail unless all the defamatory facts contained in the matter complained of and on which the comment is based are truly stated. So long as the gist or sting of any defamatory facts stated is true, and the comment is fair on the true facts, we think that the defence ought to succeed.”
64. They went on to recommend an amendment to the existing law to the effect that a defence of fair comment should succeed if<sup>51</sup>

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<sup>49</sup> Gatley paragraph 12.2; Duncan and Neill paragraph 13.07.

<sup>50</sup> See *Telnikoff v Matusevich* [1992] 2 AC 343 (HL); *Lowe v Associated Newspapers* [2006] EWHC 320 (QB); and *Joseph v Spiller* [2010] EMLR 7 (CA).

<sup>51</sup> This recommendation was given effect by section 6 of the 1952 Act as follows:

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions 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.”

“(a) the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the Court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff’s reputation, and (b) the Court is also of the opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant.”

65. The Faulks Report also criticised the defence, describing the adjective “fair” in the phrase “Fair Comment” as “seriously misleading having regard to the actual nature of the defence”. They went on to recommend that the defence be renamed simply as “Comment”.<sup>52</sup>

66. In *British Chiropractic Association v Singh*,<sup>53</sup> the Court of Appeal stated recently that:

“The law of defamation surely requires that language should not be used which obscures the true import of a defence to an action for damages. Recent legislation in a number of common law jurisdictions – New Zealand, Australia, and the Republic of Ireland – now describes the defence of fair comment as “honest opinion”. It is not open to us to alter or add to or indeed for that matter reduce the essential elements of this defence, but to describe the defence for what it is would lend greater emphasis to its importance as an essential ingredient of the right to free expression. Fair comment may have come to ‘decay with ... imprecision’. ‘Honest opinion’ better reflects the realities.”

67. The CMSC report also expressed concern about the defence, describing the fears of the scientific community that the law is stifling debate as “well founded”.<sup>54</sup>

68. The clauses aim to strip out unnecessary technical difficulties and make the renamed defence of honest opinion user-friendly in light of these criticisms. They update and simplify, providing a more accurate definition, clarifying what the defendant must prove in order to establish a sufficient factual basis, and stating the elements of the defence in clear terms. They also remove the outdated word “malice” and make it clear that the defence is lost only if the defendant does not honestly hold the opinion expressed.

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<sup>52</sup> Paragraph 152, page 39.

<sup>53</sup> [2010] EWCA Civ 350.

<sup>54</sup> Paragraph 142.

### *Effect*

69. Clause 2 defines the defence as “honest opinion”, as has been done by statute in New Zealand, Australia and Ireland. Clause 3 sets out the necessary conditions for establishing a successful defence of honest opinion. There are four conditions. The opinion must relate to a matter of public interest. It must be what an ordinary person would consider to be an opinion. It must have a factual basis or be based on information which is otherwise privileged. And, it must be possible for an honest person to have formed that opinion on the same basis, even though another person might have formed a different opinion.
70. The elements of the defence are set out clearly. The technicalities which have bedevilled the defence are removed, principally by clause 3(5). This makes clear that it is not necessary for the defendant to establish all the facts relied upon provided there is enough of a basis in truth for an honest person to have formed that opinion; it does not matter when the defendant first learned of the facts on which the opinion is based, and it is not necessary to include all (or any) of the facts on which the opinion is based in the publication.
71. The circumstances in which the defence can be defeated are set out in clause 3(6)-(7). These replace the old ‘malice’ test. Put simply: the defendant must genuinely hold the opinion expressed. Where the defendant is not the author, he or she must believe, or have no reason not to believe, that the author genuinely holds the opinion expressed.

### ***Clauses 4 and 5: Truth***

#### *Background*

72. At present a defendant who proves that what has been published is substantially true has a complete defence of so-called “justification”. The Bill does not seek to alter the common law, in the sense that proof by the defendant of substantial truth is at the heart of the defence. The Bill does not reverse the burden of proof upon the defendant to make out the defence of truth.<sup>55</sup>
73. As with fair comment, the defence has been criticised for its inaccurate terminology and excessive complexity.
74. The Faulks Committee said of the defence:

“The essence of this defence is truth. In modern parlance justification has a quite different meaning. We think it would be much more satisfactory if this

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<sup>55</sup> It was argued in *McVicar v UK* (2002) 35 EHRR 22 and in *Steel v UK* [2005] EMLR 314 that the rule as to the burden of proof was incompatible with Article 10 of the Convention but in both cases this argument was rejected.

defence were retitled 'Truth', so as to avoid any risk of juries being confused by archaic terminology."<sup>56</sup>

75. Gately describes the terminology as "unfortunate",<sup>57</sup> because although its meaning may be clear to lawyers, it may suggest to others that there must be some good reason for the publication.
76. Section 5 of the 1952 Act provides that, where the defendant publishes more than one defamatory allegation, the defence of justification does not necessarily fail by reason of the fact that the defendant fails to prove all of them, providing that what is not proved does not "materially injure" the claimant's reputation, having regard to what has been proved to be true. This mitigated the former (unduly harsh) common law rule, where failure to prove any one of a series of allegations would have caused the defence to fail. But it is a significant omission in the law that the section does not apply where there is only one defamatory allegation.<sup>58</sup>
77. The defence has developed a number of complexities, which are not addressed in the Bill. Partly as a consequence of the 'single meaning rule',<sup>59</sup> the role of 'meaning' has a critical role in the nature and scope of the defence. The claimant in a defamation claim must identify the defamatory meaning(s) about which s/he complains, and, where the publication contains more than one allegation, the claimant is entitled to pick and choose one upon which to sue. The defendant is required to identify the defamatory meanings which s/he intends to seek to prove to be true. The defence must be directed to the defamatory allegation(s) selected by the claimant. However, the defendant is entitled to seek to 'justify' (prove the truth of) any meaning that the words are reasonably capable of bearing (providing it is not 'separate and distinct' from the complaint made by the claimant). Difficult questions may arise about whether a publication makes a specific allegation (relating to one incident) or a general allegation (which may be justified by reference to incidents other than those referred to in the publication).
78. A practice has developed of referring to different 'levels' of defamatory meaning. Broadly speaking, level one is the most serious (guilt of an allegation); level two is lower (reasonable grounds to suspect guilt); and level three is the lowest

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<sup>56</sup> Paragraph 129.

<sup>57</sup> Paragraph 11.1.

<sup>58</sup> This was confirmed in *Basham v Gregory* [1998] EWCA Civ 1137.

<sup>59</sup> See *Charleston v News Group Newspapers* [1995] 2 AC 65 HL. In *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] EWCA Civ 609, Sedley LJ explained that (paragraph 1): "In defamation cases, both civil and criminal, there has for centuries been a rule that the question libel or no libel is to be answered in respect of a single meaning. This is unproblematical where there is only one thing that the words can sensibly mean, but it can be highly problematical where reasonable people might put more than one construction on the words read in their proper context." He further criticised the rule (paragraph 31) as "anomalous, frequently otiose and, where not otiose, unjust".

defamatory meaning (grounds to investigate). Many cases do not fall easily within the levels (grounds to suspect may be 'cogent' or 'strong'). What evidence is admissible in support of a plea of justification may differ, depending upon the 'level' of meaning. This may lead to case management problems, compounded by the fact that the question of what a publication means is a question for the jury (unless there is to be trial by judge alone: as to which see below at paragraph 144 ff). Disputes about meaning impede settlement and may result in unnecessary costs being incurred.

79. The Bill does not deal with the case management issues, but it does update and clarify the defence in significant respects. First, it provides more accurate terminology. Secondly, it makes clear that the defence is based on proof of the substantial truth of what has been published and that this can be not only where the defendant proves the truth of some (but not all) of a series of allegations, but also where s/he proves the truth of some (but not the whole) of a single allegation. The question of whether there is a material difference between what is proved and what has not been proved is to be considered 'horizontally' (as a series of allegations) and 'vertically' (as a single allegation).
80. If there is a material difference between what is alleged, and what has been proved, the claimant will succeed. If there is no material difference (having regard to what the defendant has proved), then these clauses make clear that the defendant will succeed. This strikes an appropriate balance between free expression and the protection of a good reputation.

#### *Effect*

81. These clauses update the defence of "justification". Clause 4 renames the defence as "truth".<sup>60</sup>
82. Clause 5(1) confirms the existing position that, for this defence to succeed, the defendant must prove that the defamatory statement is "substantially true". Clause 5(2) makes clear that the defendant is entitled to seek to prove the truth of the defamatory meaning(s) alleged by the claimant or less serious meaning(s) conveyed by the publication. Clause 5(3) provides that, in a case where the defendant does not prove that a meaning alleged by a claimant is substantially true, but does prove a lesser meaning, the defence will not fail if what is left unproved (the gap between the two meanings) would not materially injure the claimant's reputation having regard to the truth of what has been proved to be true.

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<sup>60</sup> The Bill contains a drafting error: at clause 5(3) and 5(4) the phrase "defence of justification" should in each case read "defence of truth".

83. Clause 5(4) confirms that where the complaint is about more than one defamatory allegation, the defendant does not need to prove the truth of all of the allegations, provided that s/he proves one (or more) of them and that what is left unproved does not materially injure the claimant's reputation in light of what has been proved. This reflects the current position provided for by section 5 of the 1952 Act.

## STATUTORY PRIVILEGE

### *Clause 6: Reports of court proceedings protected by absolute privilege*

#### *Effect*

84. This clause replaces section 14 of the Defamation Act 1996, which is repealed. It preserves the position that fair, accurate and contemporaneous reports of court proceedings are absolutely privileged. Absolute privilege is extended to the Inter-American Court of Human Rights, the African Court of Human and People's Rights, the International Court of Justice and other tribunals deciding matters in disputes between States.

### *Clause 7: Reports etc of certain Parliamentary matters protected by absolute privileged*

#### *Background*

85. This clause replaces the 1840 Parliamentary Papers Act, which is repealed. Section 1 of the 1840 Act prevents any civil or criminal proceedings in respect of a 'report, paper, votes or proceedings' published by order of either House. Section 2 confers similar protection on copies of such publications. Section 3 confers a lesser degree of protection on 'any extract from or abstract of' such publications. An extract or abstract must be published in good faith and without malice.

86. Section 15 of the 1996 Act, which is also repealed, confers qualified privilege on reports of the proceedings in public of a legislature anywhere in the world,<sup>61</sup> as well as material published by or on the authority of a government or legislature anywhere in the world.<sup>62</sup> The report must be fair and accurate and published without malice, and in the public interest.

87. The Joint Committee on Parliamentary Privilege described the 1840 Act as being "drafted in a somewhat impenetrable early Victorian style" and recommended that the protection given to the media by the 1840 Act and the common law

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<sup>61</sup> Schedule 1, paragraph 1.

<sup>62</sup> Schedule 1, paragraph 7.

should be retained, but that it should be replaced with a modern statute in order to be more transparent and accessible.<sup>63</sup>

88. The CMSC Report also considered the 1840 Act in relation to a case in which it was contended that the existence of a so-called 'super-injunction' prevented newspapers from reporting the substance of a parliamentary question relating to the case in question.<sup>64</sup>
89. The CMSC Report emphasised that the free and fair reporting of proceedings in Parliament is a cornerstone of a democracy. It concluded that publication of fair extracts of reports of proceedings in Parliament made without malice are protected by the Parliamentary Papers Act 1840 and cannot be fettered by a court order. However, it expressed concern that confusion over the issue may mean that this freedom is being undermined. The CMSC Report therefore repeated previous recommendations that the Parliamentary Papers Act 1840 be replaced with a clear and comprehensible modern statute.<sup>65</sup>
90. This clause gives effect to these recommendations by replacing the 1840 Act with a modern provision, emphasising that reports of Parliamentary proceedings are privileged and that this cannot be fettered by court order, and removing the qualifications imposed by the 1840 Act that such reports be bona fide and without malice.

#### *Effect*

91. Clause 7 confers absolute privilege on: fair and accurate reports of Parliamentary proceedings; of anything published by or on the authority of Parliament; or, a copy, extract or summary of such a document.<sup>66</sup>
92. The court must stay any proceedings which relate to such material, including proceedings which seek to prevent or postpone publication. This is a vital protection for the reporting of Parliament.

#### ***Clause 8: Other reports etc protected by qualified privilege***

#### *Background*

93. This clause replaces section 15 of the 1996 Act, which governs the operation of the qualified privilege scheme under Part 2 of Schedule 1 to the 1996 Act. The present state of the law on statutory qualified privilege lacks logic and

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<sup>63</sup> Paragraph 374.

<sup>64</sup> The case in question, concerning *Trafigura*, is discussed at paragraphs 94-102 of the Report.

<sup>65</sup> Paragraph 101.

<sup>66</sup> Clause 7(3) contains a drafting error: the reference to the "Welsh Assembly" should read "National Assembly for Wales".



commonsense and is internally inconsistent. It contains territorial limitations and restrictions which make little sense in an age of global internet publication via the electronic and print media.

94. The 1996 Act updated the 1952 Act by widening the scope of Part 2 protection to include the EEA dimension (except in relation to companies where Part 2 protection is confined to UK public company reports etc). However, there is no principled or logical basis for confining protection to the UK and other member States of the EEA. The forty seven member States of the Council of Europe are all bound by the European Convention on Human Rights which guarantees the right to freedom of expression and the protection of reputation. There is no good reason why Part 2 qualified privilege should protect publication of a fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of the legislature or government of member States of the EEA, but not of other states.
95. The anomalous scope of Part 2 as it stands is emphasised by the protection given in Part 1 of Schedule 1, without a right to explanation or contradiction, to fair and accurate reports of proceedings in public of a legislature or government anywhere in the world.
96. The new Schedule resolves these inconsistencies by extending the scope of Part 2 protection internationally, and by expanding the types of report which are covered.

#### *Effect*

97. Clause 8 governs the operation of the scheme of qualified privilege. It should be read with the new Schedule 1, which lists the official reports which are protected. The new Schedule updates the scheme and extends protection to a wider range of official documents.
98. The reports, copies and extracts referred to in the Schedule are privileged subject to the following conditions:
  - a. The publication must be fair and accurate;
  - b. The publication must be made without malice;
  - c. the defendant must publish a reasonable letter or statement by way of explanation or contradiction if requested to do so, unless s/he has good reason not to;
  - d. The publication must be made to the public or a section of the public, on a matter of public concern, the publication of which is for the public benefit.

## PUBLICATION

### *Clause 9: Responsibility for publication*

#### *Background*

99. Everyone who intentionally or negligently takes part in or authorises the publication of defamatory matter is potentially liable in defamation proceedings. In the case of a newspaper, everyone in the production chain from the writer of the article and the proprietors, the editor and the printers are all liable, and so too, subject to any defence, are those such as newsagents who sell the newspaper, or bookseller selling a book.

100. The width of potential liability for publication led to the development of a common law defence of “innocent dissemination”.<sup>67</sup> A statutory defence of innocent dissemination was subsequently introduced by section 1 of the 1996 Act. It was designed to protect secondary publishers (those not responsible for the content) of defamatory material.

101. The Section 1 defence does not apply to “authors, editors or publishers”. To take advantage of it, a defendant must show that s/he has taken reasonable care in relation to the publication, and that s/he did not know, and had no reason to believe, that what s/he did caused or contributed to the publication of a defamatory statement. Section 1(5) of the 1996 Act requires regard to be had to the extent of the defendant’s responsibility for content of the publication, the nature or circumstances of the publication, and the previous conduct or character of the author, editor or publisher.

102. The advent of the internet has required the courts to review the conditions in which a person who plays a subsidiary or intermediate role in the dissemination of defamatory material may be held responsible for the publication.

103. The Law Commission, in its paper on *Defamation and the Internet*, noted the dearth of case law on the question of what constitutes ‘reasonable care’ in the context of internet publication, concluding that

“There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places secondary publishers under some pressure to remove material without considering whether it is in the public interest or whether it is true. These pressures appear to bear

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<sup>67</sup>*Vizetelly v. Mudie's Select Library* [1900] 2QB 170. The common law defence has not been abolished but in practice it has been superseded by the statutory defence.

particularly harshly on ISPs, whom claimants often see as “tactical targets”. There is a possible conflict between the pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights. Although it is a legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means.”<sup>68</sup>

104. Some protection is provided under the EU Electronic Commerce Directive<sup>69</sup>, given effect by a statutory instrument<sup>70</sup>, to “information society services” which participate in publication only to the extent that they are “mere conduits” or involved in “hosting” or “cacheing” material. The effect of the Directive is that the defendant is protected from any financial remedy (damages or costs) or criminal sanction if the defendant does not have actual knowledge of the libel and, on being notified, acts expeditiously to remove or disable access to the information. Injunctions may still be obtained. This is why Internet Service Providers (“ISPs”) operate what is known as a “notice and take down” procedure, where material is removed from the website following notice that it is alleged to be defamatory. As a consequence material may be removed even if it is not defamatory by secondary publishers that are unwilling to take responsibility for it.

105. Clause 9 addresses these problems by introducing a framework of liability which is capable of dealing flexibly with technological advances in the transmission and storage of information. It reflects and extends the protection already afforded to internet service providers by the EU Directive. It provides that those involved in these activities should be liable only in circumstances in which they exert some influence or control over the content of the publication, and it seeks to reduce the chilling effect of the uncertainty surrounding the responsibilities of secondary publishers.

#### *Effect*

106. Clause 9 replaces the defence of “innocent dissemination” provided for by section 1 of the 1996 Act, which is repealed.

107. Clause 9(1)(a) provides a complete defence to a “facilitator”, being someone (as defined by clause 9(6)) who is concerned only with transmission or storage of the content of the publication, such as those who provide the “pipes” and infrastructure of the internet, and have no other influence or control over that content. Clause 9(1)(b) provides that a broadcaster of a live programme is

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<sup>68</sup> Paragraph 1.12.

<sup>69</sup> Directive 2000/31/EC

<sup>70</sup> Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013.

not liable for defamatory material in that programme if the broadcaster could not reasonably have foreseen the publication of the defamatory material.

108. Clause 9(2) provides a defence to an “intermediary” (or secondary publisher), being anyone other than a “primary publisher”<sup>71</sup>, until the defendant has received notice that the material the defendant is involved in distributing is defamatory and has had the opportunity to investigate the complaint. The defendant will have a defence until s/he has notice from the claimant of: the words complained of; to whom they relate; why they are defamatory; details of what is untrue; and the harm caused. The defendant then has a period of 14 days, or another period specified by the court, in order to investigate the complaint, after which the defendant becomes liable for the material complained of.

109. If the defendant chooses, after investigating the complaint, to continue with the distribution of the material, then s/he in effect assumes the responsibility of a primary publisher, with the same defences as are available to the primary publisher.

### ***Clause 10: Multiple publications***

#### *Background*

110. Each fresh communication of defamatory material is treated as a new publication and so gives rise to a separate cause of action, which is subject to its own limitation period. The bizarre effect of this “multiple publication rule” (the “MPR”) is illustrated by the 1849 *Duke of Brunswick* case<sup>72</sup>. In *Loutchansky v Times Newspapers Limited*<sup>73</sup> the Court of Appeal refused to over-rule the decision, and held that the multiple publication rule applied to continuing publication of defamatory material by a newspaper on its own website (its archive was available online), so each time a reader downloaded the article, there was a fresh cause of action, with a consequential new limitation period.

111. Under the Limitation Act 1980, each separate publication is subject to its own limitation period of one year. This reduces the risk of claims being brought on “stale” publications. But, because an article or programme placed on an electronic archive can easily be accessed via the internet, a new cause of action can arise (with a new one year limitation period) years after the first publication. Thus a libel claim may be brought on publication of defamatory material in an internet news archive even if the material in question was originally published many years ago. As publishers give greater access to their archive materials through the internet, they face potentially open-ended liability for defamation.

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<sup>71</sup> An author editor or person exercising effective control of an author or editor.

<sup>72</sup> (1849) 14 QB 185.

<sup>73</sup> (Nos. 2-5) [2002] QB 783. Leave to appeal to the House of Lords was refused.

112. The Law Commission recommended a review of the MPR, particularly as applied to electronic archives, on the basis that

“It is potentially unfair to defendants to allow actions to be brought against archive-holders many years after the original publication. After a lapse of time, it may be difficult to mount an effective defence, because records and witnesses are no longer available.”<sup>74</sup>

113. The Ministry of Justice’s 2009 consultation on the MPR considered the arguments for and against the retention of the rule and the alternative of a single publication rule. In light of the responses to the consultation the MoJ concluded that it would be appropriate to introduce a single publication rule, with discretion available to the court to extend the period as necessary.<sup>75</sup>

114. The CMSC Report recommended a one year limitation period for actions brought in respect of publications on the internet, subject to the court’s discretion to extend the limitation period under section 32A of the Limitation Act 1980 where the claimant did not know about the article, together with a right to obtain a court order to correct a defamatory statement. The CMSC Report also agreed that electronic archives should be protected by statutory qualified privilege after one year subject to them being flagged with a warning where there has been a complaint.<sup>76</sup>

115. The Libel Working Group Report considered two options: a single publication rule (with the court having discretion to extend the one year limitation period where appropriate); or, retention of the multiple publication rule with a new exception (either extending the scope of qualified privilege or introducing a similar free-standing defence based on a notice requirement).

116. Whilst recognising that the decision was finely balanced, the Report noted that the majority of the Working Group believed that a single publication rule (with discretion) should be the preferred option in circumstances where the republication of allegedly defamatory material is by the same publisher.

117. Clause 10 creates a single publication rule for the original publisher but (by amendments to sections 4A and 32A of the Limitation Act 1980) retains a discretion for the court to disapply this rule where its application would be contrary to the interests of justice. This would allow publishers to retain archives without the fear of open-ended liability, whilst leaving open the prospect for

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<sup>74</sup> Paragraph 1.14.

<sup>75</sup> Defamation and the Internet: the multiple publication rule Response to Consultation CP(R) 20/09 2010, page 22.

<sup>76</sup> Paragraphs 230-231.

redress for claimants in appropriate cases (for example, where, by reason of a material change of circumstances, a republication has caused real harm).

### *Effect*

118. Clause 10 concerns liability in defamation for multiple publications. It should be read with the amended sections 4A and 32A of the Limitation Act 1980, provided for by paragraphs 8 and 9 of Schedule 2 to the Bill.
119. The effect of this clause is that, as a general rule, the limitation period in an action for libel or slander runs from the date that the publication was first made available to the public. This prevents a claimant from bringing an action in defamation in relation to a publication which first became available to the public more than one year previously, except in certain specified circumstances.
120. In order to be protected, subsequent publications must be made by the same publisher, be of the same or substantially the same content, and publication must not be made in a materially different manner.
121. The amended section 32A of the Limitation Act 1980 provides that the court may disapply this general rule when it is the interests of justice to do so. The reasons for the delay, any changes of circumstances, and the behaviour of the defendant are relevant to the exercise of the court's discretion. The court can take account of all the circumstances of the case, ensuring that a proper balance is struck.

## **CAUSE OF ACTION**

### *Clause 11: Action for defamation brought by body corporate*

#### *Background*

122. Under current law, trading companies with reputations in the jurisdiction may sue for defamation and recover general damages. This contrasts with the position in several other common law jurisdictions, such as the USA, Australia and New Zealand.
123. In Australia, the National Uniform Defamation Laws (NUDL) of 2005 completely curtailed the right of corporations to sue. The rationale for this change was that at common law a corporation could sue for defamation, but as a corporation is an artificial entity, it does not have feelings. Therefore it could not recover damages for hurt to its feelings, a significant component of an award of compensatory damages for a natural person. A trading corporation could only recover for damages which are economic in nature. However, there was no requirement that a corporation prove as special damage the economic harm it suffered as a consequence of the defamatory publication. Like a natural person, a

corporation was entitled to the presumption of damage to reputation. The NUDL removed the right of corporations to sue for defamation, with exceptions for non-profit corporations and small trading corporations.

124. The Faulks Report recommended that trading corporations should be limited in bringing actions in defamation to cases where the claimant can either establish that it had suffered special damage, or that the defamation was likely to cause it financial damage. This would reflect the reality that “a company can only be injured in its pocket, and that its reputation can be injured by a defamation only when the injury sounds in money.”<sup>77</sup>
125. In *McDonald’s Corp v Steel*,<sup>78</sup> the Court of Appeal suggested that a submission that corporations should lose their right to sue for libel had ‘some substance’, but that it was a matter for Parliament to decide.<sup>79</sup>
126. The CMSC Report acknowledged concerns expressed by claimant solicitors and the Lord Chancellor that damage to a company’s reputation could lead to loss of jobs and reduction in the share value. On the other hand, the Report stated that companies have means not available to individuals to counter falsehoods and unfounded criticism through publicity campaigns. Further, it pointed out that individuals at companies who consider themselves defamed can also sue, funded by their employers. The CMSC Report concluded that the mismatch in resources between large corporations and many defendants has already led to a stifling effect on freedom of expression and suggested two possible solutions:
- (1) The introduction of a new category of tort entitled “corporate defamation” which would require a corporation to prove actual damage to its business before an action could be brought.
  - (2) A requirement that corporations rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved.<sup>80</sup>
127. The CMSC Report recommended that the Government should review the current position, looking also at the position in Australia, and consult on the desirability of introducing similar changes.

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<sup>77</sup> Paragraph 335.

<sup>78</sup> March 31, 1999, unreported, CA.

<sup>79</sup> This issue was subsequently considered by the ECtHR, which held that a company is entitled to defend its reputation. In *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44 the House of Lords considered whether a corporate claimant should be required to show that they have suffered actual harm or that such harm was “likely” but the majority rejected the proposition (the court was split 3:2).

<sup>80</sup> Paragraph 178.

128. The clause aims to draw a fair balance by limiting the standing of companies to sue for defamation to situations where they have suffered, or are likely to suffer, financial loss.

*Effect*

129. This clause prevents a corporate claimant from bringing an action in defamation unless it can prove that it has suffered, or is likely to suffer, financial loss.

***Clauses 12 and 13: Striking out where claimant suffers no substantial harm***

*Background*

130. Libel cases are subject to the Civil Procedure Rules (“CPR”). Under CPR 3.4(2), the court can strike out any claim or defence where there are “no reasonable grounds” for bringing the claim or defending it, or which is an abuse of process. Under CPR 24.2, the court can give summary judgment against a claimant on the whole or part of a claim if the claimant has no real prospect of succeeding on it. To defeat such an application, the claimant has to show that there is some real prospect of success.

131. In both of these situations the court must consider whether any reasonable jury, properly directed, could find in favour of the claimant. Summary judgment may be awarded, or the case struck out, where no reasonable jury could find for the claimant.

132. However, in a libel case the claimant does not need to prove that the words have caused any damage, as damage is presumed. This means that the elements of the cause of action are made out without proof of any harm, making it difficult to strike out flimsy or trivial claims under CPR 3 or CPR 24.

133. There is, in addition, a “summary disposal” procedure under sections 8 and 9 of the Defamation Act 1996. This procedure is little used in practice and works only for cases worth less than £10,000. It is most likely to be of use to a claimant who is willing to cap damages at £10,000, or to a defendant who is willing to abandon all substantive defences; it is not intended to be used where there is any substantial dispute of law or fact.

134. In *Jameel v Dow Jones*<sup>81</sup> the Court of Appeal held that it would be an abuse of process to pursue an action in respect of internet publication within the jurisdiction (to five people), in the face of very much wider publication

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<sup>81</sup> [2005] QB 946 CA.



elsewhere. There was no real damage to the claimant in the jurisdiction and no prospect of an injunction being granted. Thus, there was nothing at stake to warrant continuation of the claim.

135. In *Thornton v Telegraph Media Group*<sup>82</sup>, Tugendhat J recently held<sup>83</sup> that any definition of ‘defamatory’

“must include a qualification or threshold of seriousness, so as to exclude trivial claims ... It is required by the development of the law recognised in *Jameel v Dow Jones* as arising from the passing of the Human Rights Act 1998; regard for Art 10 and the principle of proportionality both require it.”

136. A related problem is that of so-called ‘libel tourism’ – that is where claimants search for the most favourable rather than the most appropriate forum in which to pursue a case. A claimant is entitled to sue wherever there has been any ‘publication’, that is, any communication to a third party. In internet cases, the place of publication is where the information is read or downloaded rather than the place where it is uploaded. So a defendant based outside the jurisdiction is at risk if s/he it puts something onto the internet which can be accessed here.

137. Within the EEA, if material is published in a number of different jurisdictions, the claimant has a choice. He or she can (a) sue the defendant in the place where it is based (in respect of all the publication); or (b) sue the defendant in any place where the “harmful event” within the meaning of Article 5(3) of the Brussels Convention, in this case the publication, has occurred.<sup>84</sup>

138. It is for the national authorities to define as a matter of domestic law what constitutes a “harmful event”. The fact that damage is *presumed* in defamation cases in the UK means that “publication” currently constitutes a “harmful event” even if there has been no real damage or loss.

139. In cases involving publication outside the EEA, the court must consider whether it is the correct forum or whether to rule the case out as *forum non conveniens*.<sup>85</sup> This entails consideration of factors relating to the degree of the claimant’s connection with the jurisdiction. Claimants often limit their claim to publication within the jurisdiction, in order to bring themselves within the rules. The focus on the fact that there has been some publication in the United Kingdom has been a powerful factor in persuading courts to accept jurisdiction

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<sup>82</sup> [2010] EWHC 1414 (QB).

<sup>83</sup> Paragraph 89. He referred to recent cases which had been struck out as an “abuse” at paragraphs 61-62.

<sup>84</sup> Case C-83/93, *Shevill v Presse Alliance* [1996] AC 959 ECJ/HL.

<sup>85</sup> See for example *Lewis v King* [2005] EMLR 4.

irrespective of the fact that the vast bulk of publication may be abroad or not actionable.

140. The Libel Working Group recommended that further consideration be given to tightening up the rules and practice relating to service out of the jurisdiction and ensuring their rigorous application, suggesting that

“the critical issue is enabling courts at an early stage to identify cases which constitute an abuse and where no real and substantial tort has been committed within the jurisdiction.”<sup>86</sup>

141. The CMSC Report also considered evidence as to the extent to which libel tourism is a real problem. The Report concluded that

“On balance, there is sufficient evidence to show that the reputation of the UK is being damaged by overly flexible jurisdictional rules and their application by individual High Court judges.”<sup>87</sup>

141. The Report recommended that the MoJ should consider how the Civil Procedure Rules could be amended to introduce additional hurdles for claimants in cases where neither party is domiciled nor has a place of business in the UK.

142. Clauses 12 and 13 build on *Jameel*, ensuring that only cases involving “substantial harm”, or the likelihood of such harm, to the claimant’s reputation within the jurisdiction, are entertained. Clause 12 requires the courts to strike out claims where there is nothing substantial at stake, while clause 13 aims to discourage forum-shopping by making clear that cases should only be heard in this jurisdiction where substantial harm has been caused to the claimant’s reputation within this jurisdiction as compared with elsewhere. These requirements are considered to be compatible with the Brussels Convention.

#### *Effect*

143. Clause 12 requires the court to strike out claims where no substantial harm has been caused, or is realistically likely to be caused, to the claimant’s reputation by the publication, provided that it would not be contrary to the interests of justice. It requires the claimant to show that s/he has suffered substantial harm. While there are many cases in which it will be obvious that harm has been caused or is likely, the court should strike out those cases which have no substance. This does not affect any other power of the court to strike out a claim for any other reason.

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<sup>86</sup> Page 15.

<sup>87</sup> Paragraph 214.

144. Clause 13 provides that the mere fact that publication has taken place within the jurisdiction will not automatically mean that there has been a “harmful event” here. The court is required to consider whether substantial harm has been caused to the claimant’s reputation in the jurisdiction, and, in doing so, to take account of the impact of publication elsewhere. This means that a claimant would have no cause of action in this jurisdiction where the defamation had been widely published elsewhere and the impact of publication in this jurisdiction was insignificant. The outmoded presumption is no longer enough to found the cause of action.

## **TRIAL BY JURY**

### *Clauses 14 and 15: Determining an application for trial by a jury*

#### *Background*

145. Defamation claims are among a small number of types of civil claim still able to be tried with a jury under section 69 of the Senior Courts Act 1981. If any party asks for jury trial, the court is obliged to order trial by jury, unless the case requires “any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.”

146. The Faulks Report recommended that the court should have a discretion, depending on the circumstances of each case, to decide whether or not in the interest of justice trial should be by jury.<sup>88</sup> However, this recommendation was not implemented.

147. This has caused problems for the effective management of cases, exacerbating the length of proceedings and costs. It is difficult for the judge to carry out effective case management when essential factual questions must be decided by the jury and, hence, cannot be decided until trial.

148. The determination of the ‘meaning’ of the defamatory allegation is a good example of this. It is for the jury to decide what words mean and whether they are defamatory. The parties often cannot agree on meaning, and the claimant is likely to assert that the words bear a more serious meaning than the defendant. A number of important matters depend on the determination of meaning, including the scope of the defences of justification and fair comment, the amount of damages and the use of the “offer to make amends” procedure.<sup>89</sup>

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<sup>88</sup> Paragraph 455(a).

<sup>89</sup> An “offer to make amends” (which includes the offer of an apology/correction) is a complete defence to a defamation claim but only in relation to the meaning(s) in respect of which it is made. The defendant must, in effect, accept the meaning alleged by the claimant to take advantage of this procedure.

149. The parties are therefore in limbo until the meaning is determined, but, as matters stand, the court can rule on meaning only at an interim stage where the position is so clear that only one outcome is possible.
150. Jury trial can be effective where the issue is whether words are true or false (the justification defence). However, the complexities and technicalities of defamation law, in relation to comment for example, are confusing to lawyers, let alone lay members of a jury. The *Reynolds* defence raises issues of fact and law and the courts have been ready to find that cases involving such a defence cannot conveniently be tried with a jury.
151. Jury trial takes longer and is therefore more expensive. Juries may not reach a conclusion, and a hung jury is not uncommon. They may also fail to reach agreement on a question along the way, requiring discharge of the jury and an order for a re-trial at yet more time and cost. These factors have, no doubt, led to the increased tendency for cases to be tried by judge alone.<sup>90</sup>
152. The aim of the clauses in reversing the presumption is therefore to promote effective case management and to reduce costs in defamation cases. Early resolution on meaning by a judge would enable the parties to know where they stand, and thus encourages early settlement, as well as fostering the more effective running of the case. It will no longer be possible for a party to de-rail effective case management by relying on the 'right' to jury trial.
153. Under the new clauses, defamation cases will be tried by juries only where the interests of justice override these concerns, either because of the nature of the matters arising in the case or the identity of the parties.

#### *Effect*

154. Clause 14 amends section 69(1)(b) of the Senior Courts Act 1981. The presumption in favour of jury trials in defamation cases is reversed, ensuring that they are the exception rather than the rule.
155. Clause 15 sets out how the court must determine an application for trial by jury. The fundamental question is whether it is in the interests of justice in all the circumstances to proceed with a jury trial. There may be circumstances where a jury verdict is desirable.

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<sup>90</sup> Applications about the mode of trial have led to appeals to the Court of Appeal, most recently in the case of *Fiddes v Channel 4 Television Corporation* [2010] EWCA Civ 516, where the Court of Appeal upheld Tugendhat J's decision to order trial by judge alone. The Court of Appeal has not yet delivered its reasoned judgment.

156. Clause 15(3) contains a non-exhaustive list of circumstances which may be relevant to this determination, including the nature of the matters in issue, the identity of the parties, and the interests of effective case management.

## **EVIDENCE CONCERNING PROCEEDINGS IN PARLIAMENT**

### ***Clause 16: Evidence concerning proceedings in Parliament***

#### *Background*

157. Section 13(1) of the 1996 Act provides that, where the conduct of a person in or in relation to proceedings in Parliament is an issue in defamation proceedings, he or she may waive the protection of Parliamentary privilege for the purpose of those proceedings. Accordingly, if an MP is accused of accepting money to ask Parliamentary Questions, the MP may waive the privilege given by Article 9 of the Bill of Rights, and, in that event, evidence may be given and questions asked about the MP's conduct without infringing Parliamentary privilege. It is not possible to counterclaim for damages for a slander spoken in Parliament even against a claimant MP who has himself waived privilege for the purpose of the proceedings.

158. The background to the enactment of this provision and the criticisms of it are described above at paragraphs 24 to 29. The new clause seeks to rectify these problems.

#### *Effect*

159. Clause 16 provides that the Speaker of either House of Parliament may waive Parliamentary privilege in relation to proceedings in an action for defamation. This clause replaces section 13 of the 1996 Act, which is repealed.

## **MISCELLANEOUS AND SUPPLEMENTARY**

### ***Clause 17: Interpretation***

160. This clause explains what is meant by various words and phrases which are used in the Bill.

### ***Clause 18: Minor and consequential provision***

161. This clause gives effect to Schedule 2, which contains amendments to other primary legislation which are necessary as a consequence of the Bill's provisions.

### ***Clause 19: Repeals***

162. This clause gives effect to Schedule 3, which repeals the provisions of other primary legislation necessary as a consequence of the Bill's provisions.

***Clause 20: Extent***

163. This clause applies the Bill to England, Wales and Northern Ireland, but not to Scotland.

***Clause 21: Commencement***

164. This clause provides for the commencement of the Bill.

***Clause 22: Short title***

165. This clause sets out the short title.

***Schedule 1: Qualified Privilege***

*Background*

166. This Schedule replaces Schedule 1 of the 1996 Act and is governed by clause 8 of the Bill.

167. It expands on the protection provided by the 1996 Act by extending the reach of Part 2 internationally; by conferring qualified privilege on reports of proceedings at press conferences, meetings and documents of overseas companies, and on material in archives; and, by expanding definitions of “governmental functions”, “proceedings”, “legislature” and “court”. For further explanation of the background see paragraphs 93 to 97 above.

*Effect*

168. Part 1 of the Schedule lists the reports, copies, extracts and summaries which have qualified privilege without explanation or contradiction.

169. Part 2 lists the reports, copies, extracts and summaries which are privileged subject to explanation or contradiction.

170. Part 3 contains supplementary provisions, including definitions of key terms used in the Schedule and provision for making orders.

***Schedule 2: Minor and consequential amendments***

171. Schedule 2 contains amendments to the following acts: the Parliamentary Papers Act 1840; the Defamation Act 1952; the Rehabilitation of Offenders Act 1974; the Rehabilitation of Offenders (Northern Ireland) Order 1978 (SI 1978/1908 (NI 27)); the Limitation Act 1980; and the Limitation (Northern Ireland) Order 1989 (SI 1989/1339 (NI 11)). These amendments are necessary to ensure that these Acts refer accurately to the new provisions contained in the Act and work properly with those new provisions.

### *Schedule 3: Repeals*

172. Schedule 3 lists the legislative provisions which will cease to have effect once the relevant provisions in the Act come into force.<sup>91</sup>

## **COMPATIBILITY WITH CONVENTION RIGHTS AND FREEDOMS**

173. Lord Lester of Herne Hill considers that the provisions of the Bill are compatible with the Convention rights, for the following main reasons.

174. The right to free expression is a fundamental civil right protected by Article 10 (1) of the Convention, as well as by the Human Rights Act 1998 and the common law. It includes the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers.

175. The exercise of the right to freedom of expression is not absolute but is qualified by the exceptions and limitations contained in Article 10 (2). Article 10 (2) provides that the exercise of these 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, amongst other things, “for the protection of reputation”.

176. Any restriction on this right must be prescribed by law, must further a legitimate aim, and must be shown to be necessary in a democratic society.<sup>92</sup> The law must not be too vague but must be reasonably certain, and it must be proportionate in its impact on freedom of expression.

177. The value afforded under the Convention to different forms of expression varies.<sup>93</sup> Political speech and public interest speech attract the highest degree of protection.<sup>94</sup>

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<sup>91</sup> The repeal schedule contains a drafting error: the Defamation Act 1952 should be listed underneath the Parliamentary Papers Act 1840.

<sup>92</sup> The Convention requires any curtailment of freedom of expression to be “convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved”, per Lord Nicholls (paragraph 200F-G) in *Reynolds v Times Newspapers* [2001] 2 AC 127 HL .

<sup>93</sup> As explained by Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 HL (paragraph 27) “The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value.”

<sup>94</sup> As expressed by Lord Nicholls in *R v BBC, ex p Pro-Life Alliance* [2003] UKHL 23 (paragraph 6) “Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy restrictions on this freedom need to be examined rigorously by all concerned, not least the courts”.

178. It is inherent in the Convention as a whole that a fair balance must be struck between one individual's rights and the rights of others, as well as the wider public interest.
179. Article 8 of the Convention guarantees the right to respect for private and family life, home life and correspondence, and the European Court of Human Rights has interpreted Article 8 in a way which gives strong protection to the protection of personal privacy against unwarranted intrusion. The Bill does not seek to codify privacy law, including data protection.
180. It is unclear from the current case law of the European Court of Human Rights whether the scope of Article 8 includes the protection of reputation as a positive right.<sup>95</sup> In *GNM v Ahmed*<sup>96</sup>, the Supreme Court rejected the argument that the recent case law of the European Court indicates that Article 8 does not include the right to have one's reputation protected against attack. The Supreme Court concluded instead that some attacks on reputation may be so serious as to undermine personal integrity.<sup>97</sup>
181. The Bill has been prepared on the basis that the right to have one's good reputation protected by law is a fundamental civil right, and that, within the wide area of discretion allowed to the Contracting States in the way they give effect to the Convention, a fair balance must be maintained between the civil right to freedom of expression, including public debate, discussion and information, and the civil right to such protection. In restating the existing defences, the Bill's preparation has been informed by the approach adopted by the European Court of Human Rights in interpreting and applying Article 10 of the Convention.
182. Articles 6 (1) and 13 of the Convention guarantee the right of access to courts in determining disputes in defamation proceedings, and the right to an

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<sup>95</sup>In *Lindon v France* (2008) 46 EHRR 35, Judge Loucaides said "The right to reputation should always have been considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life ..." This opinion was reinforced by the subsequent decision of the Court in *Pfeifer v Austria* (2009) 48 EHRR 8, where the right to reputation was expressly recognised as a right falling within the protection of Article 8. However, in *A v Norway* [2009] ECHR 28070/06 the Court drew attention to the fact that Article 8 does not expressly provide for a right to protection against attacks on personal reputation, unlike Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights. Further, in *Karako v Hungary* [2009] 39311/05 the Court said "In the Court's case-law, reputation has only been deemed to be an independent right sporadically ... and mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life."

<sup>96</sup> *Guardian News and Media Ltd & Others v Mohammed Habar Ahmed & others* [2010] UKSC 1.

<sup>97</sup> Paragraph 41.



effective remedy for the violation of the civil rights and obligations at stake in such proceedings.

183. The Convention does not require the provision of legal aid for defamation proceedings, as recommended by the Faulks Report. Conditional fee agreements enhance access to justice, but the way in which the scheme currently operates results in massive legal costs being incurred which eclipse any award of damages. That has a severe chilling effect on freedom of expression and results in self-censorship. Proceedings are pending before the European Court of Human Rights in *MGN v United Kingdom* complaining that the current system has violated the applicant's Article 10 rights. In that case, Naomi Campbell was awarded £3,500 in damages, but in addition the newspaper was ordered to pay her legal costs, which totalled more than £1 million, and included a so-called "success fee" of almost £280,000 for the proceedings in the House of Lords undertaken under a conditional fee agreement. However, it is unnecessary for the Bill to deal with this issue, since there are ample existing legal powers to alter the current scheme.
184. A fair balance is maintained in the Bill in protecting the right to reputation as well as freedom of expression by continuing to place the burden on defendants alleged to have published defamatory matter to bring themselves within the defences to a claim, while clarifying and strengthening those defences in the interests of freedom of expression, and requiring claimants to show significant harm to their reputations as a condition for having access to the courts in seeking a remedy.
185. The principles developed by the courts to ensure that damages awards are proportionate to the injury suffered by the claimant, and to prevent the award of prior restraints on publication other than in the most exceptional circumstances, are not altered by the Bill, and give necessary protection to freedom of expression. The Bill does not make provision to regulate costs in libel proceedings, since there are existing powers to do so in a way which facilitates effective access to justice without imposing disproportionate costs upon defendants.
186. Where possible the Bill seeks to reduce avoidable vagueness in existing law, and to tailor the defences to the needs of both parties to defamation proceedings.