

Lord Lester's Defamation Bill 2010 – a distorted view of the public interest?

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Executive Summary

1. Lord Lester claims that his Defamation Bill claims is intended to strike a fair balance between private reputation and public information and freedom of expression and to modernise the law in accordance with the overriding requirements of the public interest. From our perspective, the real agenda behind the Bill appears to be to alleviate so far as possible (perhaps even eradicate) the chilling effect of libel law on journalists, media organisations and others. Yet the chilling effect is precisely the purpose of libel law. It prevents unwarranted injury to reputation by means of incautious speech and is undesirable only to the extent that true and important information is withheld from the public sphere. The Bill does not properly valorise individual reputation or reflect wider societal importance of that concept.
2. The Explanatory Notes accompanying the Bill present an unbalanced picture of the law of defamation in order to make the case for reform. A more balanced presentation would have revealed that it is not the substantive law of libel that needs reform but costs and procedures. Yet

the Bill does not address these questions and as a consequence spectacularly misses the real problem.

3. There is little compelling evidence provided that justifies the significant changes that the Bill proposes making to the existing law. Thus: there is little evidence that libel tourism is a serious problem and that the courts do not have the power to control such as exists; the courts already have sufficient existing powers to strike out trivial claims; the case for extending the existing *Reynolds* public interest privilege is not made out; those publishing on the Internet are well protected from suit already without the further need to exempt 'facilitators' from liability; requiring corporate bodies to prove substantial financial harm pays insufficient attention to the huge economic value of the corporate sector to the UK Economy; and the creation of a single publication rule insufficiently valorises the right to reputation.

4. Our conclusion is that the Bill offers a dangerously unbalanced presentation of where the public interest lies. Lip service has been paid to the human right to reputation in a rush to sanctify freedom of expression. The consequence is a Bill that in time may lead to the death of libel and to the consequent undermining of the important societal interests it protects.

Lord Lester's Defamation Bill 2010 – a distorted view of the public interest?

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1. Lord Lester's Defamation Bill² was published at the end of May 2010 to much, wholly unsurprising, acclaim from the media and assorted libel reformers. Since that time it has had little adverse comment albeit that some have suggested that it is not radical enough.³ As with any Bill the first questions that one is prompted to ask are, what is it designed to do and why is it needed? Paragraph 7 of the Explanatory Notes⁴, which have been helpfully supplied with the Bill, explains the Bill's purposes as follows⁵:

- i) [to] strike a fair balance between private reputation and public information as protected by the common law and constitutional right to freedom of expression;
- ii) [to] modernise the defences to defamation proceedings of privilege, fair comment, justification, and innocent dissemination, in accordance with the overriding requirements of the public interest;

¹ Professor Mullis can be contacted at a.mullis@uea.ac.uk and Dr Scott at a.d.scott@lse.ac.uk. Without Mr Benjamin Pell, whose knowledge of, and expertise in, this area are without parallel, this article would not have been written. Our deepest thanks are due to him albeit that he would want us to say that all the remaining mistakes are ours.

² <http://services.parliament.uk/bills/2010-11/defamationhl.html>.

³ Siobhan Butterworth, 'Lord Lester's defamation bill should be more radical', *The Guardian*, 23 June 2010.

⁴ The Explanatory Notes are available here: <http://inform.wordpress.com/2010/06/30/lord-lesters-defamation-bill-explanatory-notes/>

⁵ Explanatory Notes, at para 7.

- iii) [to] 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;
- iv) [to] require corporate claimants to prove financial loss (or the likelihood of such loss) as a condition of establishing liability;
- v) [to] encourage the speedy resolution of disputes;
- vi) [to] make the normal mode of trial, trial by judge alone rather than by judge and jury;
- vii) [to] enable the Speaker of either House of Parliament to waive Parliamentary privilege as regards evidence concerning proceedings in Parliament; and
- viii) [to] modernise statutory privilege.’

2. We would regard some of these aims as entirely laudable. Who after all could object to a law of defamation that strikes a fair balance between private reputation and freedom of expression? Who would not wish to support the speedy resolution of disputes and who would not wish a modern law of statutory privilege? However, we have a number of serious concerns about the Bill as it stands and believe that it should be regarded as a useful contribution to the debate but not a substitute for a through-going review of the law and procedure in this area.
3. First, as we explain below, we are not persuaded that the case for reform has been made out in relation to several matters dealt with by the Bill. We do not, for example, believe that the case has yet been made for requiring corporate claimants to prove financial loss or to make *Reynolds*⁶ privilege even more media-friendly than currently. Nor do we think that the provision in clause 9 on responsibility for publication strikes the right

⁶ *Reynolds v Times Newspapers* 919990 UKHL 45, [2001] 2 AC 127.

balance between the protection of reputation and freedom of expression. We are more ready to be persuaded that the time for trial by jury in libel cases has come to an end and that the claimant should have to prove they have suffered or are likely to suffer real harm as a result of the defamatory publication of which they complain. However, we do not advocate making these changes without a thoroughgoing review of the law of defamation as a whole. Though jury trials are now a real rarity in defamation claims the constitutional right to trial by jury should not be swept away without very careful consideration.

4. Secondly, our real concern with the Bill is that it spectacularly misses the real issue. The real problem with the law of libel, notwithstanding the comments of the drafters in the explanatory notes about the substance of the law of defamation, is not that it is dangerously weighted in favour of claimants. In fact, as we will explain below, the law has become substantially more defendant friendly over the last decade and indeed is regarded by some as too ready to sacrifice the personal right to reputation at the wider altar of freedom of expression. The real problem with the law of defamation is instead that it can be far too expensive and procedurally complex for a defamed claimant to vindicate his reputation or for a wrongly sued defendant to clear his name. What is really needed is a series of carefully thought out procedural reforms aimed at reducing complexity and cost, and fair, appropriate adjustments made to the existing Conditional Fee Arrangements to ensure that those without great wealth are not denied access to justice but also that defendants cannot be terrorised into submission by undeserving claimants who have something to hide.

5. In this paper we examine the claims made by the drafters of the Bill and conclude that they fail to make the case that the substance of the law needs to be shifted further in the favour of the media than it is currently. That is not to say however that we disagree with all the proposals made in the Bill. We therefore undertake an analysis of the provisions of the Bill in order to identify the proposals that make a positive contribution to the existing law by way of clarification, simplification or re-balancing while also offering our a critique of those provisions we believe are flawed whether because the intention behind the proposals was flawed or because the intention has miscarried.

Does English law needs reform? – An examination of the claims in the Explanatory Notes

6. Anyone taking at face value the description in the explanatory notes of the current state of English libel would be forced to conclude that the state of English libel law is such that significant change is necessary. In paragraph 5 of the Explanatory Notes, for example, the drafters comment that “The common law defence of so-called ‘*Reynolds* privilege’, developed by the House of Lords has not been as useful to publishers as had been hoped⁷ and “The ‘chilling effect’ upon the right to free expression, induced by the threat of civil actions for libel, has been repeatedly recognised by senior judges⁸. So too the lack of clarity and outdated nature of the law relating to internet publications⁹ has been said to chill speech as has the ability of claimants to pursue defamation claims

⁷ Explanatory Notes, at para 5(vi). Footnotes omitted.

⁸ Explanatory Notes, at para 5(xi).

⁹ Explanatory Notes, at para 5(vii) and (viii).

in English courts ‘where the publication has caused no substantial harm.’¹⁰ We could continue but the general tone of the description of English libel law is to the effect that it is archaic, illiberal and unbalanced. Moreover, and critically, its effect is to chill free speech by making the media fearful about publishing on matters of scientific, academic and public interest.

7. In a recent article,¹¹ we have written about claims made by critics that the English law of libel is archaic, illiberal and unbalanced. We concluded that, though not perfect, libel’s critics had set up a straw-man that bore little resemblance to the real thing and that when properly understood the law of defamation was not archaic, illiberal or unbalanced. We do not intend to repeat the comments we made in that article here. However, in the light of the critique offered in the explanatory notes a few general points are worth making. First, reading the Explanatory Notes one would be forgiven for thinking that English law had simply not responded to changes in societal values, to the introduction of the Human Right Act and to the arrival of the internet. Yet this would be a complete misconception of what has happened over the last decade.

Pro-media revision of English law

8. The most obvious changes in libel law have come in relation to the curtailment of damages and the development of *Reynolds* ‘public interest’ privilege.¹² As is conceded in the Explanatory Notes¹³, whereas some

¹⁰ Explanatory Notes, at para 5(xiii).

¹¹ Mullis & Scott, ‘Something Rotten in the State of English Libel Law: A rejoinder to the clamour for the Reform of Defamation’, (2010) 14(6) Communications Law 172. Also available at <http://inform.wordpress.com/?s=mullis>.

¹² *Reynolds v Times Newspapers* 919990 UKHL 45, [2001] 2 AC 127.

¹³ Explanatory Notes, at para 8.

claimants may have seen at one time libel claims as a road to untaxed riches, this is no longer the case. Judges are now required to give considerable guidance to the jury about the correct approach to take in assessing damages and the Court of Appeal can also substitute its own award for that of a jury or judge in the event that it regards the award as excessive.¹⁴ The effective maximum has been said to be about £225,000 and awards of even half that amount are a rare occurrence. Given that most libel damages are modest and the claimant only recovers a proportion of his costs, even successful libel litigants are often left out of pocket.¹⁵ The development of *Reynolds*¹⁶ privilege and the related ‘reportage’ defence have widened substantially the room for error afforded to the media when reporting on matters of public interest. Provided that the journalist has acted responsibly and that the matter considered is of public interest, the defence is available.

9. There have been a number of further ‘pro-media’ reforms. The defence of ‘fair comment’ has been revitalised¹⁷ and, notwithstanding the comments of the Court of Appeal in *BCA v Singh*¹⁸, is more accommodating of free speech than previously. Certain legal entities

¹⁴ Court & Legal Services Act 1990, s 8.

¹⁵ ‘In addressing issues of proportionality, the following must be borne in mind. Defamation actions are not primarily about recovering money damages, but about vindication of a claimant's reputation. If a successful libel claimant recovers, say, £30,000, that figure does not represent the measure of his success. In many cases, after paying his irrecoverable costs, he will be out of pocket if he recovers that amount as damages. That does not mean the litigation is not worthwhile. A claimant wrongly accused of some serious fault, such as malpractice or dishonesty in business, may well suffer very large unquantifiable loss if he does not recover his reputation. The value of the verdict in his favour is expected to consist substantially in the future loss that it is hoped will be avoided by the vindication.’ Per Tugendhat J in *Clarke v Bain and Prolink Holdings* [2008] EWHC 2636, at [54].

¹⁶ *Reynolds v Times Newspapers* 919990 UKHL 45, [2001] 2 AC 127.

¹⁷ And is likely to be ‘revitalised still further by the Supreme Court in *Joseph v Spiller*. The decision of the Court of Appeal can be found at [2009] EWCA Civ 1075.

¹⁸ [2010] EWCA Civ 350.

have been found to lack the capacity to bring a claim for defamation¹⁹, and others, such as those providing web-search services, treated as effectively libel proof²⁰. The enactment of the ‘offer of amends’ procedure²¹ enables a media defendant that ‘has got something wrong’ to apologise, and for so doing to get a substantial reduction on the damages that it would otherwise have to pay. The ‘summary disposal’ procedure under section 8 of the Defamation Act 1996 allows a court, in practice usually on application by the defendant, to weed out weak cases at a relatively early stage. These and other changes warrant the conclusion that the last 20 years have seen a radical shift in the balance of power in defamation claims. The importance of freedom of speech is now more fully reflected in the law than was formerly the case. One consequence has been that it is now more difficult than ever to bring a successful libel claim.²²

Specific claims in the Explanatory Notes about the English law of libel

10. While we do not deny the truth of a number of the statements in the Explanatory Notes about the existing state of English libel law, several, in particular the suggested inadequacy of *Reynolds* privilege, the general chilling effect of libel recognised by senior judges, the inadequacy of the law to deal with internet publications, the libel tourism friendly nature of

¹⁹ See for example, *Derbyshire CC v Times Newspapers* [1993] AC 534 (local authorities and central government departments); *Goldsmith v Bhoyrul* [1998] QB 459 (political parties).

²⁰ See the decision of Eady J in *Metropolitan International Schools Ltd v Design Technica Corp, Google UK Ltd and Google Inc* [2009] EWHC 1765.

²¹ Defamation Act 1996, ss 2-4.

²² See further the statistics collected for the International Forum for Responsible Media (Inform) Blog by Benjamin Pell: <http://inform.wordpress.com/2010/07/02/defamation-trials-summary-determinations-and-assessments-jan-to-june-2010/>

English law and the unfairness of the multiple publication rule, are contestable and indeed we do contest these claims in our previous article.²³ Here, we make the following short comments.

The inadequacy of Reynolds?

11. First, the fact that *Reynolds* has been less useful to publishers than they would have liked has more to do with the irresponsible practices of some publishers²⁴ than with the law itself. An examination of the cases in which *Reynolds* privilege failed rarely persuades us that it offers inadequate protection to the sort of journalism that the law should encourage.

The chilling effect of libel

12. Secondly, suggesting that judges have recognised the general chilling effect of libel²⁵ is not an argument against the existing law of libel. Of course, libel law chills: that is its point. By chilling, unwarranted injury to reputation by means of incautious speech is prevented. The chilling effect of libel is undesirable only to the extent that it causes true and important information to be withheld from the public sphere. The important question to ask therefore is whether the balance between the protection of reputation and freedom of expression is wrong. Merely asserting that libel law chills does not take us very far.

²³ Mullis & Scott, 'Something Rotten in the State of English Libel Law: A rejoinder to the clamour for the Reform of Defamation', (2010) 14(6) Communications Law 172, at 174 ff.

²⁴ See, for example, *Grobbelaar v news Group Newspapers* [2001] EWCA Civ 33; *Galloway v Teelgraph Group* [2006] EWCA Civ 17.

²⁵ Explanatory Notes, at para 5(xi).

Internet publications

13. Thirdly, we are not persuaded that the law relating to publications on the Internet is unclear, overly protective of reputation or inadequately framed for Internet publications. In our view, the courts, Parliament and government have responded in ways that hold an appropriate balance between encouraging freedom of expression and maintaining an appropriate respect for reputation. Specifically, special defences are provided for internet service providers by section 1 of the Defamation Act 1996 and the Electronic Commerce (EC Directive) Regulations give wide immunity from liability to internet service providers who merely act as conduits of, or temporarily cache information provided by others²⁶. Where such providers act as hosts of third party material (and therefore have real control over the content), they are immune from liability if they have no knowledge of the defamatory material. Should they be informed of the defamatory content, they remain immune from suit if they act expeditiously to remove the material.²⁷
14. Secondly, operators of Internet search engines, such as Google, AltaVista or AskJeeves, are not treated as ‘publishers’ at common law.²⁸ Therefore, they cannot be held liable where in response to an Internet search the search engine provides a snippet of information that is defamatory of a claimant.
15. Thirdly, although the issue has not been determined finally, a court has already indicated that online interactive chat should be treated as a

²⁶ Electronic Commerce (EC Directive) Regulations 2002, Reg’n 17 and 18.

²⁷ Electronic Commerce (EC Directive) Regulations 2002, Reg’n, 19.

²⁸ *Metropolitan International Schools Ltd v Design Technica Corp, Google UK Ltd and Google Inc* [2009] EWHC 1765.

slander and therefore only actionable on proof of special damage.²⁹ It is therefore simply not right to suggest, as does the Explanatory Notes that ‘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 recognize technology-specific exceptions.’

*Libel Tourism*³⁰

16. Fourth, so far as the libel tourism friendly nature of English law is concerned, we note that such hard evidence as exists suggests that the problem is not a serious one. Moreover, we are not persuaded that the English law rules on jurisdiction that are said to permit libel- tourism are in themselves at all problematic. Contrary to the rules sometimes posited, the English courts in fact require the claimant to demonstrate, first, that he or she does possess a reputation in this jurisdiction,³¹ and secondly that defamatory publication has occurred here. Any damages recovered will relate only to the harm caused to the reputation held in this jurisdiction. The courts have discretion to strike out a claim as an abuse of process where no ‘real and substantial tort’ has been committed. This is not mere puffery; the discretion has been exercised in a number of recent cases.³² Again the claim in the Explanatory Notes –

²⁹ *Smith v ADVFN Plc* [2008] EWHC 1797.

³⁰ See generally on this topic, Lord Hoffmann’s Fifth Dame Anne Ebsworth Memorial Lecture available at <http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth/>.

³¹ See, for example *Kroch v Rossell* (1937) 156 LT 379, *King v Lewis* [2004] EWCA Civ 1329.

³² *Lonzim plc v Sprague* [2009] EWHC 2838 (QB); *Atlantis World Group v Gruppo Editoriale L’Espresso SPA* [2008] EWHC 1323 (QB); *Jameel v Dow Jones & Co* [2005] EWCA Civ 75. We also note that our courts are bound to apply the decision of the European Court of Justice in *Shevill v Presse Alliance* [1995] 2 AC 218. This has the consequence that any citizen of the European Union can sue for libel in any jurisdiction where his or her reputation has been damaged or where a wrong has been

‘Claimants have been able to pursue defamation claims in English courts where the publication has caused no substantial harm. This has caused widespread criticism, especially as regards so-called libel tourism by foreign claimants in respect of publications overseas.’ – is overstated.

The multiple publication rule

17. Finally, so far as the claim that there is widespread concern about the effect of the multiple publication rule³³ we concede that this is true but reiterate the response that we made to the government consultation on the subject³⁴, namely that the case for abolition of the multiple publication rule has not been made out. We do not agree that the current rule ‘defies common sense’. Instead, it is our view that almost equally simple and efficacious alternative solutions is available and suggest the introduction of a new defence of ‘non-culpable republication’ alongside retention of the multiple publication rule. Subject to certain conditions, this defence would extend not only to online archive publishers but also potentially to other authors whose work is replicated by others across the Internet. We considered that a single publication rule (even with an extended limitation period) would not always allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing rights to privacy and reputation. A single publication rule would automatically absolve both the author and the host of an impugned archive statement of any responsibility for its making after the requisite limitation period following first publication.

committed. This may allow claims that some would regard as libel tourism, but any change in English law necessarily must be consistent with European law.

³³ Explanatory Notes, at para 5(viii).

³⁴ Available here: <http://lsemmediapal.blogspot.com/2009/12/single-publication-rule-or-defence-of.html>.

We did not consider that this is appropriate. Not every author of a defamatory statement – or every archivist of online content – is deserving of exoneration from liability. In the online environment, the availability of past statements can continue to be horrendously damaging. At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed.

Compatibility of the Bill with ECHR Rights and Freedoms

18. The explanatory notes are interesting not only for the way in which the existing law of libel is described but also for the way in which the drafters discuss the compatibility of the Bill with Convention Rights and Freedoms³⁵ and the way in which they portray the various reports of committees and working groups on defamation³⁶ while ignoring critical responses to those reports. Taking first the question of the Bill's compatibility with Convention Rights and Freedoms, while it is acknowledged that freedom of expression is not an absolute right³⁷ it is nevertheless portrayed, quite properly, in terms that make clear that the existence of the right is not in doubt and any restriction on the fundamental civil right must further a legitimate aim and be shown to be necessary in a democratic society.³⁸ When the Notes come to discuss the protection of reputation however they are grudging at best in according reputation equal status.³⁹ At paragraph 180, for example, it is stated that

³⁵ Explanatory Notes, at para 173ff.

³⁶ Explanatory Notes, at paras 10-44.

³⁷ Explanatory Notes, at para 175.

³⁸ Explanatory Notes, at para 176.

³⁹ It is interesting to note in this regard that at the Westminster Policy Legal Forum on Libel and Privacy Law – Challenges for Reform, 15th June 2010, Lord Lester commented (at p 64) during discussion that 'On this business about the presumption in favour of free speech, obviously some argue that reputation and free speech must be equally balanced in all cases, I don't share that view.'

‘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.’ While it is true that the case of *Karako v Hungary*⁴⁰ does cast some doubt on whether an attack on reputation will *always* engage article 8, it is taking a very narrow view of the case law to suggest that it is unclear that reputation is included as a positive right.⁴¹ A more acceptable way of describing the current position would have been to say that article 8 certainly does include the protection of reputation as a positive right unless the attack on reputation is a trivial one that does not in any way affect a person’s personal integrity.

19. In fairness to the drafters, though the recognition of reputation as a protected right is grudging, they state in para 181 that ‘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.’ This statement is however rather undermined by the one which follows: ‘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.’ In short one is left with no doubts but that for the drafters freedom of expression is the more important right and though reputation has certainly not been ignored, the balance struck has been tilted further in favour of the former.

⁴⁰ [2009] 39311/05.

⁴¹ See for example in English law the speech of Lord Rodger in *Guardian News and Media v Ahmed* [2010] UKSC 1, at [37]-[42].

The treatment of previous committee and working group reports on defamation

20. After the introduction and somewhat unbalanced explanation of the existing law, the Explanatory Notes continue with a long section entitled ‘The Legislative History’. At para 10, it is noted that ‘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.’ There follows a summary of the Porter Committee Report (1948)⁴², the Faulks Committee Report (1975)⁴³, the Neill Committee Report (1991)⁴⁴, the Report of the Joint Committee on Parliamentary Privilege (1999), the Law Commission Scoping Studies (2002)⁴⁵, the Ministry of Justice Consultations on Defamation and the Internet (2009)⁴⁶ and Controlling Costs in Defamation Proceedings (2010)⁴⁷, the Libel Reform Campaign report entitled ‘Free Speech is not for Sale’,⁴⁸ the Culture, Media and Sports Committee Report (2009-10) and the Libel Working Group Report (2010)⁴⁹. The overwhelming impression given by a close reading of this section is that all these committees have at different times found a lot wrong with the law and yet not much has happened in legislative terms. In short, we have been

⁴² Committee on the Law of Defamation, Cmnd 7536/48.

⁴³ Committee on Defamation, Cmnd 5909.

⁴⁴ Supreme Court Committee on Practice and Procedure in Defamation.

⁴⁵ Available at: [www.lawcom.gov.uk/docs/defamation\(1\).pdf](http://www.lawcom.gov.uk/docs/defamation(1).pdf) and

www.lawcom.gov.uk/docs/defamation2.pdf.

⁴⁶ Available at: www.justice.gov.uk/consultations/.../defamation-consultation-paper.pdf.

⁴⁷ <http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm>.

⁴⁸ Available at: <http://www.libelreform.org/our-report>.

⁴⁹ Available at, www.justice.gov.uk/publications/docs/libel-working-group-report.pdf.

left, despite the best efforts of these committees and groups, with a dysfunctional law which urgently needs reform.

21. While we would not dissent from the view that it is disappointing when the work of distinguished committees is ignored by Parliament, it does not follow from Parliament's occasional failure in the past to legislate that the law is dysfunctional and now needs urgent reform. First, as has been discussed above, the courts have effected substantial changes in the law over the last two decades as a consequence of which, in our view, the law as a general rule represents an appropriate balance the reputation and freedom of expression. Legislative reform may in some cases be more appropriate but it does not follow from Parliament's failure to act that the law has stood still and needs reform.

22. Second, while a number of working group and committee recommendations have not been translated into legislation, several have. Thus several of the recommendations of the Porter report were given effect by Defamation Act 1952 and recommendations of the Neill Committee were given effect by the Defamation Act 1996. There has additionally been legislative action to deal with the problem of excessive damages and to incorporate 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 (Directive on electronic commerce) into English law⁵⁰. In short, Parliament has not been inactive over the last five decades.

⁵⁰ Electronic Commerce (EC Directive) Regulations 2002.

23. Finally, it is somewhat disappointing that in respect of the more recent reports discussed, so much credence is given in the Explanatory Notes to the recommendations of the Pen / Index on Censorship⁵¹, to the evidence given to the Culture Media and Sport Committee by Sense about Science⁵² and to the results of Ministry of Justice Consultations⁵³. The fact is, as we have written before, that the Pen / Index on Censorship has serious flaws. The Sense about Science evidence amounts to no more than mere anecdote that serious scientists would not normally accept as compelling evidence and conclusions reached as a consequence of the Ministry of Justice proposals are hardly uncontroversial and reflect the fact that the majority of respondees represented media interests. If we are to have reform that is fine but please let it be based on reliable evidence properly collected, not anecdote and also on a proper understanding of the law.

The Contents of the Bill

Clause 1 – Responsible Publication

24. Under clause 1(1), any defendant has a defence where he shows that ‘(a) the words or matters complained of were published for the purposes of, or otherwise in connection with, the discussion of a matter of public interest; and (b) the defendant acted responsibly in making the publication.’ The clause gives statutory endorsement to and builds on the

⁵¹ Explanatory Notes, at para 36.

⁵² Explanatory Notes, at para 41

⁵³ As Moore-Bick LJ pointed out in argument in *Flood v Times Newspapers*: "The problem with these Committees is that the conclusions they reach depend on who is invited to take part. I do not find them helpful". We are grateful to Benjamin Pell for drawing this to our attention.

common law defence in *Reynolds*⁵⁴ and the Explanatory Notes state that its purpose is to ‘strengthen the protection afforded to the publication of matters of public interest whilst maintaining a robust standard of responsibility in publishing.’⁵⁵ On first reading, it might appear that, a few minor differences aside, this provision simply represents a codification of the common law privilege first articulated in *Reynolds* and later developed by the House of Lords in *Jameel*⁵⁶. In our view, however, the clause goes much further than the existing law and in so doing unjustifiably extends the protection currently available to defendants where they get their facts wrong.

25. At common law, a defendant can rely on the defence provided that the matter they published is of public interest and the defendant can establish that he acted responsibly in publishing the material complained of. In determining whether the defendant acted responsibly the court is required to take into account, as appropriate, ten non-exclusive matters identified by Lord Nicholls in his speech in *Reynolds*⁵⁷. Superficially the approach taken in clause 1 seems very similar. Thus, provided the publication relates to the public interest, the defendant has a defence if he shows that he acted responsibly in making the publication. By clause 1(3), all the circumstances of the case are to be taken into account in determining whether the defendant has acted responsibly and clause 1(4) provides a non-exclusive list of circumstances which may be relevant. At first sight very similar, until one turns to the non-exclusive list and realises that three circumstances mentioned in Lord Nicholls’s speech do not make it into clause 1(4), that is to say; the source of the information, whether the article contained the gist of the claimant’s side of the story

⁵⁴ *Reynolds v Times Newspapers* [2001] 2 AC 127.

⁵⁵ Explanatory Notes, at para 52.

⁵⁶ *Jameel v Wall Street Journal Europe SpA* [2007] 1 AC 359.

⁵⁷ *Reynolds v Times Newspapers* [2001] 2 AC 127, at 205.

and the tone of the article. The omission of these circumstances was clearly deliberate and to say that they are caught by the general provision in clause 1(3) is clearly inadequate. Why leave these out while retaining the others? The question therefore arises as to what the consequences of the omission of these circumstances might be?

26. Taking the circumstances of tone and whether the article contained the gist of the claimant's first, it would appear that the intention of the drafters was to make clear that balance and restraint in reporting is not necessary to rely on Reynolds (though it is to rely on the reportage defence in clause 1(5)). What seems now to be required is that the collection process should have been responsible but that the way in which the story is told and the slant given does not have to be. The consequence of this is presumably that, should a case with similar facts to *Grobbelaar*⁵⁸, *Galloway*⁵⁹, *Radu*⁶⁰ and even *Reynolds* recur, they would be decided differently as in all these cases an important consideration against the existence of the privilege was the fact that the claimants' side of the story was not given and the writing in *Grobbelaar and Galloway* involved unacceptable embellishment of the facts and a 'verbal kicking' of the claimant. Should this be the practical result of the Bill, we would regard it as an unacceptable extension of protection to defendants. If 'responsible' means anything it should surely require that the claimant's side of the story is put and the tone is measured. As Lord Nicholls noted in *Reynolds* itself,

'It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But this cannot be a good reason for

⁵⁸ *Grobbelaar v news Group Newspapers* [2001] EWCA Civ 33.

⁵⁹ *Galloway v Teelgraph Group* [2006] EWCA Civ 17.

⁶⁰ [2008] EWCA Civ 921; [2009] EMLR 13.

omitting, from a hard-hitting article making serious allegations against a named individual, all mention of that person's own explanation ... it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. An article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true.⁶¹

27. So far as the omission of the source of the information, this is again surprising. While serious difficulties stand in the way of any claimant if the defendant claims that its sources are confidential, if a claimant could establish that the defendant had relied on a single source known to be hostile to the claimant this would surely be powerful evidence that the defendant had not acted responsibly. It may be of course that this is a matter that would be taken into account by a court under clause 1(4)(d) in that it is relevant to the question of what steps were taken by the defendant to verify what was published. The omission of the reference to sources however seems to point, at the very least, to an intention to de-emphasise the factor.

28. Apart from the omission of these three circumstances from the list of relevant circumstances, clause 1 differs in a number of other ways from its common-law cousin. First, in making the defence available to *any* defendant, the drafters have made clear that *Reynolds* privilege is not confined to the media thereby confirming that the decision of the Privy Council in *Seaga v Harper*⁶² to the effect that *Reynolds* privilege applies to *any* person who publishes material of public interest also represents English law. This is a sensible clarification but raises a question whether different standards of responsibility will apply depending on whether the

⁶¹ [2001] 2 AC 127, at 206 per Lord Nicholls.

⁶² [2009] UKPC 26.

defendant is, or is not, part of the media. Though this is not dealt with in the Bill, the status of the publisher is surely a relevant circumstance that a court should take into account under clause 1(4).

29. While the clarification that the defence now applies to any defendant is welcome, the same cannot be said about the wording of clause 1(1)(a) which makes the defence applicable where ‘the words or matters complained of were published for the purposes of, or otherwise in connection with, the discussion of a matter of public interest.’ Under the existing law, it is the publication taken as a whole that is considered in determining whether the matter published was in the public interest.⁶³ To suggest it is the words or matter complained of that must be of public interest is to focus on the wrong thing. The publication of false and defamatory words can never be a matter of public interest. If the Bill survives, this provision should be changed to make clear that it is the publication as a whole that must be of public interest.

30. A second unjustified change in the existing law is made by clause 1(2) which provides that the defence in clause 1(1) applies irrespective of whether the publication contains statements of fact or opinions. The change is justified in the Explanatory Notes on the grounds of the difficulty of distinguishing between fact and comment. It is said that bringing opinion within the defence will mean that ‘it cannot be argued, *relying on a technicality*, that part of the publication falls outside the defence

⁶³ *Jameel (Mohammed) v Wall Street Journal Europe*. [2006] UKHL 44, [2007] 1 AC 359, [2006] 4 All ER 1279, per Lord Hoffmann at [48]. See also per Lord Hope at [107]; *Charman v Orion Group Publishing Group Ltd* [2007] EWCA Civ 972, at [66]; *Flood v Times Newspapers* [2009] EWHC 2375, per Tugendhat J at [126].

simply because it not factual in nature.’⁶⁴ Setting aside for a moment the fact that there appears to us to be no reason why *Reynolds* privilege could not be claimed in respect of defamatory allegations of fact contained in an article merely because there happened also be to be some defamatory opinions in the article, the extension of the defence to cover expressions of opinion gives us serious concern. It goes against the views of the House of Lords in *Reynolds* where both Lords Nicholls and Hobhouse made clear that *Reynolds* privilege, when it applies, gives a defence notwithstanding that the facts published were untrue while the expression of opinion is protected by the fair comment.⁶⁵ Such a division makes sense because where a defamatory statement is published but recognisable as opinion it quite properly only gives rise to liability where the opinion was not honestly made. In such a case, so long as the facts on which the comment is based are true, the reader can make up his own mind whether he agrees with it. Where false facts are concerned, however, the position is different. Readers are unlikely to have any means for determining their truth or otherwise. Thus in respect of false statements of fact protection should only be afforded to the defendant if the occasion or nature of the publication demands it. To allow, as the Bill proposes, protection to a false expression of opinion where that is based on either no facts or false facts makes it impossible for readers to make up their mind about the opinion. The effect of this provision would appear to be to allow defendants who have ‘responsibly’ got their facts wrong to publish any opinion that might reasonably be justified if the facts had happened to be true. Why bother to rely on fair comment with its requirement that the comment must be based on true facts, when you can ‘responsibly’ invent facts and comment on them and rely

⁶⁴ Explanatory Notes, at para 54.

⁶⁵ [2001] 2 AC 127, at 201 and 193-5 per Lord Nicholls and 237-8 per Lord Hobhouse.

on clause 1.

31. Our final point on the *Reynolds* replacement involves a synthesis of the above. It appears that the intention of the authors of the Bill may be to see the law treat as responsible – and hence legitimate – the publication of material that includes vituperative comment, based on erroneous facts, that does not include any explanation offered by the subject. This amounts, in effect, to a comprehensive defence for public interest publication that would be excluded only very rarely on grounds of irresponsibility. We cannot accept that such publications are worthy of protection. Indeed, given that by definition any such commentary would be focused on matters of significant public concern, a law of this type risks errant publications that might do immense damage to the public good. If all this is what is intended, then we think that the authors of the Bill should have been straightforward in presenting this intention instead of relying on an obscurantist sleight of hand. The relation to *Reynolds* is minimal; the revision is not merely technical. [We note also that if the tone of the piece is irrelevant to the determination of responsibility and the honest opinion defence is to apply to ‘responsibly published’ as well as true underpinning facts (see clause 3(4)(b)), then this would be the position notwithstanding the exclusion of comment from the responsible publication defence.]

32. Finally, clause 1(5) provides a reportage defence that may go beyond the existing law⁶⁶ in that it does not require that the impartial and accurate report be about an ongoing dispute between two parties: all that the Bill requires is that the report be on a pre-existing matter that ‘it is in the public interest for the existence of that matter, and anything reported in

⁶⁶ Despite the warning given by Sedley LJ (at [74]) in *Roberts v Gable* [2007] EWCA Civ 721; [2008] 2 WLR 129 that the defence needs to be ‘treated restrictively’.

connection with it, to be the subject of a report.⁶⁷ The existing common law defence is an unsatisfactory one (interestingly it has not been uniformly adopted in the United States) sitting uneasily as it does with the repetition rule. It has never seemed to us to be sensible to privilege the publication of material which the writer believes to be untrue simply because the matter being written about is of public interest and the writer reports what has been said accurately and impartially. Rather than codification, we would therefore have recommended statutory abolition.

Clauses 2 and 3 – Honest Comment

33. The changes made in clauses 2 and 3 are rather subtler than those made in clause 1 and, for the most part, are beneficial. The existing common law defence of fair comment provides a defence to any person who comments ‘fairly’ on a matter of public interest.⁶⁸ Fairness in this context has not for some time required that the defendant’s comment be a reasonable one: at common law the defence applied provided that the comment was one that an honest minded man could hold.⁶⁹ Additionally the comment had to be based on true facts.

34. That there have been criticisms of the existing law is not in doubt. The Culture Media and Standards Committee for example expressed concern that the defence stifled debate. The recent *Singh*⁷⁰ case highlighted the difficulty that may be experienced in distinguishing fact from comment. There had also been criticism that the defence was misnamed and that

⁶⁷ Clause 1(5).

⁶⁸ See, e.g., *Telnikoff v Matusevitch* [1992] 2 AC 343, at 354 per Lord Keith.

⁶⁹ See, e.g., *Telnikoff v Matusevitch* [1992] 2 AC 343, at 354 per Lord Keith; *Lowe v Associated Newspapers* [2006] EWHC 320, per Eady J at [74].

⁷⁰ The decision of the Court of Appeal can be found at [2009] EWCA Civ 1075.

⁷⁰ [2010] EWCA Civ 350. Eady J’s decision can be found at [2009] EWHC 1101.

‘honest comment’ better reflected the reality of the defence.⁷¹ While we would not endorse all the criticisms directed against the defence and in particular struggle to see how it stifles legitimate debate⁷², we would accept that statutory clarification of certain issues could be beneficial.

35. So far as the particular matters dealt with in the Bill are concerned, the defence is renamed ‘honest comment’ in clause 2 reflecting the fact that ‘fairness’, in the sense of reasonableness, has no role in the defence. This clarification is useful as it recognises the reality that it is a defence available to a person who expresses an opinion that an honest minded person could hold even if that was an unreasonable opinion to form on the basis of the facts referred to.

36. Clause 3 in large part restates the existing common law defence. Thus, clauses 3(1)-(5) provide that a defendant has a defence if he shows that: (a) the words or matters complained of relate to a matter of public interest; (b) in the circumstances in which the words or matters are published, an ordinary person would reasonably consider those words or matters to be an opinion; (c) at the time of the publication, there existed one or more facts or material that is protected by privilege; and, (d) an honest person could form an opinion on the basis of the facts or material shown by the defendant in satisfying (c). We have two observations to make about these provisions and a concern to express.

37. First, it seems sensible to make clear, as is done in clause 3(5) and (6)(a),

⁷¹ See, e.g., *BCA v Singh* [2010] EWCA Civ 350, at para [142].

⁷² Explanatory Notes, at para 67.

that the defendant need not establish the truth of all the facts published provided only that there is enough basis in truth for an honest person to have formed the opinion expressed.

38. Second, quite properly in our view, the basis for distinguishing between fact and opinion remains that of the common law, namely that the words or matters complained of are recognisable by a reasonable reader as opinion. We trust that the consequence of this will be that the conventional approach to this matter adopted by Eady J in *Singh v BCA*⁷³ will be followed rather than the over-sophisticated analysis preferred by the Court of Appeal⁷⁴ in the same case. The test is whether an *ordinary person* would reasonably consider the words facts or opinions, not how would they be interpreted by an All Souls' philosopher.

39. Our concern about these clauses really follows on from one of our concerns about clause 1. It will be recalled that in clause 1 we criticised the drafters for including the expression of opinion within the privilege.⁷⁵ By including within the list of material on which a person can form an opinion, 'any material that falls within section 1 (responsible publication)', we would argue that they compound their earlier error. The effect of clause 3(4)(b) may be to allow a person expressing an opinion on another opinion that was itself based on false facts to rely on the defence. This strikes us as frankly bizarre

⁷³ [2009] EWHC 1101.

⁷⁴ [2010] EWCA Civ 350.

⁷⁵ See para 30 above.

40. So far as the other provisions of clause 3 are concerned, we doubt whether a person should be allowed to rely on the defence if at the time he expressed the opinion the fact that he later relied on as justifying his comment did not exist. Yet that seems to be the effect of clause 3(6)(b). We are more persuaded in this respect by the judgment of Eady J in *Lowe v Associated Newspapers*⁷⁶ in which he held that to rely on the defence, the defendant must prove he had actual knowledge of the fact on which he relies; he cannot comment on opinions of others or circulating rumours, nor can he rely on facts that were not in existence at the time when he made the comment.

41. Finally, as at common law, the defence is defeated if the claimant proves that the defendant did not in fact hold the opinion.⁷⁷ Sensibly the drafters have avoided using the confusing word ‘malice’⁷⁸ and have confirmed that the appropriate test for honest comment is that of honest belief as had been stated in the judgment of Lord Nicholls in the Hong Kong Final Court of Appeal in *Cheng v Tse Wai Chun*.⁷⁹ Where the defendant is not the author, he must believe, or have no reason not to believe, that the author genuinely holds the opinion expressed.⁸⁰

Clauses 4 and 5 – Truth

42. Clauses 4 and 5 recast the existing justification defence, renaming it

⁷⁶ [2006] EWHC 320 [2006] 3 All ER 357, at [74].

⁷⁷ Clause 3(7).

⁷⁸ Even as long ago as 1886, ‘malice’ was described by Lord Bramwell in *Abrath v. North Eastern Railway Co.* (1886) 11 App.Cas. 247 at 253 as ‘that unfortunate word.’

⁷⁹ [2000] 3 HKLRD 418 [2001] EMLR 31, (2000) 10 BHRC 525.

⁸⁰ Clause 3(8).

truth in clause 4, only to revive (presumably not deliberately)⁸¹ the ‘justification’ nomenclature in clauses 5(3) and (4). Renaming was suggested by the Faulks Committee⁸² as early as 1975 and is probably sensible. It is certainly a linguistic improvement: ‘justification’ implies a publication is made *either* with good reason *or* that it was right; the meaning of ‘truth’ suffers no such ambiguity.⁸³

43. Apart from the renaming, one of the most pleasing surprises about the Bill is to see the burden of proof remain on the defendant. In our view, the presumption that an impugned statement is false is the preferable starting point. Placing the burden of proving the truth of an imputation on the defendant forces a publisher, when considering whether or not to publish, to focus particular attention on whether the statement can be justified. If a potentially damaging statement cannot be justified, then it becomes difficult to identify the compelling public interest in permitting it to be made. If a potentially damaging statement can be justified in part only or if provable facts warrant only a call for further investigation, then any statement made should not jump to wider conclusions. Without such a legal responsibility, speech would become cheap and the proper restraints placed on the media, or indeed any person, when making serious allegations would be undesirably loosened. Proponents of a reallocation of the burden of proof assert that the claimant will always be better placed to demonstrate falsity than the defendant the converse. This is palpably not always true; rather it will depend entirely on the nature of the imputation made.

44. So far as clause 5 is concerned, the first two and last provisions largely

⁸¹ This ‘drafting error’ was originally drawn to our attention by Benjamin Pell.

⁸² Faulks Committee on Defamation, Report (Cmnd 5909, March 1975)

⁸³ Oxford English Dictionary.

restate the common law. Clause 5(1) makes it clear that for the defence to succeed, the defendant need prove only that the words or matters complained of are substantially true, and in clause 5(2), it is provided that the defendant is entitled to seek to prove the truth of defamatory meaning(s) alleged by the claimant or less serious meaning(s) conveyed by the publication. Clause 5(4) reflects the current position in section 5 of the Defamation Act 1952, and provides that where the complaint is about more than one defamatory allegation the defendant does not need to prove the truth of all the allegations provided that he proved one or more of them and the others do not material injure the claimant's reputation in the light of what has been proved.

45. Clause 5(3) is however more problematic. This provides that: 'A defence of justification does not fail only because a particular meaning alleged by the claimant is not shown to be substantially true, if that meaning would not materially injure the claimant's reputation having regard to the truth of what the defendant had shown to be substantially true.' While we understand that the drafters were concerned about the case management and pleading difficulties to which the justification defence can currently give rise, in our view the addition of clause 5(3) will add to, not lessen, these difficulties. Not only will it not deal with the pleading difficulties but it will also require additional, no doubt drawn out, argument about whether there is a material difference between what was alleged and what has been proved.

46. More fundamentally, we think it a shame that the opportunity has been missed in this Bill to address two fundamental issues. First, the existence of the single meaning rule is a cause of many of the pleading and case management problems to which the defence gives rise. This is alluded to

in para 77 of the Explanatory Notes but, even though the rule has now been abandoned in malicious falsehood cases, the issue is not addressed in the Bill. Secondly, if the drafters of the Bill were really serious about reducing cost, consideration should have been given to dealing with the issue of meaning at an early stage of the proceedings.

Clauses 6-8 – Statutory privilege

47. Clauses 6, 7, 8 deal with a number of issues of statutory privilege. The main purpose of the Bill in this regard is to modernise the law and in large part this is done. Clause 6 accords absolute privilege to contemporaneous reports of certain court proceedings. It largely reproduces section 14 of the Defamation Act 1996, though sensibly adds a number of new international courts, tribunals and other bodies.

48. 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, and requires the court to stay proceedings which relate to such material, including proceedings which seek to prevent or postpone publication. It represents a welcome replacement for the Parliamentary Papers Act 1840. Clause 8 offers a replacement provision for section 15 of the Defamation Act 1996 and extends the protection of qualified privilege internationally and by expanding the types of report which are covered.⁸⁴

49. In general, the extensions are sensible and uncontroversial save one and that is the provision contained in Schedule 1 Pt II, para 12. This is not

⁸⁴ The new provisions are contained in Sch 1, Pt 1, cl 1(2)(b), Pt II, paras 9, 10, 11, 13 and 14.

mentioned at all in the Explanatory Notes and yet an entirely new category of statutory qualified privilege is created for: ‘A fair and accurate copy of, extract from, or summary of material in an archive where – (a) the material has been publicly available online for a period of at least 12 months starting with the date of first publication by or on behalf of the archive; and (b) in the course of that period, no challenge has been made, whether in the courts or otherwise, which indicates that the material is considered to be defamatory.’ While it may be reasonable to privilege extracts or copies of *some*, perhaps governmental, online archives, it is not clear to us that copies, extracts or summaries of material contained in *all* online archives ought to be so privileged particularly given the wide meaning given to archive in clause 17 of the Bill.⁸⁵ The effect of the provision would appear to be that if a statement was hidden away in some obscure online archive and one year and a day later published in a national newspaper the national newspaper would be able to rely on privilege. Such a position would in our view offer wholly inadequate protection to reputation and the provision should therefore either be omitted or, at the very least, changed to refer to governmental archives only. We appreciate that this may be regarded as a ‘natural’ extension of the rule in clause 10; it would be ridiculous if only the original archive publisher could subsequently republish. For us, however, this feature rather highlights the weakness of the proposed single publication rule and the relative advantages of a ‘non-culpable republication’ defence (see below).

The wheels come off

⁸⁵ ‘Archive’ Includes any collection of sound recordings, images or other information however stored (including by electronic means).

50. While there are serious problems with several of the provisions in the first part of the Bill, it is from clause 9 onwards that the wheels really come off. In virtually every provision from clause 9 to 15 substantial changes to the existing law are proposed without obvious justification. Though it is true that some of the issues, such as the multiple publication rule and the question of evidence concerning proceedings in Parliament, have been the subject of serious consideration before, other issues, such as the consequences and desirability of making a claimant prove substantial harm or face having his claim struck out, the effective abolition of trial by jury, and the requirement that a corporation prove substantial financial loss have not. Given the impact that changes of this nature will have on the existing balance between reputation and freedom of expression, they should not be made without a wholesale review of the law of defamation.

Clause 9 – Responsibility for publication

51. Clause 9 deals with responsibility for publication and is very much more radical than it might at first appear. First, clause 9(1) provides an *absolute* defence to ‘facilitators’ (that is, a person concerned only with transmission or storage but with no control over content) and ‘broadcasters of a live programme in circumstances in which it was not reasonably foreseeable that those words and matters would be published’. How far this extends the protection already given to information society services under the EU Electronic Commerce Directive⁸⁶ is not entirely clear. The difficulty lies in the interpretation of

⁸⁶ Transposed into English law as the Electronic Commerce (EC Directive) Regulations 2002.

‘facilitator’. To the extent that ‘facilitator’ is limited to persons who simply, as the Explanatory Notes state, provide ‘the pipes and infrastructure of the internet’⁸⁷, then the defence does not go much further than the existing defences available to those who act as mere conduits or cache⁸⁸, save that the defence given to ‘facilitators’ is absolute and ‘facilitators’ includes those who provide such services other than for remuneration.⁸⁹ However, to the extent that ‘facilitators’ also includes those who host material the defence provided is much more extensive than that provided by the EU Electronic Commerce Directive in that whereas ‘facilitators’ have an absolute defence, the defence available to those who host is much more restricted.⁹⁰ Such an extension in our opinion would be dangerous. It would appear to remove any incentive on an ISP that acts as a host to remove material even if that material is found by a court to be defamatory. Yet in cases involving anonymous or impecunious posters the claimant’s only realistic avenue to get the site taken down will be the ISP.

⁸⁷ Explanatory Notes, at para 107.

⁸⁸ Electronic Commerce (EC Directive) Regulations 2002, Reg’n 17 and 18.

⁸⁹ The defences in regulations 17-19 of the Electronic Commerce (EC Directive) Regulations 2002 are available to ‘information society services’ providing services of a merely technical, automatic and passive nature. It is not intended to cover those who sell goods and services on-line and is limited to those who provide such services for ‘remuneration’. However, where the service is provided free of charge to users with the service provider deriving their revenue from charging advertisers for advertising on the service, it is suggested that this would still fall within the definition.

⁹⁰ So far as those who provide hosting services are concerned they are immune under regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 provided that: first, the service provider neither knows of unlawful activity or information, ‘nor is aware of facts from which it would have been apparent to the service provider that the activity or information was unlawful’; secondly, on obtaining such actual or imputed knowledge, it acted expeditiously to remove or disable access to the information; and, finally, the recipient of the service was not acting under the authority or control of the service provider.

52. Beyond the question of whether facilitators include ISPs that host materials, a question also arises whether ‘facilitators’ could include those who transmit and store the content of the publication in other than electronic form. There is nothing in the Bill that specifically restricts ‘facilitators’ to those who transmit and store electronic data. Thus, book-sellers and printers might be said to store the content of the publication and they certainly have no control over its contents. Is it intended that the Bill should provide them with absolute protection?
53. For those secondary publishers⁹¹ who are not ‘facilitators’ the Bill provides a defence by clause 9(2) 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 the claimant sends a notice of complaint complying with the requirements of clause 9(3). The defendant then has a period of 14 days, or other period specified by the court, in order to investigate the complaint after which he will become liable unless he removes the words or matter complained of. The take down provisions are admirably clear and there is some merit in them in that they give an honest and responsible secondary publisher time to remove material that they claimant argues is defamatory. However, while we would endorse these provisions as more straightforward than the existing provision in the Defamation Act 1996, section 1, we do not see why a secondary publisher who could be shown to have known, or had reason to believe, that the publication contained defamatory matter should be allowed to rely on the defence. We would therefore suggest that where the claimant can establish that the defendant knew or ought to have known that the

⁹¹ A ‘secondary’ publisher is for these purposes a person who is not a primary publisher, primary publisher being defined as ‘an author, an editor, or a person who exercises effective control of an author or editor.’

publication contained defamatory matter, the defendant should not be able to rely on the defence.

Clause 10 – Multiple publications

54. Clause 10 is intended to replace the existing ‘multiple publication’ rule with a single publication rule. Under the existing English law, ‘publication’ occurs on each occasion that a statement is accessed as opposed to the occasion on which it is – in lay terms – published. This is the *Duke of Brunswick*⁹²/ multiple publication rule. In the context of the maintaining of online digital archives by traditional media companies, this rule results in a heightened legal risk that is arguably undesirable given the social benefit delivered by such archives. In the wake of the *Loutchansky* litigation and the subsequent action brought by Times Newspapers before the Strasbourg court,⁹³ there have been calls for the introduction of a single publication rule for online publication. The Government conducted a consultation on this theme in late 2009.
55. The effect of the Bill 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.⁹⁴ Thus a claimant is prevented from bringing a claim in respect of a publication that first became available to the public more than one year previously except in certain limited circumstances.⁹⁵ The provision only applies where the publication

⁹² (1849) 14 QB 185.

⁹³ Respectively, *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805, and *Times Newspapers Ltd (Nos 1 and 2) v. United Kingdom* (nos. 3002/03 and 23676/03).

⁹⁴ Clause 10(1)(a).

⁹⁵ Limitation Act 1980, s 4A and 31A, as amended by Schedule 2, paras 8 and 9

complained of (a) was published by the same person on multiple occasions and (b) on each occasion had the same or substantially the same content.⁹⁶ However the provision does not apply where ‘a subsequent publication is made in a materially different manner.’⁹⁷

56. Not only do we have serious concerns about the effect of the clause as drafted, we also do not accept that the case for abandonment of the multiple publication rule has been made out. Taking first the effect of the clause as drafted. Its effect will be to exempt from liability many defendants who do not deserve to be exempted. Consider, for example, the case of a defamatory online publication made on an obscure website. After some months, a web aggregator picks up the post and includes it within a profile of the claimant. 13 months after the original publication, an Internet search engine picks up the defamatory publication and publishes it as part of a Google search snippet. In such a scenario, the original author would escape liability as the limitation period would have expired. Google and the web aggregator would also escape liability under clause 9. Yet the damage to the claimant’s reputation could in such a scenario be severe and causing such damage may have been the precise intention of the defendant.

57. Not only in our opinion is the effect of the rule to exempt many publishers who should not be exempted but, as drafted, the Bill appears to have the effect that damage caused more than one year after first publication cannot be taken into account when assessing damages. If the clause was only intended to be relevant to limitation then presumably clause 10(1)(a) would have said ‘for limitation purposes’ as opposed to ‘for all purposes’.

⁹⁶ Clause 10(2).

⁹⁷ Clause 10(3).

58. Not only is the clause unsatisfactorily drafted but in our opinion a single publication rule (particularly with a one year limitation period) does not allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing rights to privacy and reputation. The single publication rule envisaged by the Bill would automatically absolve the author of an impugned archive statement of any responsibility for its making after the requisite limitation period following first publication. We do not consider that this is appropriate. Not every author of a defamatory statement – or every archivist of online content – is deserving of exoneration from liability. In the online environment, the availability of past statements can continue to be horrendously damaging. At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed.
59. Consequently, it is our view that the multiple publication rule should be retained and a new defence of ‘non-culpable republication’ introduced. Subject to certain conditions, this defence would extend not only to online archive publishers but also potentially to other authors whose work is replicated by others across the internet. This defence would be available to protect both the online archivist and the author who has ‘lost control’ of transposed or viralled statements. A variant of the defence could also be made available to persons maintaining hard copy archives. Although manifestly different in terms of the persons to whom it would be available and the requirements that it would impose, the proposed new defence has some affinity with the existing statutory defence of ‘innocent dissemination’ in its focus on relative culpability.⁹⁸

⁹⁸ s.1, Defamation Act 1996.

60. The non-culpable republication defence would be available to an archivist after the elapse of one year after the initial publication of the story in question. To avail of the defence, the archivist would be required to append a notice to the archived online article (or, perhaps, in the case of a hard-copy archive to a register of notices relating to archived articles). We would suggest that such a notice should indicate that a challenge to the accuracy of the original story had been made under the new statutory defence.⁹⁹ Should the publisher in fact be persuaded of the inaccuracy of the original article on the approach of the prospective claimant, he or she may choose instead to amend the archived article or to attach a correcting notice. Importantly, the archivist-publisher could choose not to append a notice on request of a prospective claimant. This would allow him or her to assert the accuracy of the original piece, and to retain the option of fighting an action where it was deemed desirable or necessary to do so. Presumably this would happen only where the archivist-publisher fully believed themselves able to rebut a libel claim.

61. The advantages of this approach in the context of archiving are numerous. The integrity of the archive as a facet of the historical record is maintained, while future users of the archive are left in no doubt that further investigation is necessary before statements made therein can be simply adopted. The force of the alleged libel would thereby be mitigated. Moreover, any inclusion in the notice of the competing perspective of the person whose reputation had been impugned would often add to the discursive value of the original piece.

⁹⁹ By way of a specimen, we might suggest the following: “A challenge to the accuracy of the following article has been made by [X] under section [x] of the Defamation Act 1996. Specifically, it is asserted that [1, 2 and 3]. To preserve the integrity of the original article no direct amendment thereto has been made. ”

Clause 11 – Corporations and the need to prove substantial financial damage

62. Under the existing law, a trading corporation can recover damages for injury to its trading reputation without proving special damage provided that the publication has a tendency to damage it in the way of its business and the damages that may be recovered need not be limited to lost income but may also include damages for loss of good will.¹⁰⁰ Under the proposed clause 11 of the Bill, a body corporate would be prevented from bringing a claim in defamation unless it can show that the publication of the words or matters complained of has caused or is likely to cause “substantial financial loss”. The Explanatory Notes justify this significant change by reference to the position in some other common law jurisdictions where corporates are either prevented from suing altogether or have to prove actual damage to be able to recover¹⁰¹ and the ‘stifling’ effect on freedom of speech that some corporates are said to have as a consequence of the fact that no financial damage need be proved as a pre-condition of being to sue or even to recover substantial damages.¹⁰²

63. We have a number of observations to make on this provision. First, we are surprised to note that all corporations, of whatever size, and whether or not involved in trade, are included within this provision. If this provision is really about reducing the risk of corporations stifling free

¹⁰⁰ *Lewis v Daily Telegraph* [1964] AC 234 at 262 per Lord Reid: ‘A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured.’

¹⁰¹ Explanatory Notes, at para 122.

¹⁰² Explanatory Notes, at para 126.

speech by threatening libel claims, it is hard to see why, as in Australia, a distinction was not drawn between large and smaller corporations, and between trading and other corporations. Inevitably, any line drawn will be artificial but the Australian law does at least have the merit of recognising that the capacity of a very small company, or even a small charity, to threaten a national media group is likely to be limited.

64. Second, we would note that not all common law jurisdictions take the approach suggested in clause 11. The Explanatory Notes in this respect are once again not entirely transparent when they say that the position in English law ‘contrasts with the position in several other common law jurisdictions, such as the USA, Australia and New Zealand.’¹⁰³ Not only is the position in the USA not uniform, it is *only* these three jurisdictions that take a different line from English law. Other common law jurisdictions, such as Ireland, India, Canada and South Africa continue to allow a company to sue without proving damage.

65. Thirdly, the Explanatory Notes simply do not address the reasoning of the majority of their lordships in *Jameel*¹⁰⁴ in which it was decided that a corporate claimant did not have to show actual harm to recover. For the sake of balance, we remind readers that their lordships held a non-resident corporation could recover substantial damages provided only that the publication had a tendency to damage the company in the way of its business. In the opinion of the majority, there was no inconsistency in this regard between English law and Art 10 of the Convention. As

¹⁰³ Explanatory Notes, at para 122.

¹⁰⁴ *Jameel (Mohammed) v Wall Street Journal Europe*. [2006] UKHL 44, [2007] 1 AC 359, [2006] 4 All ER 1279.

Lord Bingham explained:

‘First, as the text of Art 10 itself makes plain, the right guaranteed by the Article is not unqualified. The right may be circumscribed by restrictions prescribed by law and necessary and proportionate if directed to certain ends, one of which is the protection of the reputation or rights of others. Thus a national libel law may, consistently with Art 10, restrain the publication of defamatory material. Secondly, the national rule here in question, pertaining to the recovery of damages by a trading corporation which proves no financial loss, has been the subject of challenge before the European Commission and court which ... did not hold the current rule to be necessarily inconsistent with art 10: it was a matter for the judgment of the national authorities. Thirdly, the weight placed by the newspaper on the chilling effect of the existing rule is in my opinion exaggerated.’¹⁰⁵

66. Moreover, there were, for the majority, good reasons for concluding that a right to sue existed even in the absence of proof of financial loss. First, the good name of a company, as that of an individual, is a thing of value. A damaging libel could lower its standing in the eyes of its customers, employees and shareholders making it less attractive for investors to invest in, employees to work for and customers to deal with. Contrary to the argument made by the defendant it would not be easy to repair this and there is therefore nothing repugnant in the notion that it is a value that the law should protect.

67. Secondly, it will not always be the case that a truly damaging publication about a company will result in provable financial loss, since the more prompt and public a company’s issue of proceedings, and the more diligent it is in the pursuit of a claim, the less the chance that financial

¹⁰⁵ *Jameel (Mohammed) v Wall Street Journal Europe*. [2006] UKHL 44, [2007] 1 AC 359, [2006] 4 All ER 1279, at [18]-[20].

loss will actually accrue.¹⁰⁶

68. Finally, as a matter of policy, we are concerned that the position taken in the Bill seriously underestimates the value to any economy of the corporate sector. It is surely wrong not to allow a company, on whom many thousands of people may depend for their jobs, to defend its reputation without having to prove substantial financial loss, something that is notoriously difficult in the modern corporate world. No such provision should become law until research is done as to the likely effect of the provision.

Clause 12 – Claimants and the need to establish substantial harm

69. Clause 12 mandates a court to strike out a claim unless the claimant shows that: (a) the publication has caused substantial harm to the claimant's reputation; or (b) it is likely that such harm will be caused. The first question posed by this provision is why is it needed? The courts already have power to strike out any claim or defence under CPR 3.4(2) where there are no reasonable grounds for bringing the claim or defending it. Under CPR 24.2, the court can give summary judgment against a claimant if he has no real prospect of succeeding on it. The courts also have the power to strike out a claim where it amounts to an abuse of process. Importantly these are powers that are used. This year alone, of the ten libel claims that have concluded in court, the action was struck out or stayed in six cases and summary judgment was granted to

¹⁰⁶ *Jameel (Mohammed) v Wall Street Journal Europe*. [2006] UKHL 44, [2007] 1 AC 359, [2006] 4 All ER 1279, at [25]-[26].

the defendant in a further case.¹⁰⁷ Not much evidence we believe to demonstrate the need for yet more powers particularly in light of Tugendhat J's recent decision in *Thornton v Telegraph Group*.¹⁰⁸

70. We also have some concerns about how this new restriction on claimants' rights to sue will work in practice. Presumably every libel claim will now require an additional stage of proceedings to deal with the question whether 'substantial harm' was suffered.¹⁰⁹ Claimants will be forced to offer up evidence at an early stage of how the harm they have suffered is substantial and it will take litigation to work out what is meant by this. Presumably it is not restricted to financial loss and so protestations of upset, anger and hurt will need to be made to show such harm. It is hard to see how this requirement will do anything other than add to the cost of litigation. That is not to say however that we think trivial claims should be allowed to succeed: they should not. The point, however, is that courts already have the powers to deal with such claims and they already do so. The addition of a further procedural step far from reducing the cost of litigation is likely to increase it and as a consequence we believe that the provision should be abandoned.

¹⁰⁷ <http://inform.wordpress.com/2010/07/02/defamation-trials-summary-determinations-and-assessments-jan-to-june-2010/#more-3059>.

¹⁰⁸ Somewhat disingenuously, Tugendhat J's decision in *Thornton v Telegraph Group* [2010] EWHC 1414 in which he held that any definition of 'defamatory' must include a qualification or threshold of seriousness so as to exclude 'trivial claims' is dismissed in footnote 15 of the Explanatory Notes on the basis that 'This is a first instance decision which, although based on a detailed analysis of cases, is likely to be the subject of review.'

¹⁰⁹ It has been suggested to us that the addition of this additional interim hurdle will mean that even if the claimant survives and recovers 73-78% of his costs on a standard basis, one only needs another two or three interim applications (which is not unusual in libel claims) and the claimant is guaranteed to make a loss even if he obtains more than the average quantum of approximately £38,000.

Clause 13 Libel Tourism

71. Earlier in this article we commented that such hard evidence as exists suggests that libel tourism does not pose a serious problem, that the English jurisdictional rules represent a balance with which we are comfortable, and that the courts already have the necessary powers to deal with any real abuses by foreign claimants. We would also point out that the powers of the English courts and legislature to change the existing rules so far as Europe is concerned is restricted by Article 5(3) of the Brussels Convention and the European Court of Justice's decision in *Shevill v Press Alliance*¹¹⁰.

72. Against that background it is perhaps not surprising that we are not persuaded by the need for clause 13. We also have serious concerns about the meaning of the provision as drafted. The clause is intended to apply in an action where 'the court is satisfied that the words or matters complained of have also been published outside the jurisdiction (including publication outside the jurisdiction of any words or matters that differ only in ways not affecting their substance).'¹¹¹ Where this is the case '(2) No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of publication elsewhere'.¹¹²

¹¹⁰ [1995] ECR I-415.

¹¹¹ Clause 13(1).

¹¹² Clause 13(2).

73. According to the Explanatory Notes, under this provision 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 the publication elsewhere.’¹¹³ Precisely what this means is not clear. It presumably is not intended to preclude all claims where the greater number of publications was made outside the jurisdiction. Such a position would be nonsensical because a person’s reputation can be seriously damaged even by a small number of publications.¹¹⁴ More fundamentally, the provision seems to require the courts to take account of an irrelevant consideration: the extent of publication in another jurisdiction does not influence the question whether substantial harm has been suffered by the claimant in this jurisdiction. The two issues are distinct. The extent of publication in the other jurisdiction may mean that the claimant has suffered more harm there, but it does not impact on the question whether he has suffered substantial harm in this jurisdiction.¹¹⁵ The provision is simply not clear and litigation would appear necessary to determine its meaning. It should be abandoned.

Clauses 14 and 15 – trial by jury

74. Defamation claims are currently among a small number of civil claims still able to be tried by jury under section 69 of the Senior Courts Act

¹¹³ Explanatory Notes, at para 144.

¹¹⁴ See, e.g., Tugendhat J in *Underhill v Corser* [2010] EWHC 1195, at [142]-[143].

¹¹⁵ As Lord Hoffmann explained in the Fifth Dame Anne Ebsworth Memorial Lecture ‘But there does not seem to me much logic in saying that if you have significantly damaged someone’s reputation in England, it should be a defence that you have published ten times as many copies of the libel somewhere else. It is simply a device to allow Americans to carry *New York Times v Sullivan* with them to this country.’ (<http://www.indexoncensorship.org/2010/02/the-libel-tourism-myth/>)

1981. If either party asks for jury trial the court should order it 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.’ However, notwithstanding the right contained in section 69, jury trials are now almost as rare as hens’ teeth and after the decision of Tugendhat J in *Fiddes v Channel 4*¹¹⁶ likely to be rarer still in practice, though it should be noted that, on appeal, the Master of the Rolls did reaffirm the constitutional importance of the right to trial by jury¹¹⁷ and noted in particular the need for caution when invoking the additional length and costs of a jury trial as a reason for refusing jury trial¹¹⁸. The practical effect of clauses 14 and 15 would be that the existing presumption against trial by jury would be reversed with trial by jury being reserved as a possibility where, in all the circumstances of the case, it is in the interests of justice that that trial be by jury.¹¹⁹

75. In some respects we are sympathetic to this proposal. Jury trial is more expensive than trial by judge alone and the fact that a case may be tried by a jury undoubtedly leads to case management difficulties that would be much reduced if trial by jury were abolished. That said, the right to trial by jury remains an important constitutional right and it should not be brushed aside without considerable thought. There is a serious debate to be had with regard to this question which must be conducted before the Bill proceeds any further.

Clause 16 – evidence concerning proceedings in Parliament

¹¹⁶ Available at <http://inform.wordpress.com/2010/05/31/case-law-fiddes-v-channel-4-the-end-of-trial-by-jury/>.

¹¹⁷ *Fiddes v Channel 4* [2010] EWCA Civ 730, at [21].

¹¹⁸ *Fiddes v Channel 4* [2010] EWCA Civ 730, at [18].

¹¹⁹ Clause 15(1).

76. Under section 13(1) of the Defamation Act 1996, where the conduct of a person in, or in relation to proceedings in Parliament is an issue in a defamation claim, a member of either House or neither House may, so far as he is concerned, waive Parliamentary privilege for the purposes of the proceedings. This provision was of course enacted to deal with the ‘injustice’ that may potentially be caused to a person where the existence of parliamentary privilege prevents him from leading evidence of what had happened in Parliament that might enable him to establish his claim or defeat the claim against him. However, as the Joint Committee on Parliamentary Privilege noted in its report, allowing an individual to waive parliamentary privilege undermines the basis of the privilege: ‘freedom of speech is the privilege of the House as a whole, not an individual member in his own right, although an individual member can assert and rely on it.’¹²⁰

77. Clause 16 has been drafted with the intention of giving effect to the recommendations of the Joint Committee on Parliamentary privileges. Under the Bill, it will be for the Speaker¹²¹ of either House of Parliament, acting on an application by notice, to decide whether to waive Parliamentary privilege in an action for defamation. While the effect of the clause may be to remedy the constitutional aberration created by section 13, the effect is of course to ensure that the injustice that may be caused by refusing to allow an individual to waive Parliamentary privilege is perpetuated. For what it is worth, our view is that, despite the difficulties to which it may give rise, the solution adopted in section 13

¹²⁰ Joint Committee on Parliamentary Privilege Report, at para 68.

¹²¹ The recommendation of the Joint Committee on Parliamentary Privilege Report was actually to the effect that section 13 of the Defamation Act 1996 should be repealed and it should be replaced by a provision empowering each House to waive privilege for the purposes of any court proceedings.

of the Defamation Act 1996 was a perfectly sensible one and it should therefore be retained.

Conclusion

78. While we have genuine respect for those who have been involved in the drafting of this Bill and its accompanying Explanatory Notes, it is for us both disappointing and potentially very dangerous. It is disappointing because it fails to address the fundamental problems with the law of libel, that is to say costs and procedures. It is dangerous because it offers an unbalanced presentation of where the public interest lies. Lip service has been paid to the human right to reputation in a rush to sanctify freedom of expression. The consequence is a Bill that in time may lead to the death of libel and to the consequent undermining of the important societal interests it protects. It should be dropped as soon as possible and a thoroughgoing review of the whole law of defamation carried out by an independent committee appointed by the government.