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Dear Sirs,

Re: Draft Defamation Bill

A. Introduction

This is our submission to the Draft Bill and Consultation paper.

We note the express policy objective and core aim described in the notes to the draft Bill –to ensure defamation law strikes a fair balance between freedom of expression and the protection of reputation. Indeed, the draft Bill is arguably a result of the prevailing consensus that these competing rights are not now well balanced, yet (with two exceptions) the Bill merely codifies current case law –and therefore enshrines rather than alters the balance.

While we welcome codification for its own sake –as the law should be as accessible and predictable as possible-- with respect, in our opinion, more radical solutions are called for. This draft Bill is written by defamation lawyers-- for defamation lawyers. We do not think this is the right approach in the information age –where every man is an author and publisher. The law should strive to be more accessible and more predictable than ever before.

In particular, we note the proverbial elephant in this Bill is the law on meaning –which the Bill avoids –in part by employing the new term 'imputation'—despite the fact that it arises in relation

to §1 and §3 –where it is a key issue. The law on meaning desperately needs clarification and simplification—but is not tackled in the Bill.

B. Publication on the Internet

This is a specialist area of our practice and we regularly advise online publishers and ISPs and offer our observations based on this experience.

It is our view –and we recently undertook a survey and analysis of cases in this field – http://www.mcevedy.eu/downloads/InternetIntermediaries.pdf -- that section 1 of the Defamation Act 1996 is redundant as it is overly complex and offers a narrower scope of protection than the Ecommerce Regulations --which are therefore being relied on in practice. We recommend section 1 be amended both to state the survival of common law innocent dissemination –as recently clarified in *Metropolitan Schools v DesignTechnica* [2009] EWHC 1765 (QB) ---and to bring the scope of section 1 into line with the Ecommerce Directive –or better still, to delete the current section and cross-refer to the protection of the Directive.

There is a strong economic incentive for the ISPs to merely remove content on receipt of a Takedown Notice. That was the intention of the drafters of the Ecommerce Directive –namely that ISPs would not have to act as judge and jury and determine the merits of any dispute but could remove and allow the parties to take their issues to the courts. See the analysis of the US model in the DMCA and the Directive at http://www.mcevedy.eu/downloads/DMCA-Victoria_McEvedy.pdf. There is no doubt this is chilling in its effect on speech.

Wealthy individuals and corporates are often able to suppress all negative content about themselves –except where it remains on the site of a reputable traditional media outlet or other publisher who cannot benefit from intermediary defences. We are in favour of a statutory put back regime –like the US DMCA model—although US statistics show that that is very rarely employed and content tends to find a new home rather than being put back. We favour put back however on the basis that at least one of the functions of law is to educate and the message it sends is an important one about the value of Freedom of Expression. The real difficulty is that while in the copyright context it is easy for an author/publisher to know whether they have rights to the content (that they are prepared to assert formally on pain of perjury) –it is much more difficult for a lay author/publisher to know whether they have a defence to Libel without taking (expensive) legal advice –thus our comments above and below urging plain English in the draft Bill.

The option of requiring claimants to obtain a court order for removal is also problematic in Libel due to the rule against prior-restraint (applicable when a defendant indicates he will defend on grounds of Truth) which means that often the matter will have to go to full trial before an order for removal would be granted. While that could be changed by statute –any interim relief would engage the policy concerns that led to the rule against prior –restraint namely the concern that the courts not be perceived to engage in censorship. The rule however may not survive much longer as its pre-determined outcome does not reflect the balancing of the competing values and Articles –under the Human Rights Act and the European Convention, as noted by Eady J. in his recent speech at the City University and see *Sunderland Housing Company v. Baines* [2006] EWHC 2359 (QB).

As to the Booksellers' Association's concerns –we refer to our comments above as to the scope of section 1 and the concurrent coverage of the Ecommerce Directive. We also note that *Metropolitan Schools* (above) has clarified that common law innocent dissemination remains intact in original scope. We believe that on the whole the current law works reasonably well. Requiring claimants to sue for removal is problematic as so few could afford to do so. In any event, in practice issues would be resolved largely during pre-action correspondence –so that it would operate in a manner very similar to the Takedown regime in the vast majority of cases.

As to practical problems-- many ISPs hosting user generated content –while not moderating or approving pre-publication --have communities with teams of volunteers who enforce acceptable use polices and language standards and tag or remove material. This activity might be regarded as classic moderating or editing and create liability on the basis that knowledge of the relevant content might be imputed to the ISP from the volunteers –perhaps on an agency theory. However, ISPs like the tone/civility and sense of community it fosters—and see it as improving the behavior of members. There is no question that it reduces legal disputes. ISPs would greatly welcome a means of creating a legal boundary between their own knowledge and liability –while allowing the community to continue these policing efforts. A Good Samaritan provision might protect this conduct without jeopardizing the ISPs' defenses.

ISPs faced with Takedown threats based more on might than right –have asked us to help them fight Takedown and we then remove and then legal the content and re-post it once it can be established that there is a legal basis to defend a claim of Libel –often by working through the Reynolds factors or establishing the factual foundation for fair comment. There is a risk in this -- it might jeopardize the ISP's ability to claim neutrality and the status of a mere host in relation to

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other content –although current cases and current practice allows ISPs to claim the immunity in relation to some content while acting as a publisher in relation to other content –although we are concerned this may not survive closer scrutiny in future. See *Imran Karim v Newsquest Media Group Limited* [2009] EWHC 3205, *Kaschke v Hilton* [2010] EWHC 690, *Mulvaney v Betfair* [2009] EIHC page 133 and the discussion of this issue at http://www.mcevedy.eu/downloads/InternetIntermediaries.pdf. This is an area that would benefit from further attention.

C. Detailed comments on the Draft Bill

1. Substantial Harm

We have real concerns about the inclusion of this section at all --and in this form. Further we have concerns about the tests of substantial harm and real and substantial tort as currently being employed by the courts. The doctrine of abuse of process (and other remedies) already adequately protects the publically funded judicial system from vexatious and frivolous litigants. There is no need for further protection and we are concerned that the proposed section will increase the need for expensive preliminary hearings –already an issue where justification is pleaded and meaning is disputed----those hearings will now have to include substantial harm, both as an aspect of meaning and the test of a real and substantial tort focusing on the extent of publication with an overall proportionality analysis---on a cost benefit basis. These preliminary hearings contribute to the very high cost of defamation litigation--costing anywhere from £20,000- £75,000 for the initial hearing alone. A claimant who loses at this hurdle is closed out of relief and pays heavily for that refusal.

Given this –and generally--the language "substantial harm" is unacceptably vague for use in legislation and defeats the purpose of codification. Legislation should be written in plain English and be accessible to the general public. This is not the case with this section –a reader would need to be a defamation lawyer in order to understand the meaning and how to apply the test. We would prefer an express test with limits generally as to damages or extent of publication and guidance on the cost benefit ratio.

In terms of the test for substantial harm as currently applied by the courts –this also causes us concern. The test is not sufficiently certain to assist parties predict outcomes and so increases costs, and the risks of litigation—already prohibitive. We are concerned that this offers a general discretion for the courts to deny rights and remedy to some –but not others --on grounds which

are not predictable and may appear arbitrary. For example—in *Kaschke v Osle*r [2010] EWHC 1075 (QB) (13 May 2010) –the claimant represented herself against very serious allegations -- that she was once a member of the Baader-Meinhof gang – which was a serious matter to her given she was politically active and contemplating standing for office. The defendant sought to strike out the claim on the basis there was no substantial harm as --there was nothing of substance to be gained from the proceedings by way of vindication --given a reply by the claimant had previously been published. The claim failed the test of substantial harm as damages would be modest and disproportionate to the cost of litigation. We find this an astonishing result in light of the seriousness of the allegations- and are concerned the claimant was not regarded as of sufficient stature/fame. We are concerned by this --surely it is not the law that some claimants who are seriously defamed as to their character in a zone of their affairs directly relevant to their public and professional life must be satisfied with a right of reply --- while others (at the discretion of the courts) are entitled to press their claims and seek the full range of relief offered by the law? This would bring the law into disrepute –and ignore current concerns that the law of defamation is the province of the rich and famous.

The commentary in the notes to the Bill explains that this section will repeal the presumption of damage—and if this is the intention, a much fuller discussion needs to take place –and express language should be included in the Bill. Some commentators have suggested that the test is likely to present a particular hurdle to companies –and again we would urge further discussion and clarity –particularly as the courts recently rejected reducing the protection for companies following a thorough analysis in *Jameel* [2006] UKHL 44.

2. <u>Responsible Publication on matters of Public Interest</u>

We agree that Reynolds should be codified. We believe that public interest and publication should be defined –in plain English. Again in the interests of the general public –being able to understand the laws –we agree the 10 factors should be included- but we think it would be much clearer to include Lord Nichol's original 10 –rather than any re-worked version. There is at least some guidance on the 10. We believe the defence should be applicable to oral statements and that this should be made clear. We agree that compliance with the codes should not be included—they do not add anything. As to 2(3) –is this intended to be restricted to political speech --as the common law originally and currently provides (see *Flood* [2010] EWCA Civ 804 Neuberger MR at §62)? If so, this should be express.

We note also the amendments to Statutory Qualified Privilege at §5 –however in our opinion – common law qualified privilege is no longer fit for purpose. Outside the few well defined

categories (master and servant and bankers' and other references) and cases which fit clearly into an analogy with a previous cases --- applying the duty and interest analysis in a modern context proves very difficult and risky –and given the cost of litigation ---there is arguably greater need for certainty than ever before. In particular, we note that even complaints to regulators and civil enforcement authorities carry the risk that they will not be protected by privilege where the motives might include a personal benefit to the party complaining ---due to the test for malice. Further, predicting correctly the scope of the relevant group with an interest is fraught exercise. Political and NGO and other campaigning material and literature remain high risk unless they present both sides of the argument and this is inconsistent with Freedom of Expression ---which includes the right to criticize and offend.

3. Truth

We agree with the renaming of the defence –and welcome this plain English approach. We note our earlier comments however and the need for meaning to be reformed and simplified. Indeed as noted at §26 of the commentary to the Bill –half of the issue here is meaning --described there as 'imputation.' We do not find this change of language an improvement. Is something different from traditional or current meaning intended? If so –this is not clear. We therefore question the statement in §22 of the notes ---that a clear statutory test has been provided –this would need to go very much further. We also note the statement at §24 that given the complexity of the current law –the statute cannot express the law on meaning in justification. This supports our point –if it cannot be clearly stated –it is indeed in need of clarity and reform. Again –the public must be able to read and understand the law and it should not be comprehensible only to practicing defamation lawyers. To suggest that the common law will provide guidance but no longer bind is a recipe for a period of confusion and uncertainty without more. We do not think §1(1) states the repetition rule –on any reading --and would suggest this be more fully expressed if that is the intention. Nor does any plain reading of it clarify the position in relation to the third level of the three Chase meanings. We refer to our earlier comments on plain English and accessability.

4. Honest Opinion

We welcome these amendments and the clarity of the draft section. We do not see the need to retain a public interest requirement for the defence –and do not see why Freedom of Expression should not extend to honest criticism on a wider range of matters. We are concerned however that the sensible reading down of meaning in the *British Chiropractors Assn. v Singh* [2010] EWCA Civ 350 case – has not found its way into the bill or the law and that result remains a matter of application only.

5. Privilege

We agree with the amendments.

6. Single Publication Rule

We welcome this change –which will bring certainty and greater ability to control libel risk --and therefore insure it --for publishing businesses. We would urge greater clarity in the drafting of sub-section 5 –again on the basis that the application of those factors should be clearer to the public and the outcome predictable.

7. Jurisdiction

While we welcome this section –we would prefer a more precise test than the "most appropriate" place test.

8. Other

We question whether sufficient consideration was given to borrowing from other jurisdictions where Libel law seems to strike a balance that reflects societal consensus. Thought should be given to reducing the protection for public/political figures –who should be more susceptible to robust criticism and less likely to reach for their lawyer than issue a response –indeed it is these figures rather than the smaller claimant --that might best be deterred from wasting the resources of the courts. Another option that would truly impact the current balance is reversing the burden of proving Truth so that it rests on a claimant and not a defendant—combined with automatic standardized pre-action disclosure --this would stop many cases in their tracks.

Please do not hesitate to contact us if we can provide further information on any of the above.

Yours faithfully,
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