



House of Lords
House of Commons
Joint Committee on Human
Rights

Legislative Scrutiny: Defamation Bill

Seventh Report of Session 2012–13



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*Report, together with formal minutes and
written evidence*

*Ordered by the House of Lords
to be printed 4 December 2012
Ordered by the House of Commons
to be printed 4 December 2012*

**HL Paper 84
HC 810**

Published on 12 December 2012
by authority of the House of Commons
London: The Stationery Office Limited
£10.00

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Summary

The Defamation Bill was introduced in the House of Lords on 8 October 2012 having already completed its passage through the Commons. In this Report we consider the significant human rights issues raised by the Bill and wider legal issues prompted by defamation reform.

THE BILL

Clause 4—Responsible publication in the public interest

The Bill as drafted seeks to codify the common law *Reynolds* defence for responsible publication on a matter of public interest. In doing so, it seeks to put on a statutory footing the checklist of relevant factors expounded in that case. We find these factors to be too narrow. To retain them will fail to rebalance the law of defamation in favour of the right to freedom of speech in Article 10 ECHR, and instead will perpetuate the difficulties already manifest in practice. We urge the Government to abandon the checklist, in favour of a clear, unambiguous defence of public interest. We are also concerned that, by omitting to mention the relevance of editorial judgment, as emphasised in *Flood v Times Newspapers*, the Bill would not encompass the full degree of protection offered by the common law.

We considered two alternative formulations for a public interest defence clause. The Libel Reform Group proposed a defence to the existing clause where the libel in question concerns a matter of public interest and correction is given promptly. We do not support such a defence: prompt correction will not always be the most appropriate remedy and to deny a claimant access to damages may cause injustice.

We are persuaded, though, by the replacement clause proposed by Lord Lester of Herne Hill at Second Reading in the House of Lords. That clause sought to institute a test of a “reasonable belief that the publication was in the public interest”. This would provide a clear test, without limiting consideration with a checklist of factors. We take the view that such a proposal is compliant with the ECHR, and indeed think that judges will use Article 8 to shape their understanding of ‘public interest’. It will also clearly encompass a view of what steps, if any, a publisher took to verify an alleged defamatory statement. We therefore recommend that the Government amend the Bill to replace clause 4 in accordance with that formulation.

Clause 5—Website operators

The Bill provides for a defence for website operators in a defamation action, provided they did not post the statement complained of. To make use of the defence, a website operator is compelled to remove defamatory material following a notice of complaint if they have no means of contacting the author. We think that this could create a chilling effect, whereby statements which are in fact lawful, by virtue of an available defence, are removed from the public domain on the basis that a claimant has asserted they are defamatory. We recommend that the threshold be elevated to “unlawful”, a change which would also ensure consistency with the E-Commerce Directive and the Pre-action Protocol for defamation.

The Bill provides that regulations will set out a process for website operators to put complainants in contact with the author of allegedly defamatory material. It is proposed that these regulations will be agreed in Parliament by use of the negative resolution procedure. We think that, as the regulations will effectively govern how website operators will be expected to respond to defamatory notices, their agreement requires full Parliamentary debate, and that therefore they should be subject to the affirmative resolution procedure instead.

Universities and colleges are often website operators, and therefore would be able to use the Clause 5 defence only if they comply with a notice of complaint. They are also under a statutory duty under section 43(2) of the Education (No. 2) Act 1986 to “take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.” An institution publishing allegedly defamatory material may therefore be in a position of conflict—of attempting to adhere to the duty to protect freedom of speech in respect of allegedly defamatory material while also being under an obligation to remove it. We recommend that the Government should bring forward statutory guidance as to which duty should take precedence in that scenario, in order to assist educational institutions. We also recommend that regulations made pursuant to Clause 5 protect the anonymity of whistleblowers.

Clause 8—Single publication rule

The Bill would introduce a single publications rule, which prevents an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or to a section of the public. This would replace the longstanding principle that each publication gives rise to a separate cause of action.

We ask the Government to reassure us that Clause 8, as drafted, will provide adequate protection for subsequent publication of defamatory material. If it cannot we would encourage the Government to explore an alternative defence of non-culpable republication.

Corporate claimants

The Bill does not address the issue of use of defamation proceedings by corporate claimants. We take the view that businesses ought only to succeed where they can prove actual damage. The Bill should be amended so as to provide that non-natural persons are required to establish substantial financial loss in any claim for defamation.

WIDER ISSUES RAISED BY DEFAMATION REFORM

Costs, funding and access to justice

The Legal Aid, Sentencing and Punishment of Offenders Act instituted changes which limited the recoverability of success fees and after the event insurance (ATE) in defamation cases. We are concerned that these changes may inhibit access to justice for those individuals who are middle-income, but not eligible for legal aid. The Government have made a commitment to ask the Civil Justice Council to consider the case for possible options for

reform. We welcome this ongoing consideration, and note that a solution is needed to ensure that all persons, regardless of financial means, can access justice in defamation proceedings.

1 Background

Date introduced to first House	10 May 2012
Date introduced to second House	8 October 2012
Current Bill Number	HL Bill 41 2012–13
Previous Reports	None

Introduction

1. The Defamation Bill was introduced in the House of Lords on 21 September 2012, having already completed its passage through the Commons.¹ The Bill is intended to make a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute.

2. The Rt Hon Lord McNally, Minister of State for Justice, has certified that in his view, the Bill is compatible with Convention rights. The Bill received its Second Reading in the House of Lords on 9 October 2012.

3. We wrote to the relevant Minister on 18 October 2012 asking for further information about a number of specific human rights issues raised by the Bill. The Minister replied by letter on 15 November 2012.

4. We identified the Bill as one of our priorities for legislative scrutiny in this Session and called for evidence in relation to it. We received written evidence in relation to the Bill from JNT Association (trading as JANET), UCISA, Professor Phillipson from the University of Durham Law School, and Professor Mullis, University of East Anglia and Dr Scott, London School of Economics. All of the written evidence we have received is available on our website. We are grateful to all those who have assisted with our scrutiny of the Bill's human rights implications.

5. This Report concentrates on the most significant human rights issues likely to be debated during the remainder of the Bill's passage, in light of the debates so far at the Second Reading in the House of Lords.

The information provided by the Government

6. The Government published alongside the Bill a detailed ECHR Memorandum prepared by the Ministry of Justice, setting out the Government's views on the principal human rights implications of the Bill. The memorandum provides a detailed account of the Government's reasons for concluding either that particular provisions do not interfere with human rights or that any interference is justified. The detail and quality of most of the human rights analysis in the memorandum shows that serious and careful consideration has been given to the human rights implications of the Bill.

¹ 12, 19, 21 and 27 June 2012

7. The relevant members of the Bill team also made themselves available to meet our Legal Adviser and the Lords Clerk to answer any questions about the Bill and to provide any further information. The combination of the detailed ECHR memorandum, the meeting with the Bill team, and the detailed response to our questions in the response to our letter has made it possible to focus this Report on the most significant human rights issues raised by the Bill.

2 Significant Human Rights issues raised by the Bill

Clause 4—Responsible publication in the public interest

The need for a new public interest defence

8. Clause 4, as drafted, represents a codification of the existing *Reynolds* defence for responsible publication on a matter of public interest. The present formulation of this clause raises two important issues: first, whether the drafting does in fact represent the common law; and second, whether the Defamation Bill should go beyond the current limits of the common law to provide greater protection for publisher-defendants.

9. We wrote to the Government expressing our concerns with the current drafting. In light of the Government response, we wish to expand further on our concerns and outline our rationale for recommending that Clause 4 of the Bill be improved.

The difficulties with a checklist of factors

10. A repeated criticism of the current law is that the decision in *Reynolds* is too restrictive and has been applied by the courts so narrowly as to render it almost impossible for defendants successfully to plead that their statement is protected by qualified privilege.

11. This analysis of the existing law is consistent with that of the UN Committee on Human Rights, which expressed its criticism of the UK's libel laws in its 2008 report on the implementation of the International Covenant on Civil and Political Rights:

“The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as “libel tourism.” The advent of the internet and the international distribution of foreign media also creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest.”²

12. JUSTICE has voiced its concerns as to the scope of *Reynolds* stating “it may be too narrow and that the lower courts may continue to apply it in a conservative manner.”³ In particular, JUSTICE cites the views of Lord Steyn speaking in May 2011, in support of the argument that there exists a judicial conservatism towards *Reynolds*:

“Optimism about the practical utility of *Reynolds* privilege unfortunately proved misplaced. The great majority of *Reynolds* defences failed at first instance. The decision in *Reynolds* was criticised by the New Zealand Court of appeal in *Lange v Atkinson and Australian Consolidated NZ Limited* [2003] 4 LRC 596, a case involving again a suit in defamation by a public figure. It held that the *Reynolds*

2 CCPR/C/GBR/CO/6 at para 25

3 JUSTICE, Defamation Bill, Second Reading Briefing, July 2012

decision altered the law of qualified privilege in a way which added to the uncertainty and chilling effect of the existing law of defamation[...] Unfortunately as matters stand, the *Reynolds* privilege will continue to complicate the task of journalists and editors who wish to explore matters of public interest and it will continue to erode freedom of expression.”⁴

13. In order to avail of the defence under the Bill, as currently formulated in Clause 4, the defendant will need to satisfy both limbs outlined in Clause 4, subsection 1(a) and (b). Paragraph (b) requires that the defendant acted responsibly in publishing the statement complained of. Clause 4(2) then sets out a list of factors the court may take into account when determining if the defendant has indeed acted responsibly on the facts—factors first expounded by Lord Nicholls in *Reynolds*. The Explanatory Notes explain that the Bill attempts to rectify the subsequent difficulty defendants have had with *Reynolds* privilege, namely that the listing of such factors is not intended to be a hurdle or a checklist.

14. Given the fact there has already been a history of these factors being misconstrued (albeit in a common law rather than statutory context), it is our view that the Government should consider redrafting the law on responsible journalism in such a way as to leave no room for doubt.

15. We do not think that the retention of the Reynolds checklist of factors will bring about the much-needed rebalancing of the law on defamation in favour of the right to freedom of speech in Article 10 ECHR. We think that to retain these factors will only perpetuate the difficulties already manifest in practice. We note that the Government has indicated in its response to our letter that it is currently considering how best to respond to proposals for a new public interest defence. We therefore recommend that the Government take this opportunity to abandon the statutory checklist of factors in favour of clear, unambiguous defence of public interest.

Flood and editorial judgement

16. We are also concerned that the present drafting of Clause 4 does not, in fact, represent the entirety of the existing common law protection, in particular, the relevance of editorial judgement, as emphasised by the Supreme Court in *Flood v Times Newspapers*.⁵

17. The decision in *Flood v Times Newspapers* concerned the publication of allegations of corruption made against a police officer by *The Times* in both its online and print editions. The Supreme Court held that the ‘meaning’ of the story was the police investigation into the allegations, rather than the allegations *per se*, and that it was difficult to see how *The Times* could report on the matter without naming the police officer in question. Although the article was damaging to DS Flood’s reputation, the court concluded that it was balanced in content and tone, did not assert the truth of the allegations, gave DS Flood the opportunity of commenting, and that the editorial judgement of *The Times* merited respect. It found that editorial freedom and journalistic judgement were relevant factors,

4 Lord Steyn, “Defamation and Privacy: Momentum for substantive and procedural change?” 3rd Annual Boydell Lecture, 26 May 2010

5 [2012] UKSC 11

and were entitled to be given weight when considering how much detail should be published.⁶

18. There is significant doubt that Clause 4, as drafted, adequately reflects the decision of the Supreme Court in *Flood*. Not only do we take the view that the retention of *Reynolds* will restrict the defence, but that the decision to omit the relevance of editorial judgement from the Bill will marginalise the importance of journalistic freedom in the court's decision. We raised these concerns with the Government in our letter. We did not receive an explicit response from the Government on this point, but the Government did indicate it was currently reflecting on the views expressed by the Committee and others.

19. We note that the Government is currently considering the concerns around the drafting of Clause 4 and the decision in *Flood*. We urge the Government to ensure that any public interest defence contained in the Defamation Bill provide at least the minimum protection afforded at common law to editorial judgement.

An alternative formulation

20. In proposing an alternative formulation to Clause 4, we considered carefully two alternatives: (i) “reasonable belief that the publication was in the public interest” and (ii) “no liability where libel concerns a matter of public interest.”

Lord Lester’s proposal: reasonable belief that the publication was in the public interest

21. At Second Reading in the Lords, Lord Lester of Herne Hill (a member of our Committee) outlined an alternative defence to that proposed by the Government in Clause 4. Lord Lester’s proposal, developed by Sir Brian Neill, may be expressed as follows:

- (1) *It is a defence in an action for defamation—*
 - (a) *for the defendant to show that the statement complained of was on, or formed part of a publication, a matter of public interest, and*
 - (b) *if the defendant acted honestly and reasonably believed at the time of publication that the making of the statement was in the public interest.*
- (2) *In the case of publication for the purposes of journalism the court shall, in determining whether the requirements of (a) and (b) are satisfied, give a wide discretion to the editor or other person responsible for the publication as to the content of the statement, the form of which the statement was made and the timing of the publication.*

6 See [2012] UKSC 11, per Lord Mance at para 180

(3) *For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.*

(4) *A defence under the section shall not succeed if the claimant shows that he asked the defendant for the publication of a correction of the statement complained of and that the request was unreasonably refused or granted subject to unreasonable conditions.*⁷

22. The advantage of this formulation is that it provides the court with a clear test, without limiting their consideration with a checklist of factors. A public interest defence modelled on this formulation would allow judges to determine if indeed the defamatory material was protected, whilst allowing for careful fact-specific consideration, without reference to a rigid checklist.

23. We have received written evidence from Professor Phillipson from the University of Durham Law School which raises concerns as to the impact of such a public interest defence. Professor Phillipson's prime concern is that this proposal does not provide adequate protection for the right to respect for private life in Article 8 ECHR. In particular, Phillipson argues that such a proposal would not protect the core principle of *Reynolds*—responsible journalism.

24. Phillipson's concern is that this formulation leaves scope for protection of a journalist who publishes a statement, which he may reasonably believe is in the public interest as it relates to a serious allegation on a matter of high public importance (for example, allegations of corruption involving a senior politician), even though little attempt had been made to investigate its veracity. If this defence could be applied in such a way, then the requirement to act responsibly would fall away. Instead, publishers would be protected for what they thought, and not what they did to verify or investigate a story, subject only to a requirement of reasonableness.

25. Phillipson takes the view that such a formulation may not survive a challenge at Strasbourg, as the European Court of Human Rights has maintained a strict insistence upon compliance with the ethics of journalism. Phillipson cites *Pedersen & Baadsgaard v Denmark*⁸ and *Radio France v France*⁹ as authority for the proposition that the European Court has repeatedly held that journalists benefit from the protection of Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability. This was recently restated by the European Court earlier this year in *Axel v Springer*¹⁰ at paragraphs 82–83:

“[...] Art.10(2) of the Convention states that freedom of expression carries with it “duties and responsibilities”, which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to

7 HL Hansard, 9 October 2012, col 957, per Lord Lester of Herne Hill

8 App no. 49017/99 (17 December 2004)

9 App no. 53984/00 (30 March 2004)

10 [2012] E.M.L.R. 15

assume significance when there is a question of attacking the reputation of a named individual and infringing the “rights of others”. **Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals.** Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see *Pedersen and Baadsgaard*, cited above at [78], and *Tonsbergs Blad A.S. and Haukom v Norway* (510/04) ECHR 2007–III at [89]). The Court reiterates that the right to protection of reputation is a right which is protected by art.8 of the Convention as part of the right to respect for private life.”

26. Phillipson also argues that if this proposal were accepted, the courts may still choose to read into the provision the Strasbourg requirement of responsible journalism, using section 3(1) of the HRA 1998. This, Phillipson states, is undesirable because it would create uncertainty in the law, which in turn would trigger extensive litigation and judicial consideration. Instead, Phillipson advocates the retention of the Government’s proposed Clause 4, with the addition of one feature from the Lester proposal—the requirement for a prompt and reasonable retraction.

27. We have, however, received a contrary view from Professor Alastair Mullis, University of East Anglia, and Dr Andrew Scott, London School of Economics. Mullis and Scott support the Lester proposal, on the basis that it would be Convention-compliant. In reaching that conclusion, they take the view that the assessment of whether a journalist’s belief was reasonable would involve essentially the same analysis as that which currently is applied under the *Reynolds* defence. The question for the court would be how the belief was reasonable, rather than how the journalism was responsible: this would invariably require inquiries into whether attempts were made to verify it, and whether it was investigated adequately. Mullis and Scott also assert that the protection afforded by Article 8 would no doubt shape the court’s approach to the question of reasonable belief.

28. We are not persuaded by the analysis of Professor Phillipson. We take the view that Lord Lester’s proposal is Convention-compliant, as the courts, when assessing whether a journalist’s belief was reasonable, will apply the same analysis already conducted under the Reynolds test but without a checklist of factors. A defence of ‘reasonable belief that the publication was in the public interest’, will clearly encompass consideration of what steps, if any, a publisher took to verify the alleged defamatory statement. Furthermore, we take the view that judges will inevitably use Article 8 to shape their understanding of ‘public interest’. For these reasons, we are persuaded by the reasoning of Professor Mullis and Dr Scott. We recommend that the Government amend the Bill, to replace Clause 4 with a general test of the defendant’s reasonable belief that the publication was in the public interest, without a checklist of factors.

The Libel Reform Group Proposal: No liability where libel concerns as a matter of public interest and prompt correction given

29. The Libel Reform Group (LRG) have also proposed that an additional defence be inserted before Clause 4, which would protect genuine public interest statements made in

good faith¹¹. The LRG's new clause provides that statements which cannot be shown to be true are promptly clarified or corrected with adequate prominence, thus delivering an appropriate remedy to the claimant with no need for the expense of a full trial. The LRG argue this new defence would encourage prompt and suitably prominent clarifications which is what most complainants want.

30. We note that Professor Phillipson has been heavily critical of this proposal in his written evidence. His first objection to this defence is the risk that it may well encourage irresponsible journalism, where media bodies can show that the statement relates to the public interest and promptly retract if it is incorrect. Provided a media body does not act with a reckless disregard for the truth (which is difficult to prove in and of itself), it would be completely protected by such a defence, if it publishes a statement which causes significant damage to the victim, without making any real attempt to verify it, so long as it is prepared to provide a prompt retraction.

31. Professor Phillipson's second objection to the LRG proposal is that, in disabling the claimant from pursuing damage, the LRG proposal would seriously under-protect the right to respect for private life in Article 8. Barring access to damages where an apology and retraction cannot rectify the harm suffered by the claimant risks breaching Article 8. Phillipson notes that such a provision could deny a claimant access to a remedy which is commensurate with the damage inflicted on his or her reputation.

32. Phillipson cites the following as an illustrative example of the shortcoming of such a proposal. A very serious allegation of professional misconduct is made against an individual, just at the time of applying for a new post. The adverse publicity generated by the allegation prevents the individual from obtaining that post. A retraction published after the event is too late, and will not necessarily put that individual back to the position prior to the publication of the defamatory allegation.

33. We are aware that there is case law from the European Court of Human Rights which indicates that such a provision would fall foul of the Convention. *Peck v United Kingdom*¹² and *Armonas v Lithuania*¹³ are cited as authority for the proposition that a blanket prohibition on the ability to obtain damages for a serious defamatory allegation, regardless of what actual damage has been caused to the claimant, may breach Article 8. The Court has stated that protection of reputation in a practical, effective way was part of Article 8, and that inadequate remedies may fail to provide individuals with the protection they could legitimately expect under Article 8. In *Armonas v Lithuania*, the Court did not need to consider if the low level of damages available for a privacy claim breached Article 13 (the right to an effective remedy) because adequate, effective protection of Article 8 itself required the State to ensure that applicants could enforce their right to private life. States are therefore under a positive obligation to show respect for private life—and this in itself requires a certain kind of remedy—one which is effective and commensurate with the expectation of protection provided by the Convention.

11 See the LRG Second Reading Briefing Note:
http://www.senseaboutscience.org/data/files/Libel/Briefing_note_for_second_reading_debate_of_Defamation_Bill_2012.pdf

12 (2003) 36 EHRR 41

13 36919/02 (25 Nov 2008)

34. We do not support the LRG's proposed reformulation of the public interest defence. We share the view of Professor Phillipson on this matter and have serious concerns as to the compatibility of the LRG proposal with Article 8 ECHR. A blanket prohibition on damages provides insufficient protection from damage to reputation. Prompt correction will not always be the most appropriate remedy for claimants in defamation actions, and to deny access to damages will risk injustice.

Clause 5—Operators of Websites

The threshold for a Clause 5 notice: defamatory or unlawful

35. Clause 5 provides for a defence for website operators in a defamation action, provided they did not post the statement complained of. Where a complainant does not know the identity and/or contact details of the author of the statement, he can send a notice of complaint to the website operator. The website operator will then be compelled to remove the material if they have no means of contacting the author. Clause 5(6) of the Bill requires that a claimant need only explain in his notice why the statement complained of is defamatory and not unlawful.

36. We asked the Government to consider redrafting Clause 5, so as to raise the threshold from one of 'defamatory' to 'unlawful', which means complainants would have to consider if any defence applied to the posted statement, and which would bring the clause into line with Regulation 19 of the E-Commerce (EU Directive) Regulations. The use of 'defamatory' rather than 'unlawful' in this context presents a difficulty in terms of consistency with Regulation 19 of the E-Commerce (EU Directive) Regulations.¹⁴ Regulation 19 restricts liability of web providers to instances where they have actual knowledge of the "unlawful activity". By contrast, Clause 5 only requires a claimant to demonstrate why a statement is defamatory. The effect of the use "defamatory" rather than "unlawful" means that claimants would not have to consider if any defence were applicable.

37. This could create a chilling effect, whereby statements which are in fact lawful by virtue of an available defence are removed from the public domain on the basis that a claimant has merely asserted they are defamatory. Unless website operators contest the validity of such notices, defamatory material which is nonetheless lawful will likely be suppressed. This places website operators in a precarious position whereby they can either comply and are protected, or challenge the validity of a mere assertion of defamation (rather than unlawful activity) and risk financial cost and associated strains of litigation.

38. The Government indicated in its response to us that it is concerned that to adopt the higher threshold would overcomplicate the process. The Government takes the view that requiring complainants to provide details of why they consider the posting to be unlawful, rather than just defamatory, would make it more difficult for a layman to make a complaint without first having sought legal advice, and would add to the cost and difficulty involved.

¹⁴ We also note that the Pre-Action Protocol for defamation also requires that the claimant explain why the statement is unlawful, rather than merely defamatory.

39. The Government response also distinguishes between the purposes of the E-Commerce (EU Directive) Regulations and of Clause 5, so as to justify the inconsistency between the two. Under the E-Commerce Regulations, a website operator, acting as intermediary hosting material, is potentially liable once notified that a statement is unlawful. By contrast, a website operator is not liable under Clause 5 of the Bill provided they did not post the defamatory material. The website operator, according to the Government, acts merely as a middle man and does not need to consider the merits of the complaint in order to protect itself from liability.

40. We are not satisfied with the Government's distinction in this matter. We think there is a real risk that website operators will be forced to arbitrate on whether something is defamatory or lawful, and will to readily make decisions on commercial grounds to remove allegedly defamatory material rather than engage with the process. As drafted, Clause 5 risks removing material from the internet, which, although it may be defamatory, may be lawful if a relevant defence applies. Material which is lawful may be suppressed because website operators are served with such notices. **We recommend that the threshold for a Clause 5 notice should be elevated to 'unlawful', which would also ensure consistency with the E-Commerce Directive and the Pre-Action Protocol for defamation.**

Regulations and Procedure

41. Clause 5(5) provides that regulations will set out a process for website operators to put complainants in touch with the author of the allegedly defamatory material. Clause 5(8) makes it clear that the negative resolution procedure will be used here.

42. We asked the Government to reconsider the use of the negative resolution procedure, and opt instead to adopt the affirmative resolution procedure so as to allow for greater scope for debate with a view to producing a coherent, balanced process. We also asked the Government to commit to publishing draft regulations in the near future.

43. The Government has informed us that it is aware of the views on the issue of whether the affirmative resolution procedure is a more appropriate process in this context and is giving consideration to this issue. The Government has also confirmed that it intends to consult stakeholders on the contents of the draft regulations, with a view to doing so by the end of the year.

44. We welcome the Government's intention to consult with stakeholders on the contents of the draft regulations by the end of the year. We recommend that the Government amend Clause 5(8), so as to adopt the affirmative resolution procedure, which will enable greater consultation and scrutiny of the forthcoming regulations. These regulations will effectively govern how website operators will be expected to respond to defamatory notices, and therefore should be the subject of full Parliamentary debate via the affirmative resolution procedure.

Universities and colleges

45. Universities and colleges are also likely to be affected by Clause 5. On the one hand, they are very often website operators, and would therefore only be able to avail themselves of the defence under Clause 5 if they comply with any notice served upon them. On the

other hand, universities and colleges are under a statutory duty, by virtue of section 43(2) of the Education (No.2) Act 1986, to “take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.”

46. Two organisations, UCISA and Janet, have highlighted in evidence to us that Clause 5 as drafted may place such institutions in a position of conflict with their duties under the Education Act. Such institutions owe a duty to promote freedom of speech, but under Clause 5, may be obliged to remove material on receipt of a notice from a complainant. Similarly, institutions may be placed in the same position of conflict if they are required to reveal the identity of an individual that has posted allegedly defamatory material without their consent.

47. In its submission, Janet has suggested that educational institutions should be able to leave the alleged defamatory material in place, without incurring liability, until a judicial view is obtained on the balance between the conflicting legal duties.

48. We note the concerns raised by UCISA and Janet. We think that the Government should consider providing statutory guidance so as to make it plain what steps universities and colleges should take when faced with a Clause 5 notice. We think that this statutory guidance should further clarify whether or not an educational institution will be liable under the Education (No. 2) Act 1986 if it complies with a Clause 5 notice and removes allegedly defamatory material from its website. We also recommend that regulations made pursuant to Clause 5 should make provision to preserve the anonymity of whistleblowers.

Clause 8—Single Publication Rule

49. Clause 8 of the Bill introduces a single publications rule, which prevents an action being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material to the public or to a section of the public. Under the current law, each time an alleged defamatory statement is published, it becomes actionable. This rule would restrict a claimant’s ability to bring an action in defamation where a statement was published and then subsequently re-published online. Clause 8 would replace the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period.

50. Article 6 ECHR can be engaged in matters of limitation and access to justice. The Government have recognised this concern in their Memorandum, and indicate that no claimant should suffer injustice as a result, as the courts will be able to rely on the existing provisions under the Limitation Act 1980 to have regard to all the circumstances in a case.

51. In evidence to the Committee, Mullis and Scott highlight that this clause, as drafted, may not achieve the aim of limiting liability. In their analysis, Mullis and Scott argue that any judge faced with a claimant who argues credibly that the reading of a defamatory online publication that took place yesterday, and which might be emulated tomorrow, has had adverse consequences for his Article 8 rights. Most judges faced with a case would likely waive the limitation period. Mullis and Scott suggest that judges will find themselves

in this position on every occasion were a claimant manages to convince the court they have suffered ‘serious’ harm. The effectiveness of Clause 8 as a curb on litigation is therefore illusory.

52. Mullis and Scott suggest a remedy to this issue may be through the introduction of a new defence of ‘non-culpable republication’: an archivist would be protected after the lapse of one year following first publication provided he appended a notice to the archived article. Such a notice would highlight that the veracity of the material was under challenge, thus mitigating the impact of the alleged libel.

53. We note the evidence of Professor Mullis and Dr Scott on the impact of Clause 8 and the single publication rule. We ask the Government to reassure us that Clause 8, as drafted, will provide adequate protection for subsequent publication of defamatory material. If, however, the Government cannot persuade us that Clause 8 will function effectively so as to curb litigation for multiple publication, we would encourage the Government to explore an alternative defence of non-culpable republication.

Corporate claimants

54. One omission from the Bill consistently raised by libel reform campaigners and indeed in debate in both Houses is the treatment of corporations as natural persons for the purposes of defamation actions.

55. Professor Phillipson in his evidence suggests that the failure to impose any restrictions on corporations’ ability to sue in defamation renders the law on reputation inconsistent and incoherent. Defamation law and the protection afforded under Article 8 has developed on the basis that the protection of an individual’s reputation is a significant human rights issue. Corporate claimants have neither personal emotions nor dignity, and yet are treated as natural persons for the purposes of defamation.

56. The Culture, Media and Sport Select Committee recommended the creation of a new category of “corporate defamation” requiring a corporation to prove actual damage to its business before an action could be brought.¹⁵ That Committee also envisaged alternative means by which corporations can seek redress, through non-legal avenues such as publicity campaigns to counter falsehoods and unfounded criticism,¹⁶ to the tort of malicious falsehood, requiring proof of damage maliciously or recklessly caused.¹⁷ A similar approach was adopted by Lord Lester in his Private Member’s Bill, which requires proof of substantial financial loss to the body corporate before a claim in defamation is actionable.¹⁸

57. The Bill does not contain specific provision relating to the ability of corporations to bring actions in defamation, with the Ministry of Justice concluding that such a step is not

15 House of Commons Culture, Media and Sport Committee (24 February 2010) Press Standards, Privacy and Libel (Second Report of Session 2009–10, Vol. 1) (London: TSO), at paragraph 178.

16 House of Commons Culture, Media and Sport Committee, Second Report of Session 2009–10, at paragraph 176.

17 House of Commons Culture, Media and Sport Committee, Second Report of Session 2009–10, at paragraph 178.

18 Clause 11 of Lord Lester’s Private Member’s Bill.

necessary in light of the present reforms and in the context of the reform of civil litigation funding.¹⁹

58. We take the view that businesses ought only to succeed in defamation proceedings where they can prove actual damage. We therefore recommend that the Bill be amended so as to require non-natural legal persons to show substantial financial loss. This requirement should be relative to the nature, size and scope of the claimant business or organisation.

¹⁹ Largely implemented by Part 2 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

3 Wider issues raised by defamation reform

59. Whilst scrutinising the Bill for human rights concerns, we also considered some wider issues, which, although not directly dealt with by the Bill itself, are nonetheless pertinent to the reform of defamation.

Costs, funding and access to justice

60. The availability of conditional fee agreements (“CFAs”) for actions in defamation has long been the subject of debate. Under a traditional CFA the lawyer does not generally receive a fee from the client if the case is lost. However, if the case is won, the lawyer’s costs (the ‘base costs’) are generally recoverable from the losing party. In these cases, the lawyer could charge an uplift on these base costs, which (until very recently) was recoverable from the losing party. This uplift is known as the ‘success fee’. In addition, After the Event (ATE) insurance can be taken out by parties in a CFA-funded case to insure against the risk of having to pay their opponent’s costs and their own disbursements if they lose. As with success fees, until very recently, ATE insurance premiums were recoverable from the losing party.

61. It has therefore been argued that defendants in actions for defamation could be perceived to be under a coercive financial risk, as they could be liable for success fees on top of base costs. Critics argue that this inhibits the freedom of expression of defendants in a real and material way. Irresponsible parties have no incentive to maintain sensible costs, as they are afforded protection by the structure and operation of the CFA model. In addition, ATE insurance raised similar concerns, as it was recoverable from the losing defendant.

62. The European Court of Human Rights recently gave judgment in *MGN v the UK*²⁰ in which the Court agreed with such a view, finding that the existing CFA arrangements on recoverability contravened Article 10: the risk to the defendant of being liable for the high and disproportionate costs in a defamation action produced a chilling effect on free speech. CFAs that enabled recovery of success fees from the losing side were deemed disproportionate.

63. The subsequent Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 has altered the way in which CFAs operate. Sections 44–46 of the LASPO Act 2012 govern the recoverability of success fees and ATE insurance. The net effect of these provisions is to limit the recoverability of success fees and ATE in a CFA-funded case from a losing defendant. Members will recall that a major criticism of these reforms is that they render the CFA-model almost obsolete, as lawyers will be reluctant to take on defamation cases on a CFA-basis if they are no longer commercially viable.

64. We wrote to the Government expressing our concerns that this change to CFAs and ATE may inhibit access to justice for those claimants and defendants, who are middle-

income, but not eligible for legal aid. The Government has responded to our concerns by reaffirming their commitment to the LASPO reforms, and the belief that these rules will restore balance to the system and result in a reduction in legal costs. The Government also relied on the decision of the European Court of Human Rights in *MGN Ltd. v the UK* (2011) ECHR 66, to justify the changes to costs in defamation proceedings: the new rules on non-recoverability of success fees and ATE from the losing party will address the European Court's criticism in that case.

65. The Government also outlined what the LASPO reforms would achieve:

“We are not removing the access to CFAs of either claimants or defendants; rather we aim to create a stronger balance between the interests of claimants and defendants. The reforms will still provide the claimants with a means to bring meritorious cases but will also ensure that the costs faced by defendants are proportionate, thereby correcting the present anomaly where claimants have little incentive to keep an eye on the costs they incur. Moreover, it is unfair on defendants that they may feel unable to fight cases, even when they know they are in the right, for fear of excessive costs if they lose.”

66. However, the Government has acknowledged the dilemma facing less wealthy claimants and defendants, as they may be put off from pursuing or defending reasonable actions because of the risk of having to pay the other side's legal costs if their case fails. The Government has therefore said that it will therefore consider the issue of costs protection.

67. Lord McNally made a commitment at Second Reading to ask the Civil Justice Council to consider the case for, and possible options for reform of, costs protection in defamation and privacy related claims. The Civil Justice Council is an advisory body, chaired by the Master of the Rolls, and has previously assisted the Ministry of Justice in developing a regime of costs protection in personal injury cases. The Government has indicated in its response to us that the Civil Justice Council will set up a working group to consider the issue of costs protection in defamation/privacy cases, and report with its recommendations by the end of March 2013. This timetable will allow the Government to consider what, if any changes, should be made to the Civil Procedure Rules when the Defamation Bill comes into effect.

68. We are concerned that this change to CFAs and ATE may inhibit access to justice for those claimants and defendants who are middle-income, but not eligible for legal aid. We are particularly concerned that the reforms in the LASPO Act 2012 do not tackle this issue, as the present rules on CFAs may prevent claimants and defendants of modest means from accessing the courts, a particularly pertinent concern when the action is one of defamation.

69. We note the Government's ongoing efforts to address this particular issue, and welcome its ongoing consideration of the 'costs protection' issue. We remind the Government that a solution to the difficulty faced by “middle income, not eligible for legal aid” claimants and defendants is necessary if defamation reform is to be effective in practice, so that all persons, regardless of financial means, can access justice in defamation proceedings.

Relationship between qualified privilege and Article 8 ECHR

70. We also sought to ascertain the Government's view on the on the inter-relationship of Article 8 and 10 ECHR and the law of qualified privilege in light of recent judicial decisions such as *W v Westminster City Council*²¹.

71. *W v Westminster City Council* involved an action for libel against a defendant council, for the allegations made by its social workers in a child protection dispute. W was alleged to have been grooming S, the daughter of W's partner, with a view to abusing her sexually. It was also alleged that there were serious grounds to suspect W was a predatory paedophile. These allegations were contained in a report intended for use at a child protection case conference relating to S. W took action against Westminster Council for libel. The defendant council advanced defences of absolute and qualified privilege.

72. The High Court held that the social workers' report was protected by qualified privilege, where the social workers had been acting in good faith, but they had mistakenly exceeded the limits of what should have been communicated. The publication of the report therefore breached W's rights under Article 8 of the ECHR. Accordingly, just because the original claim was defeated by a defence of qualified privilege did not mean that a claim under section 7 of the HRA 1998 for breach of Article 8 would also fail.

73. The Government has stated in its response to us that it notes the conclusion of *W v Westminster City Council* concerning actions under section 7 of the HRA 1998, but is content to await further considerations of this issue by the courts.

74. We have concerns that the development of the relationship between qualified privilege and section 7 claims under the HRA 1998 may inhibit local authorities in their ability to execute their statutory functions, under the Children Act 1989, to investigate safeguarding and child protection matters. We recommend that the Government make further enquiries and keep this matter under review.

21 [2004] EWHC 2866 (QB)

Conclusions and recommendations

Significant Human Rights issues raised by the Bill

1. We do not think that the retention of the Reynolds checklist of factors will bring about the much-needed rebalancing of the law on defamation in favour of the right to freedom of speech in Article 10 ECHR. We think that to retain these factors will only perpetuate the difficulties already manifest in practice. We note that the Government has indicated in its response to our letter that it is currently considering how best to respond to proposals for a new public interest defence. We therefore recommend that the Government take this opportunity to abandon the statutory checklist of factors in favour of clear, unambiguous defence of public interest. (Paragraph 15)
2. We note that the Government is currently considering the concerns around the drafting of Clause 4 and the decision in Flood. We urge the Government to ensure that any public interest defence contained in the Defamation Bill provide at least the minimum protection afforded at common law to editorial judgement. (Paragraph 19)
3. We are not persuaded by the analysis of Professor Phillipson. We take the view that Lord Lester's proposal is Convention-compliant, as the courts, when assessing whether a journalist's belief was reasonable, will apply the same analysis already conducted under the Reynolds test but without a checklist of factors. A defence of 'reasonable belief that the publication was in the public interest', will clearly encompass consideration of what steps, if any, a publisher took to verify the alleged defamatory statement. Furthermore, we take the view that judges will inevitably use Article 8 to shape their understanding of 'public interest'. For these reasons, we are persuaded by the reasoning of Professor Mullis and Dr Scott. We recommend that the Government amend the Bill, to replace Clause 4 with a general test of the defendant's reasonable belief that the publication was in the public interest, without a checklist of factors. (Paragraph 28)
4. We recommend that the threshold for a Clause 5 notice should be elevated to 'unlawful', which would also ensure consistency with the E-Commerce Directive and the Pre-Action Protocol for defamation. (Paragraph 40)
5. We welcome the Government's intention to consult with stakeholders on the contents of the draft regulations by the end of the year. We recommend that the Government amend Clause 5(8), so as to adopt the affirmative resolution procedure, which will enable greater consultation and scrutiny of the forthcoming regulations. These regulations will effectively govern how website operators will be expected to respond to defamatory notices, and therefore should be the subject of full Parliamentary debate via the affirmative resolution procedure. (Paragraph 44)
6. We note the concerns raised by UCISA and Janet. We think that the Government should consider providing statutory guidance so as to make it plain what steps universities and colleges should take when faced with a Clause 5 notice. We think

that this statutory guidance should further clarify whether or not an educational institution will be liable under the Education (No. 2) Act 1986 if it complies with a Clause 5 notice and removes allegedly defamatory material from its website. We also recommend that regulations made pursuant to Clause 5 should make provision to preserve the anonymity of whistleblowers. (Paragraph 48)

7. We note the evidence of Professor Mullis and Dr Scott on the impact of Clause 8 and the single publication rule. We ask the Government to reassure us that Clause 8, as drafted, will provide adequate protection for subsequent publication of defamatory material. If, however, the Government cannot persuade us that Clause 8 will function effectively so as to curb litigation for multiple publication, we would encourage the Government to explore an alternative defence of non-culpable republication. (Paragraph 53)
8. We take the view that businesses ought only to succeed in defamation proceedings where they can prove actual damage. We therefore recommend that the Bill be amended so as to require non-natural legal persons to show substantial financial loss. This requirement should be relative to the nature, size and scope of the claimant business or organisation. (Paragraph 58)

Wider issues raised by defamation reform

9. We are concerned that this change to CFAs and ATE may inhibit access to justice for those claimants and defendants who are middle-income, but not eligible for legal aid. We are particularly concerned that the reforms in the LASPO Act 2012 do not tackle this issue, as the present rules on CFAs may prevent claimants and defendants of modest means from accessing the courts, a particularly pertinent concern when the action is one of defamation. (Paragraph 68)
10. We note the Government's ongoing efforts to address this particular issue, and welcome its ongoing consideration of the 'costs protection' issue. We remind the Government that a solution to the difficulty faced by "middle income, not eligible for legal aid" claimants and defendants is necessary if defamation reform is to be effective in practice, so that all persons, regardless of financial means, can access justice in defamation proceedings. (Paragraph 69)
11. We have concerns that the development of the relationship between qualified privilege and section 7 claims under the HRA 1998 may inhibit local authorities in their ability to execute their statutory functions, under the Children Act 1989, to investigate safeguarding and child protection matters. We recommend that the Government make further enquiries and keep this matter under review. (Paragraph 74)

Formal Minutes

Tuesday 4 December 2012

Members present:

Dr Hywel Francis, in the Chair

Rehman Chishti

Rt Hon Simon Hughes

Mr Virendra Sharma

Richard Shepherd

Baroness Berridge

Baroness Kennedy of the Shaws

Baroness Lister of Burtersett

Baroness O'Loan

Draft Report (Legislative Scrutiny: Defamation Bill), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 74 read and agreed to.

Several papers were appended to the Report.

Resolved, That the Report be the Seventh Report of the Committee to the House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 3 July, 10 July, 23 October and 27 November was ordered to be reported to the House.

[Adjourned till Tuesday 11 December at 2.00 pm]

Declaration of Lords' Interests

Baroness Kennedy:

Board Member of the Media Standards Trust.

A full list of members' interests can be found in the Register of Lords' Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

List of written evidence

- | | | |
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| 1 | Letter from the Chair, to Rt Hon Lord McNally, Minister of State for Justice, Ministry of Justice | p 28 |
| 2 | Letter to the Chair, from Rt Hon Lord McNally, Minister of State for Justice, Ministry of Justice | p 30 |

List of written evidence published on the Internet

- | | |
|---|---|
| 1 | JNT Association (trading as JANET) |
| 2 | Universities and Colleges Information Systems |
| 3 | Professor Alastair Mullis and Dr Andrew Scott |
| 4 | Professor Gavin Phillipson |

Written evidence

1. Letter from the Chair, to Rt Hon Lord McNally, Minister of State for Justice, Ministry of Justice

The Joint Committee on Human Rights is currently scrutinising the Defamation Bill for compatibility with the UK's human rights obligations. The Bill clearly has some significant human rights implications, including for the UK's ability to strike the correct balance between the right of an individual to a reputation and the preservation of free speech and expression and the public's right to information.

I am grateful for the detailed ECHR Memorandum addressing issues arising under the European Convention on Human Rights, and to your officials for making themselves available to meet with the Committee's staff. The combination of the ECHR Memorandum, the meeting with officials from the Bill team and the additional information provided following that meeting has made it possible for the Committee's members to focus their scrutiny on the most significant questions which they consider require further explanation or justification. I would be grateful if you could answer the following questions.

The need for an effective public interest defence

English defamation law has been criticised for its failure to provide adequate protection of the fundamental right of freedom of expression. The UN Committee on Human Rights, reporting on the UK's implementation of the International Covenant on Civil and Political Rights in 2008, expressed its concern about this chilling effect on free speech:

"The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the Internet and the international distribution of foreign media also creates the danger that a State party's unduly restrictive libel law will affect freedom of expression world-wide on matters of valid public interest."

Q1: The Government has accepted the proposition that defamation law is in need of both consolidation and reform. Will the Government reconsider its position on Clause 4, and abandon the Reynolds defence in favour of a new, robust defence of public interest that offers protection of freedom of expression, where matters are of public concern and are the subject of honest opinion, along the following lines:

"It is a defence in an action for defamation (a) for the defendant to show that the statement complained of was on, or formed part of a publication on, a matter of public interest, and (b) if the defendant honestly and reasonably believed at the time of publication that the making of the statement was in the public interest."

Q2: Will the Government consider removing the statutory list of factors contained in Clause 4(2) so as to remove the risk that courts will apply these factors in a rigid, narrow manner?

Q3: Does the Government believe that the drafting of Clause 4 adequately reflects the protection afforded by the existing common law, most notably the relevance of editorial judgement, in light of the decision of the Supreme Court in *Flood v Times Newspapers*?

Q4: If the Government wishes to retain the list of factors in Clause 4(2), will it consider an amendment to the wording so as to make it plain on the face of the statute that editorial judgement will be relevant when a court determines if a journalist, editor or publisher has acted responsibly?

Q5: Will the Government amend Clause 4 so as to prevent a defendant relying on the public interest defence where a claimant can demonstrate:

(i) that the claimant requested that the defendant print a correction to the statement complained of; and

(ii) that the defendant unreasonably refused to do so, or did so subject to unreasonable restrictions.

Responsible journalism and the relevance of professional codes of conduct

Q6: Given the Government's emphasis on the importance of responsible journalism (in this Bill and the Leveson Inquiry, for example) will the Government consider making an explicit reference to the relevant professional codes of conduct, as other legislation already does,²² so as both to (i) encourage greater responsibility by journalists, and (ii) foster an environment of self-regulation within the press, thus avoiding expensive litigation?

Q7: In the Government's view, would an amendment which obliged the court to take into account whether or not any such codes were broken in an individual case assist the court in determining whether the defence of responsible publication is made out?

Q8: Given the historic unpredictability of the *Reynolds* defence, would reference to a code of conduct or similar guidelines assist the courts in ensuring cases are dealt with in a fair, consistent manner?

Q9: Would the Government reconsider its position in terms of Clause 4, and abandon the *Reynolds* defence in favour of a new, effective defence of public interest which would provide that statements which cannot be shown to be true are promptly clarified or corrected with adequate prominence, thus delivering an appropriate remedy to the claimant with no need for the expense of a full trial?

Clause 5 and consistency with the E-Commerce (EU) Directive Regulations

Q10: Will the Government reconsider the drafting of Clause 5(4) so as to provide that a complainant must demonstrate why a statement is unlawful and not just defamatory, which would bring Clause 5 into line with Regulation 19 of the E-Commerce (EU Directive) Regulations?

Regulations under Clause 5

Q11: Would the Government reconsider drafting Clause 5 so as to allow for the use of the affirmative resolution procedure, so as to give greater scope for debate between website operators parliamentarians and wider stakeholder groups, with a view to draft a coherent, balanced procedure?

Q12: Will the Government undertake to publish in draft the regulations it intends to make under clause 5?

Conditional Fee Agreements and Access to Justice:

Q13: Would the Government consider an amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 so as to exempt actions for defamation from the recoverability provisions concerning success fees and ATE insurance premiums?

Q14: If the Government is not convinced of the need for an amendment to the LAS PO, Act 2012, how does the Government propose dealing with the problem of "middle income, not eligible for legal aid" claimants and defendants, and the restriction of their access to justice in defamation claims?

Q15: What progress has the Government made in relation to the commitment made by Lord McNally to review costs protection for defamation proceedings, particularly in light of the risk of restricting access to justice for innocent defendants and individual claimants who traditionally relied on CFAs?

Q16: What discussions have the Government already had with the judiciary about the changes to the Civil Procedure Rules that will be needed to make the new Act work?

Q17: What is the Government's view of the inter-relationship between Articles 8 and 10 ECHR and the law of qualified privilege in the light of recent judicial decisions such as *W v Westminster*?

It would be helpful if we could receive your reply by Thursday 1 November 2012. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to aid publication.

I look forward to hearing from you.

18 October 2012

2. Letter to the Chair, from Rt Hon Lord McNally, Minister of State for Justice, Ministry of Justice

Thank you for your letter of 18 October. I am sorry that it was not possible to reply sooner, as your letter was not received by my department until 9 November.

The Government's response to the questions raised by the Committee is as follows

Questions 1 to 5, Question 9 (Clause 4)

The Committee seeks the Government's views on a number of ways in which clause 4 of the Bill could be amended. In the course of debate on the Bill at Third Reading in the House of Commons, the Secretary of State indicated our intention to reflect further on the contents of clause 4 in the light of the views that had been expressed about the measure from differing perspectives. I reiterated that commitment at Second Reading in the House of Lords.

We are currently in the process of considering these issues with a view to tabling amendments at Committee Stage in the House of Lords if it is considered appropriate to do so. I am not in a position to comment on the specific points raised in these questions at this stage. However, I can reassure the Committee that these are issues which are being looked at in the course of our considerations.

Questions 6 to 8 (Clause 4)

These questions all relate to the issue of whether an explicit reference to professional codes of conduct should be included in clause 4.

As noted above, our considerations regarding clause 4 include the question of whether the list of factors in clause 4(2) should be retained, and this may affect the question of whether any reference to codes of conduct is appropriate. We will of course also wish to take account of any recommendations which may emerge from the Leveson Inquiry which have implications for clause 4 or the Bill more generally.

Question 10 (Clause 5)

The Committee asks whether Clause 5(4) (now Clause 5(6)) should require the complainant to explain why the statement concerned is unlawful and not just defamatory, in order to be consistent with Regulation 19 of the E-Commerce Directive.

Clause 5 and the E-Commerce Directive serve different purposes. In introducing the new process under clause 5 we were responding to concerns from internet organisations that the current law puts website operators in a position where they have to consider the merits of a complaint (which they are seldom in a position to do) and decide whether they should remove the posting concerned or risk being sued for defamation. Instead, Clause 5 gives website operators a defence provided they pass a complaint on to the

author of the material within a fixed period, and then take appropriate follow-up action in the light of the author's response (or lack of it).

The interaction between the complainant and the author of the material will be akin to the pre-action process, whereby a complainant provides details of his or her claim, and the defendant has an opportunity to consider whether any defence are available and respond, before formal proceedings are begun. The website operator will simply fulfil the role of a middle man in this process, and there is no need for it to consider the merits of the complaint in order to protect itself against liability. This is different from the position under the E-Commerce Directive, where an intermediary hosting material is potentially liable once notified that a statement is unlawful. As the two operate on different principles we do not believe that there is any need for the provisions to work in the same way.

In addition, we are concerned that the clause 5 process should be as simple and easy to operate as possible, and should be fair to all parties. Requiring complainants to provide details of why they consider the posting to be unlawful, rather than just defamatory, would make it more difficult for a layman to make a complaint without first having sought legal advice, and would add to the cost and difficulty involved. We can reassure the Committee that the draft regulations will cover in detail the information that a complainant has to provide in a notice of complaint, and that we envisage this including details such as the meaning attributed to the words complained of and why they are defamatory, including any factual inaccuracies or unsupportable comment.

Questions 11 and 12 (Clause 5)

The Committee asks whether there Government will consider making the regulations under Clause 5 subject to the affirmative resolution procedure in Parliament, and whether the regulations will be published in draft.

Clause 5 currently provides for the regulations to be subject to the negative resolution procedure. We are aware of the views that have been expressed that use of the affirmative procedure may be more appropriate, and are giving consideration to this issue. We can confirm that we intend to consult stakeholders on the contents of the draft regulations, and hope to be in a position to do this by the end of the year.

Questions 13 and 14 (Conditional Fee Agreements and Access to Justice)

These questions relate to whether defamation actions should be exempt from the provisions on CFAs (sections 44–46) in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and how issues relating to access to justice in these cases will be addressed. The Government has made it clear—including during the passage of the Bill itself—that it does not support amending the LASPO Act in respect of defamation actions. The reforms were drawn up by Lord Justice Jackson, and implemented by the Government, on the basis that they should apply across all proceedings in civil litigation. We believe that the provisions in the Act—and the accompanying rules and regulations—will restore balance to the system and result in a reduction in legal costs.

Part 2 of the LASPO Act introduces a package of reforms, which will change the way 'no win, no fee' conditional fee agreements (CFAs) work. The Act will abolish the recovery of success fees and after the event (ATE) insurance premiums from the losing side. The implementation of the relevant provisions will address the criticism of the current regime found by the European Court of Human Rights in *MGN Ltd. v the UK* [2011] ECHR 66. People will still be able to use CFAs but will have to pay their lawyer's success fee and, if appropriate, any ATE insurance premium themselves.

The Government believes that the reforms should be seen in the context of what they will achieve. We are not removing the access to CFAs of either claimants or defendants; rather we aim to create a stronger balance between the interests of claimants and defendants. The reforms will still provide claimants with a means to bring meritorious cases, but will also ensure that costs faced by defendants are proportionate, thereby correcting the present anomaly where claimants have little incentive to keep an eye on the costs they incur. Moreover, it is unfair on defendants that they may feel unable to fight cases, even when they know they are in the right, for fear of excessive costs if they lose.

The LASPO reforms, and the procedural changes which we are taking forward alongside the Defamation Bill (eg to enable the early resolution of key issues such as meaning) are intended to reduce the complexity and expense of pursuing and defending defamation claims. However, we acknowledge that difficulty may arise in respect of less wealthy claimants and defendants, and how they might be put off from pursuing or defending reasonable cases because of the risk of having to pay the other side's legal costs if their case fails, and we are accordingly considering the issue of costs protection (see Question 15, below).

Question 15 (Commitment to review costs protection for defamation proceedings)

I made a commitment at Second Reading of the Defamation Bill in the House of Lords on 9 October 2012 to ask the Civil Justice Council (CJC) to consider the case for, and possible options to reform, costs protection in defamation and privacy related claims.

The CJC is an advisory body chaired by the Master of the Rolls and has in the past assisted this department in developing a regime of costs protection in personal injury cases (known as qualified one way costs shifting or 'QOCS'), which will be implemented when Part 2 of the LASPO Act comes into effect in April 2012. The CJC will set up a working group to consider the issue of costs protection/privacy related claims. The working group will report its recommendations to MoJ by the end of March 2013, allowing the Government time to consider what, if any, changes to the Civil Procedure Rules should be made for when the Defamation Bill comes into effect.

Question 16—discussions with the judiciary

The Committee asks what discussions the Government has had with the judiciary about changes to the Civil Procedure Rules to make the new Act work.

Officials have discussed the contents of the Bill and related procedural issues with members of the senior judiciary on a number of occasions during the period over which the Bill has developed. Most recently, a meeting has taken place with the new Master of the Rolls, Lord Dyson, to discuss these issues. The Government will put proposals for procedural changes to support the new Act before the Civil Procedure Rule Committee in the new year. Our intention is to ensure that these are in place for when the Act comes into force.

Question 17—inter-relationship between Articles 8 and 10 and the law of qualified privilege

The Committee asks for the Government's view on the inter-relationship of Articles 8 and 10 ECHR and law of qualified privilege in light of recent judicial decisions such as *W v Westminster*.

As we have stated from the outset, this Bill is about striking the right balance between a claimant's right to reputation and a defendant's right to freedom of expression. The Bill makes modest but sensible changes to existing forms of statutory privilege. However we think it is right that matters such as the existence of a duty and interest privilege should continue to be for the courts to determine on the facts of the individual case. That will, of course, include consideration of the Convention.

We have noted the conclusion in *W* concerning actions under section 7 of the Human Rights Act 1998, and are content simply to await further consideration of the issue by the courts.

I hope that this reply is helpful. I would of course be happy to respond further should the Committee have any further questions.

15 November 2012

List of Reports from the Committee during the current Parliament

Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810

Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition	HL Paper 156/HC 767

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Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
Seventeenth Report	The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)	HL Paper 192/HC 1483
Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
Twenty-third Report	Implementation of the Right of Disabled People to Independent Living	HL Paper 257/HC 1074
Twenty-fourth Report	The Justice and Security Green Paper	HL Paper 286/HC 1777