



## **Draft Defamation Bill**

# **JUSTICE response to Ministry of Justice Consultation CP3/11**

**May 2011**

### **For further information contact**

Eric Metcalfe, Director of Human Rights Policy  
email: [emetcalfe@justice.org.uk](mailto:emetcalfe@justice.org.uk) direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100  
fax: 020 7329 5055 email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)

## Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. JUSTICE has long pressed for changes to the English law of defamation. We therefore welcome public consultation on the Draft Defamation Bill. Although we believe there is scope to go further, we welcome the Draft Bill as an important first step in rebalancing the law on defamation in favour of greater freedom of expression.

## Problems with the current law

3. For several decades, JUSTICE has argued for various changes to the law of defamation in order to better protect freedom of expression. In 1965, for instance, we published *The Law and the Press* which recommended, among other things, the introduction of:<sup>1</sup>

a statutory defence of qualified privilege for newspapers in respect of the publication of matters of public interest where the publication is made in good faith without malice and is based upon evidence which might reasonably be believed to be true

In *Freedom of Expression and the Law*, the 1990 report of a JUSTICE committee chaired by Lord Deedes stated that freedom of expression was ‘our bedrock’, something that should be restricted ‘only when absolutely necessary for limited purposes’.<sup>2</sup> Although we noted that ‘freedom of expression has long been recognised as an important value in this country’, we also speculated that ‘perhaps we have grown careless of its value’, noting the increasing trend towards restrictions upon print media and broadcasting.<sup>3</sup> We expressed concern that the government and the judiciary had ‘grown progressively more careless about the principles which should govern all limitations on free expression’.<sup>4</sup> In particular, we described the law on defamation as ‘one of the pressing issues of law and freedom of expression’:<sup>5</sup>

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<sup>1</sup> JUSTICE and the British Committee of the International Press Institute, *The Law and the Press* (1965), recommendation 6. This defence was available if the defendant had published a ‘reasonable letter or statement by way of explanation or contradiction’ at the claimant’s request.

<sup>2</sup> JUSTICE, *Freedom of Expression and the Law*, p1 and para 1.5. See also para 1.9: ‘[t]he fundamental rule should be that the free expression of ideas and information is only to be restricted for the most pressing of reasons, and that restrictions must be only those that are necessary for those reasons. That general principle should be made specific by the revival of Blackstone’s description that freedom of the press should be an absence of prior restraint’ [emphasis added].

<sup>3</sup> *Ibid.*, para 1.8.

<sup>4</sup> *Ibid.*, p1.

<sup>5</sup> *Ibid.*, paras 2.16 and 2.17. Emphasis added.

The lottery of libel is out of control. At one extreme the absence of legal aid for libel means that the poor (and not-so-poor) can be libelled with impunity and have no means of remedy. At the other extreme, the level of libel damages (and settlements in anticipation of them) make libel trials a very expensive game .... *There must be a better way of protecting the right to reputation.*

4. While several things have changed in the twenty years since our 1990 report, including the availability of legal aid, many of the essential problems remain the same and even some new ones have emerged. Notwithstanding such developments as the judgment of the European Court of Human Rights in *Steel and Morris v United Kingdom*<sup>6</sup> (which held that the blanket denial of legal aid to defendants in libel claims was a breach of the right to a fair hearing under article 6 ECHR), the introduction of conditional fee agreements for libel claimants, and the judgments of the House of Lords in *Reynolds v Times Newspapers*<sup>7</sup> and *Jameel v Wall Street Journal*<sup>8</sup> (establishing a defence of qualified privilege concerning matters of public interest), the English law on defamation still poses a substantial interference with press freedom and with freedom of expression in general. Specifically:

- The level of libel damages remains extraordinarily high. Despite various attempts at reform over the years,<sup>9</sup> we find it astonishing that it continues to be possible for a successful claimant to recover more for damage to reputation than, for example, the loss of a limb.<sup>10</sup>

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<sup>6</sup> (2005) 41 EHRR 22.

<sup>7</sup> [1999] 3 All ER 961.

<sup>8</sup> [2006] UKHL 44.

<sup>9</sup> Section 8(2) of the Courts and Legal Services Act 1990 enables the Court of Appeal to substitute for an 'excessive' award by a jury 'such sum as appears to the Court to be proper'. In *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, the European Court of Human Rights held that the jury's award of £1.5 million in damages following a defamation claim was a disproportionate interference with the right to freedom of expression under article 10 ECHR.

<sup>10</sup> According to two academic defenders of the existing law, 'the Court of Appeal now exercises considerable control over the level of damages, with the effective maximum now just over £200k. Moreover, the award of even half that amount is a rare occurrence' (Mullis and Scott, 'Something Rotten in the State of English Libel Law?', January 2010). In JUSTICE's view, however, the fact that libel awards only infrequently exceed £100,000 is hardly evidence of either proportionality or restraint. We note, for instance, that the average award for the loss of a leg is approximately £70,000 (see Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 9<sup>th</sup> ed (Oxford University Press)). In the circumstances, we do not think the proposal of English PEN and Index of Censorship to impose a cap of damages of £10,000 to be an unreasonable one (see *Free Speech Is Not For Sale: The impact of English libel law on freedom of expression*, 2009 at p8).

- Costs in defamation cases are similarly excessive,<sup>11</sup> and out of all proportion to the general complexity of the law in this area: a 2008 study by the Programme in Comparative Media Law and Policy at the Oxford Centre for Socio-Legal Studies found that England and Wales was by far the most expensive European jurisdiction in which to conduct defamation proceedings.<sup>12</sup> This has been exacerbated by the introduction of conditional fee agreements (CFAs) in defamation cases. Originally intended to address the lack of legal aid for poorer claimants (one of the points we highlighted in our 1990 report), we have seen little evidence to suggest that CFAs have increased access to justice in this area. On the contrary, it seems to us that claimants in defamation cases are by-and-large those same private individuals and organisations who would have been able to afford to bring a defamation claim in any event.
- The reversal of the ordinary burden of proof, which obliges defendants to prove that their statements were *not* defamatory, combined with the high cost of defending libel claims and the threat of substantial damages, gives rise to enormous pressure upon defendants to settle out of court rather than risk an adverse finding. More generally, it gives rise to a potential chilling effect on all those who would publish or express critical views that may be taken by others to be defamatory.
- Notwithstanding the establishment of the *Reynolds* defence of qualified privilege for so-called ‘responsible journalism’, and its further clarification by the House of Lords in *Jameel v Wall Street Journal*, we remain concerned that the scope of this defence may be too narrow, and that the lower courts may continue to apply it in a conservative manner.
- Despite the skepticism of some legal figures,<sup>13</sup> we have no doubt that forum-shopping and ‘libel tourism’ – whereby foreign claimants seek to establish a UK readership or

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<sup>11</sup> See e.g. most recently the judgment of the Court of Appeal in *Fiddes v Channel Four Television* [2010] EWCA Civ 730, endorsing Tugendhat J’s account of the ‘vast costs in this case’ as a ‘fair description on our understanding of the figures’ (para 13). At first instance, Tugendhat J accepted in principle that ‘the level of costs in libel proceedings could in some cases have a possible chilling effect on freedom of speech’ (para 40). The Court of Appeal, including the Master of the Rolls, unanimously held that this was a ‘perfectly proper’ factor for the judge to have taken into account when deciding whether to hold the trial with a jury (para 42).

<sup>12</sup> Programme in Comparative Media Law and Policy at the Oxford Centre for Socio-Legal Studies, *A Comparative Study of Costs in Defamation Proceedings across Europe* (December 2008, p187. See also Ministry of Justice, *Report of the Libel Working Group* (March 2010), referring to the ‘widespread perception that the costs of [defamation] proceedings are prohibitive’ (para 89).

<sup>13</sup> See e.g. the comments of Lord Hoffmann, ‘Libel Tourism’, February 2010, at para 28 ‘[T]he complaints about libel tourism come entirely from the Americans and are based upon a belief that the whole world should share their view about how to strike the balance between freedom of expression and the defence of reputation .... If the *Ehrenfeld* case or the *Don King*

audience, however small, in order to bring a defamation claim within the jurisdiction of English courts – is a serious problem, particularly for NGOs and investigative journalists reporting on matters of public interest outside the UK. It is shameful that the threat of a libel action in English courts should be used to stifle freedom of expression abroad. Nor is England's reputation as a 'Mecca for aggrieved people from around the world who want to sue for libel' anything to be proud of.<sup>14</sup> One factor contributing to the growth of libel tourism has been the rule in the Duke of Brunswick's case from 1849,<sup>15</sup> which – in the age of the internet and online archives – has greatly multiplied the opportunities for foreign claimants to find instances of 'publication' here in the UK. In December 2009, we argued for the rule to be abolished on the basis that it undermined legal certainty and was impractical given the nature of modern media.<sup>16</sup>

5. While we think there is certainly scope to go further in addressing the problems described above, we welcome the Draft Bill as an important first step towards rebalancing the law on defamation in favour of greater freedom of expression.

## Clause 1

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

6. Yes, we strongly support this measure. It is well-understood that the reverse burden of proof in defamation cases, together with the threat of substantial damages and costs, produces tremendous pressure on defendants to settle an otherwise meritorious case for fear of an adverse ruling. As Lord Steyn, a former law lord and former chair of JUSTICE, noted recently:<sup>17</sup>

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case is the best that the campaigners for a change in our law can do, their case seems to me far from overwhelming'. But see contra, the speech of Lord Steyn, 'Defamation and Privacy: Momentum for substantive and procedural change?', 3<sup>rd</sup> annual Boydell Lecture, 26 May 2010 at p4: 'Some libel specialists question that libel tourism is a significant problem. *In my respectful view the concerns of the Lord Chief Justice are well-founded.* A combination of the multiple publication rule, and the even a small number of internet readers of the United Kingdom, has created the risk of a cause of action here, and opened the door to libel tourism' [emphasis added].

<sup>14</sup> 'Britain, Long a Libel Mecca, Reviews Laws' by Sarah Lyall, *New York Times*, 10 December 2009: 'England has long been a Mecca for aggrieved people from around the world who want to sue for libel. Russian oligarchs, Saudi businessmen, multinational corporations, American celebrities — all have made their way to London's courts, where jurisdiction is easy to obtain and libel laws are heavily weighted in favor of complainants'.

<sup>15</sup> *Duke of Brunswick v Harmer* (1849) 14 QB 185.

<sup>16</sup> JUSTICE response to *Defamation and the Internet: The multiple publication rule*: consultation paper CP 20/09 (December 2009).

<sup>17</sup> See n13 above, p 3.

It is (I believe) a fact that very often that British newspapers, when sued in libel, give up and settle when one would not expect them to do so. The reasons for this state of affairs are to be found in centuries old strict liability in defamation law. Libel law is tilted against the media.

We have no doubt that this state of affairs constitutes an undue interference with freedom of expression in the UK. Consequently, we believe a requirement on claimants to show that publication of a statement has or is likely to cause substantial harm is a sensible and proportionate way of limiting the number of libel claims that may be brought by wealthy or CFA-aided claimants for weak or even frivolous reasons.<sup>18</sup> We also agree with the general view identified in the consultation paper that, even if the common law rules are clear, 'legislation would provide extra certainty and help to discourage trivial claims'.<sup>19</sup>

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

7. We are aware of some debate as to whether that the phrase 'substantial harm' adequately captures the purpose of the clause, which is to remove the scope of trivial and unfounded actions succeeding, and that some have suggested 'significant harm' as an alternative. To our mind, we cannot see a sensible distinction in the circumstances between 'substantial' and 'significant', nor do we think anything would be gained by adjoining the two terms (i.e. 'significant *and* substantial'). On the contrary, we think would be likely to only lead to further confusion. While we understand the concern behind those proposals, we are satisfied that the threshold of a 'substantial' test is sufficient.
8. We also note that clause 11 of Lord Lester's Private Members Bill required companies to show 'substantial financial loss'. We prefer the view that companies should not be able to sue in defamation at all for reasons set out at greater length below. Nonetheless, if companies are to be permitted to bring actions for defamation, we agree that the threshold proposed by Lord Lester is the correct one.

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

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<sup>18</sup> See e.g. *Khader v Aziz and others* [2010] EWCA Civ 716 at para 32 per May P: 'The appellant's claim on the first publication is at best fraught with difficulties. But even if it were to succeed at trial, it would not be worth the candle. She would at best recover minimal damages at huge expense to the parties and of court time. This would be so, even if she and those representing her were to adopt for the future a hitherto elusive economical approach to the amount of paper and time which the case might need. As things are, the parties' expenditure must vastly exceed the minimal amount of damages which the appellant might recover even if she were to succeed in overcoming all the obstacles in the path of such success. The judge was correct to conclude that this claim is disproportionate and that it should be struck out as an abuse'.

<sup>19</sup> Consultation paper, para 3.

9. Yes. We agree that both the 1891 Act and the common law rule are thoroughly outdated and should be repealed.

## Clause 2

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

10. Yes, we agree that a public interest test should be included and that it would represent an improvement over the existing common law defence. Indeed, having first called for the establishment of such a defence more than forty five years ago, JUSTICE finds it deeply unfortunate that it should have taken so long to be recognised by the courts. We share the view expressed by Lord Steyn, previously chair of JUSTICE, in May this year:<sup>20</sup>

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* decision altered the law of qualified privilege in a way which added to the uncertainty and chilling effect of the existing law of defamation .... As a matter of precedent, *Jameel* did not amount to the much-needed critical re-examination of *Reynolds*. 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.

11. It is, of course, inevitable with any new legislation that there will be some additional litigation in order to settle the meaning of particular provisions. However, we do not regard this as a serious objection to the desirability of putting an improved public interest test in statutory form. In our view, the importance of rebalancing the substantive law outweighs the problem of increased litigation in the short- or medium-term.
12. However, we are concerned that the public interest test as currently worded in clause 2 is too narrow. We therefore recommend the following changes:
- (i) First, we would caution against treating the concept of responsibility in clauses 2(1)(b) and 2(2) in a restrictive manner, and that the criteria in clause 2(2) should be regarded as

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<sup>20</sup> Lord Steyn, 3<sup>rd</sup> annual Boydell lecture, n13 above, pp5-8.

merely illustrative rather than exhaustive. Not all of the criteria will be relevant in every case. And, as Lord Bingham said of the factors listed by Lord Nicholls in *Reynolds*:<sup>21</sup>

He [Lord Nicholls] intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, *and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege.*

- (ii) Secondly, we think it is crucial that the availability of the public interest defence should not be limited to professional journalists. The importance of a free press lies in its contribution to the free and open exchange of information, ideas and opinions. In JUSTICE's view, this is not an activity that depends on being an accredited member of some particular profession, or having a contract of employment with a media organisation. Accordingly, we take the view expressed by Lord Hoffmann in *Jameel* that the defence of public interest should be 'available to anyone who publishes material of public interest in any medium',<sup>22</sup> whether they be a reporter for an international news channel, an NGO or an unpaid blogger. Given the increasing importance of the internet as a source for news and reportage, we think it would be impractical to limit the scope of the defence to paid journalists only. This also reinforces our earlier point about the concept of 'responsible journalism' being applied in as broad and as flexible a manner as possible. The resources available to undertake fact-checking and the like will obviously differ depending on whether the defendant is a major newspaper, for instance, or someone who blogs on the internet in their spare time. It would be unjust to require the latter to meet the standards that can reasonably be expected of the former. To this end, we consider that one of the criteria in clause 2(2) should be 'the resources available to the defendant'.
- (iii) Thirdly, although prior notification is given as a factor in ground (e) ('whether the defendant sought the claimants views on the statement before publishing it'), the public interest grounds *against* prior notification are not as clearly set out. Ground (g) refers to the timing of the publication and 'whether there was any reason to think it was in the public interest for the statement to be published urgently', but this appears to presuppose that the only reason for non-notification might be urgency. An equally strong public interest ground for not providing prior notification would be the concern that a well-financed claimant might seek use article 8 grounds to bar publication, rather than bring an action in defamation. The importance of source protection is another strong public interest

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<sup>21</sup> *Jameel*, n8 above, para 33. See also Lord Hoffman at para 56: 'Lord Nicholl's well-known non-exhaustive list of ten matters ... are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds* they can become ten hurdles at any of which the defence can fail. That is how Eady J treated them'.

<sup>22</sup> *Ibid*, para 54.

ground for non-notification that is not given weight among the criteria. A statutory public interest defence should not assume that non-notification amounts to irresponsible journalism.

- (iv) Fourthly, given the importance of the public interest defence, we believe that, where a defendant raises a defence of responsible publication, there should be a rebuttable presumption that the defendant has acted responsibly unless the claimant can demonstrate the contrary to the civil standard of proof. At the very least, it should be for the claimant to show that the subject matter of the statement (clause 2(2)(e)) was not in the public interest rather than for the defendant to show that it was.

***Q5. Do you have any views on the substance of the draft clause? In particular: a) do you agree that it would not be appropriate to attempt to define “public interest”? If not, what definition would you suggest?***

13. We agree that it would not be appropriate to attempt to define ‘public interest’ for the reasons set out in the consultation paper.<sup>23</sup> JUSTICE favours as broad a definition of ‘public interest’ as possible and believe that any attempt to define it would run the risk of inadvertently reducing its breadth. Although we acknowledge there is a risk in leaving the definition to the courts, in the long run we think this is likely to deliver greater breadth and flexibility than a flawed statutory definition that would be much more difficult for the courts to put right. If, over time, it emerged that the courts were defining public interest in too narrow a fashion, it would be open to Parliament to legislate to correct this.
14. One way to help promote a broad approach would be to put the burden of proof on the claimant to show that the subject matter of the statement (clause 2(2)(e)) was not in the public interest, rather than oblige the defendant to prove that it was. Although this would not directly affect the breadth of the definition, it would have the practical effect of limiting the opportunities given to a court to adopt a narrower construction.

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

15. No. We have already argued that the public interest defence should be available to anyone engaged in the activity of journalism, whether paid or unpaid, and that it is important not to judge the latter by the standards that can reasonably be expected of the former. This is not simply because of the very different kinds of publication involved, but also because of the

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<sup>23</sup> Consultation paper, para 13.

obvious unfairness of a defendant being bound by standards he or she had no part in making. Where a publisher *has* agreed to be bound by a particular code of conduct, we do not doubt that courts will have regard to its compliance or noncompliance (as the case may be) in any event. But a statutory public interest defence should not become the vehicle for the enforcement of voluntary standards against those not party to them.

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

16. The weight to be given to any particular factor will always depend to a large extent on the circumstances of the particular case. However, we agree that the nature of the publication should be given special weight when considering what was reasonable to expect of the publisher. As we noted above, it would be wholly unreasonable to expect an unpaid blogger to comply with the same requirements as the editor of a national broadsheet.

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

17. We agree that the defence should apply to inferences and opinions as well as statements of fact. We can see force in the argument that specific reference to this may be desirable for the avoidance of doubt. To the extent that there is an overlap between the public interest defence and the defence of honest opinion, we believe again that a generous approach should be taken for the sake of protecting free expression.

***e) do you agree with the approach taken on the issue of “reportage”?***

18. Yes. We believe that the approach in clause 2(3) is broadly correct.

### **Clause 3**

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

19. Yes. We believe that replacing the existing common law defence with a statutory defence provides a good opportunity to improve the law on this issue.

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

20. We agree with the suggested approach for the reasons set out in the consultation paper, particularly the problem of the complexity of the law in this area.<sup>24</sup>

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

21. We welcome the provision in subclauses 3(2) and (3) making clear that the defence of truth does not fail where there is more than one distinct imputation and, having regard to an imputations which has been shown to be substantially true, those which are not shown to be substantially true do not materially injure the claimant's reputation. However, we believe the Bill should go further and incorporate a defence as outlined in clause 5(3) of Lord Lester's Private Members Bill, i.e. that the defence of truth also does not fail in circumstances where a particular meaning alleged by the claimant has not been shown to be substantially true, but there is no material injury to the claimant's reputation having regard to the truth of what the defendant *has* shown to be substantially true.

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

22. Yes. See our recommendation at para 21 above.

**Clause 4**

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

23. Yes. As the Court of Appeal noted in *British Chiropractic Association v Singh*, the term 'fair comment' is misleading:<sup>25</sup>

In an area of law concerned with sometimes conflicting issues of great sensitivity involving both the protection of good reputation and the maintenance of the principles of free expression, it is somewhat alarming to read in the standard textbook on the Law of Libel and Slander (Gatley, 11<sup>th</sup> edition) in relation to the defence of fair comment, which is said to be a 'bulwark of free speech', that '...the law here is dogged by misleading terminology... 'Comment' or 'honest comment' or 'honest

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<sup>24</sup> Consultation paper, para 24.

<sup>25</sup> [2010] EWCA Civ 350, paras 35-36. Emphasis added.

opinion' would be a better name, but the traditional terminology is so well established in England that it is adhered to here'.

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

Although the proposed defence is based on the common law defence, we welcome this codification on the grounds that it is likely to promote greater certainty. To some extent, as the Court of Appeal's judgment in *Singh* shows, the fault of the existing law lies not so much in the legal principles themselves but in how they have been applied by the courts. In *Singh's* case, the judge at first instance had concluded that the defendant's expression of opinion (that various treatments offered by members of the Chiropractic Association were bogus) was to be treated as a factual claim (i.e. members of the Association offered the treatments knowing that they were bogus). Accordingly, although the defendant had only alleged foolishness, he was required to prove deceit. As the Court of Appeal held, the court below was mistaken.<sup>26</sup>

the material words, however one represents or paraphrases their meaning, are in our judgment expressions of opinion. The opinion may be mistaken, but to allow the party which has been denounced on the basis of it to compel its author to prove in court what he has asserted by way of argument is to invite the court to become an Orwellian ministry of truth. Milton, recalling in the *Areopagitica* his visit to Italy in 1638-9, wrote:

'I have sat among their learned men, for that honour I had, and been counted happy to be born in such a place of philosophic freedom, as they supposed England was, while themselves did nothing but bemoan the servile condition into which learning among them was brought; .... that nothing had been there written now these many years but flattery and fustian. There it was that I found and visited the famous Galileo, grown old a prisoner of the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought.'

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<sup>26</sup> *Ibid*, para 23.

That is a pass to which we ought not to come again.

Although the courts ultimately arrived at the correct result, we note that the defendant was put to costs of approximately £200,000 in defending the claim.<sup>27</sup> The *Singh* case is as good an illustration as any of the propensity of many libel claimants to use the English law of defamation as a means to silence unwelcome comment. In the circumstances, while we welcome the codification set out in clause 3, we believe that there is a principled case for going further and establishing a broader defence of honest opinion, to make clear to the courts that robust expressions of opinion should not readily be construed as factual claims.

24. As between the term 'honest opinion' or 'honest comment' (as suggested by Lords Phillips and Lord Nicholls), we have no strong view and believe either would be satisfactory.

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

25. We agree with the approach suggested by the consultation paper for the reasons it sets out, subject to the points we make at para 26 below.

***Q12. Do you have any views on the substance of the draft clause? In particular: a) do you agree that condition 1 adequately reflects the current law that the statement must be recognisable as comment?***

26. Whether or not condition 1 adequately reflects the current law, we believe that condition 1 represents the correct approach. It should not be necessary for a statement to be objectively recognisable as comment. It should be enough that the statement was *intended* as such.

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

27. No. We can see no good reason why the freedom to express one's opinions, honestly held, should be constrained by a requirement to demonstrate that the opinion relates to a matter of public interest. We note that Lord Phillips in *Spiller v Joseph* also doubted the need for this requirement.<sup>28</sup> If, as the consultation paper suggests, the issue is rarely raised in any event,

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<sup>27</sup> See e.g. The Times, 'Science writer Simon Singh wins bitter libel battle', 16 April 2010.

<sup>28</sup> [2010] UKSC 53 at para 113.

this seems only to strengthen the case for removing it entirely. Any article 8 concerns are properly the subject of the law governing privacy, not defamation.

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

28. As we indicate at para 31 below, we prefer a subjective test rather than an objective one.

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

29. Yes. In our view, this is an extremely important aspect of freedom of opinion and expression.

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

30. No. We believe the defences should be available concurrently.

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

31. No. We favour the subjective approach under section 10 of the Defamation Act 1992 (New Zealand) and highlighted by Lord Phillips in *Spiller*.<sup>29</sup>

## **Clause 5**

***Q13. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular: a) do you agree that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed? If not, what extension (if any) would be appropriate?***

32. Yes. In JUSTICE's view, this extension is a valuable provision that will, among other things, reduce the threat of needless litigation brought in respect of information that is already in the public domain, or at least should be.

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<sup>29</sup> Para 112.

33. The defence of absolute privilege is particularly important in light of the October 2009 injunction obtained on behalf of Trafigura against the Guardian which, astonishingly, purported to restrict the Guardian from reporting, among other things, a question in Parliament asked by Paul Farrelly MP. As Trafigura's solicitors subsequently told a parliamentary committee:<sup>30</sup>

[O]n the wording of the Order as it then stood, it was clear to us that, absent a variation of its terms, it would amount to a breach and therefore a contempt for the *Guardian* to publish, as it proposed, information about Mr Farrelly's parliamentary question, referring to the existence of the injunction.

The Lord Chief Justice subsequently said:<sup>31</sup>

I am speaking entirely personally but I should need some very powerful persuasion indeed - and that, I suppose, is close to saying I simply cannot envisage - that it would be constitutionally possible, or proper, for a court to make an order which might prevent or hinder or limit discussion of any topic in Parliament. Or that any judge would intentionally formulate an injunction which would purport to have that effect.

We agree with the view expressed by the House of Commons Committee on Culture Media and Sport that the 'free and fair reporting of proceedings in Parliament is a cornerstone of a democracy'.<sup>32</sup> We also note the recommendations of the committee chaired by Lord Neuberger on the use of super-injunctions, in particular those in Part Six of its report which indicated that Parliament may wish to use the Defamation Bill to clarify the scope of the privilege.<sup>33</sup>

It ... appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by the 1840 Act. *What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.*

In light of this, we recommend the draft Bill should make clear on its face the absolute right of any person to publish an accurate report of parliamentary proceedings without fear of either

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<sup>30</sup> House of Commons Committee on Culture, Media and Sport, *Press Standards, Privacy and Libel* (HC 532: February 2010), para 99.

<sup>31</sup> Statement of the Lord Chief Justice, 20 October 2009.

<sup>32</sup> Note 30 above, para 101.

<sup>33</sup> *Report of the Committee on Superinjunctions: Superinjunctions, Anonymised Injunctions and Open Justice* (May 2011), para 6.33.

prosecution or suit. The draft Bill should also adopt the provision contained in clause 7(2) of Lord Lester's Private Members Bill, which would require the court to stay any proceedings where the defendant is able to show that they would 'prevent or postpone' the reporting of parliamentary proceedings.

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

34. We believe that the requirement of contemporaneity is unnecessary (see below). If it is retained, however, we agree that it should not be defined for the reasons set out in the consultation paper, i.e. it is unlikely a satisfactory statutory definition could be arrived at without inviting undue complexity and further litigation.

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

35. In our view, there is no good reason why the defence of absolute privilege should be restricted to only contemporaneous reportage, while non-contemporaneous reporting attracts only a defence of qualified privilege. In our view, this distinction cannot be sustained. Instead, the defence of absolute privilege should be available to all such reporting, whether contemporaneous or not.

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

36. Yes. We believe the approach taken towards summaries is a sound one.

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

37. Yes. We strongly support measures to safeguard free expression in this area. We believe the definition of 'scientific and academic conferences' should be given as broad a definition as possible and, for this reason, we tend to think it would be better not to attempt a specific statutory definition.

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

38. Yes. Increasing globalisation and advances in communication technology means that it is now much easier to report on proceedings in other countries, and foreign litigants are not reluctant to use English law to defend their reputations. We therefore welcome the extension of Part 2 qualified privilege to other countries and agree with the approach taken.

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

39. Yes. In particular, we agree with the view expressed in the consultation paper that in the internet age it is illogical for the rest of the world to be able to know about and comment on a matter that cannot be safely reported in the UK. In terms of the types of companies covered, again we prefer that the definition should be as broad as possible.

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

40. Although we agree that most press conferences would qualify as a 'public meeting' under existing provisions, we can see an argument raised that a press briefing that was restricted to accredited members of the media might fall outside this definition. We are not ourselves aware of such an argument having been run, but we would support the Bill making explicit reference to press conferences and press briefings for the avoidance of doubt.

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

41. Yes. We do not think it should be necessary, however, to define an archive for this purpose. It seems to us that the natural and ordinary meaning of the word plainly encompasses electronic and internet-based archives, for instance. In the event that there were any ambiguity, though, we would favour as broad a definition as possible in order to ensure that the scope of the defence is not unduly limited.

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

42. We believe that it would be appropriate to extend the defence of qualified privilege to fair and accurate copies or summaries or extracts of any original documents contained in the National Archives. In our view, the public interest in the Archive and its contents surely outweighs any individual interest in the protection of their reputation.

## Clause 6

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

43. Yes. In our response to the Ministry of Justice consultation on the multiple publication rule last December,<sup>34</sup> we argued for the rule in the Duke of Brunswick's case<sup>35</sup> to be abolished on the basis that it undermined legal certainty and was impractical given the nature of modern media. We therefore strongly support the introduction of a single publication rule, providing that the first occasion on which material becomes publicly available shall be treated as the date of publication for all purposes. However, we express concern that the rule in clause 10(3) as currently drafted is likely to undermine the main purpose of this provision – see our answer to Q17(b) below.

### ***Q17. Do you have any views on the substance of the draft clause? In particular, a) do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope?***

44. See our answer to question 17(b) below.

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

45. No. In our view, such a provision is likely to dramatically undermine the benefit of the single publication rule. In particular, an enormous amount of material that has been in the public domain for many years is currently being transferred into electronic format and made available on the internet (e.g. newspaper archives, scholarly journals, etc). The effect of clause 10(3), however, is likely to be that this would count as fresh publication, which would oblige those making archival material available to scrutinise all republished material for potentially

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<sup>34</sup> JUSTICE response to *Defamation and the Internet: The multiple publication rule*: consultation paper CP 20/09 (December 2009).

<sup>35</sup> See n15 above.

defamatory content. It is obvious that such an exercise would be enormously time-consuming and, in many cases, prohibitively expensive. Given the compelling public interest in making archival material as widely available as possible, we recommend that clause 10(3) should be removed from the Bill. The court would still be free to exercise its discretion under s32A of the Limitation Act 1980 in exceptional cases.

**Q18. Do you consider that any specific provision is needed in addition to the court's discretion under section 32A of the Limitation Act 1980 to allow a claim to proceed outside the limitation period of one year from the date of the first publication?**

46. No.

#### **Clause 7**

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

47. Yes. The phenomenon of libel tourism is a significant problem, notwithstanding that a relatively small number of cases reach court. We note, for example, the difficulties highlighted in the recent report by Lord Neuberger's committee in estimating the number of superinjunctions that have been made:<sup>36</sup>

The current absence of any data renders it impossible to verify whether and to what extent super-injunctions and anonymised injunctions are being granted by the courts. Equally, it renders it impossible to verify whether claims of the existence of as many as 200 – 300 such orders refer to super-injunctions, anonymised injunctions, a combination of the two, is based on double counting orders made first at a without-notice hearing and then continued at a with-notice notice hearing, or is simply an exaggeration.

If the head of the civil justice system in England and Wales is unable to state with any confidence exactly how many superinjunctions or anonymised injunctions have been issued by the courts in any given year, then we hardly find it surprising that the extent of libel tourism in the sense of actions being *threatened* should be significantly underestimated.

48. In our view, restricting the ability of foreign claimants to bring an action for defamation in England and Wales would be an entirely proportionate restriction on the right of access to a court, given the need to safeguard freedom of expression both here and abroad.

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<sup>36</sup> See n33 above, paras 4.4-4.5.

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

49. We recognise that the draft clause is limited to non-EU defendants, and that this is due to the requirements of the Brussels I Regulation. The limitations of this measure mean that it becomes all the more important to rebalance other aspects of the law on defamation to ensure that the courts are not used stifle freedom of expression, wherever the parties are domiciled.

**Clause 8**

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

50. Yes. We favour reversing the long-standing statutory presumption that actions in defamation will be heard by a jury. Although we believe that juries are an important constitutional safeguard against unfairness and injustice, we agree that the generally high cost of defamation proceedings means that ending the *presumption* in favour of jury trial is a reasonable step.<sup>37</sup>

51. However, the constitutional importance of the right to trial by jury means that a *defendant* should not be deprived of his right to *elect* trial by jury if he believes it necessary. This will be particularly important in circumstances where the defendant (i) has the burden of proving his case and (ii) believes that the meaning of his statement is better assessed by a jury of his peers than by a trial judge. It seems to us that the primary argument against retaining trial by jury is the concern that it will add significantly to costs, but that this is typically a concern for defendants rather than claimants.<sup>38</sup> We think ending the presumption against jury trial but retaining a defendant's right of election strikes the appropriate balance between these competing interests.

**Q22. Do you have any views on the substance of the draft clause? In particular: a) do you consider that guidelines on the circumstances governing the courts' exercise of its discretion to order jury trial should be included on the face of the Bill? If so, what factors or criteria do you consider would be appropriate? Please provide examples.**

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<sup>37</sup> See e.g. the recent Court of Appeal judgment in *Fiddes v Channel Four Television* [2010] EWCA Civ 730, the Court upheld the trial judge's ruling that it was appropriate to hear the case without a jury in light of the 'vast costs' that had already been incurred.

<sup>38</sup> It is also relevant that defendants, unlike claimants, have no choice in the matter of whether they will be sued for defamation. In this sense, an asymmetry in the entitlement to trial by jury as between claimants and defendants is justified.

52. As we have argued above, we believe that the defendant's right of election should be determinative.

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

53. We agree that the approach taken by the draft Bill is the appropriate one.

#### **Responsibility for publication on the internet**

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

54. Yes. In our view, the internet is fast-becoming the dominant medium, both in the UK and globally, for the free expression of ideas and information. In these circumstances, it is vital that the law should give much greater protection to the various intermediaries such as ISPs, search engines and discussion boards who facilitate this expression.

55. In particular, the present model of 'notice and take-down', which enables claimants to secure the removal of any offending material simply by giving notice to an intermediary rather than to the primary publisher, is hopelessly unbalanced and a serious threat to freedom of expression. Intermediaries, who lack the necessary resources to review the offending material, will sensibly comply rather than risk being held liable. Meanwhile, the primary publisher's freedom of expression is curtailed without any judicial determination of the merits of his or her case.

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

56. We agree with and support the proposals for a 'court-based liability gateway' put forward by the Libel Reform Campaign in its response to the consultation.

#### **A new procedure for defamation cases**

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

57. Yes, we strongly support such measures as a means of reducing costs and, thereby, lessening the potential chilling effect of actions in defamation.

#### **Ability of corporations to bring a defamation action**

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

58. Yes. We agree with the Libel Reform Campaign that non-natural persons do not have psychological integrity and are therefore incapable of suffering harm to their reputations in the manner of natural persons. Whatever public benefits may be derived from granting legal personality to non-natural persons, they must never be allowed to take precedence over the public good of free expression as enjoyed by natural persons. We therefore agree with the Campaign's recommendation that corporate bodies suing in libel should have to show (i) actual or likely financial harm and (ii) malice. As has been noted, corporate bodies have alternative means to protect their reputation, including the tort of malicious falsehood, copyright and trademark protections, not to mention the wealth of regulation of advertising and marketing generally that restricts what business competitors may say about one another (see e.g. the Business Protection from Misleading Marketing Regulations 2008).

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

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

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

59. We believe the Derbyshire principle should be put on a statutory basis. In our view, the action in *McLaughlin* and the recent action brought by South Tyneside Council in the US courts against a local internet critic<sup>39</sup> shows the continuing need to restrain public bodies from wasting public funds and stifling public discussion on their conduct. The bar on public bodies

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<sup>39</sup> See e.g. BBC News, 1 June 2011, 'South Tyneside gains Twitter access to unmask Mr Monkey'.

should also extend, in our view, to private bodies carrying out public functions (so-called 'hybrid bodies') under section 6(3)(b) of the Human Rights Act 1998. The ability of members of the public to freely discuss and debate the public services they pay for and the public bodies that exercise powers on their behalf is a fundamental aspect of democratic governance.

ERIC METCALFE  
Director of Human Rights Policy  
JUSTICE  
1 June 2011