

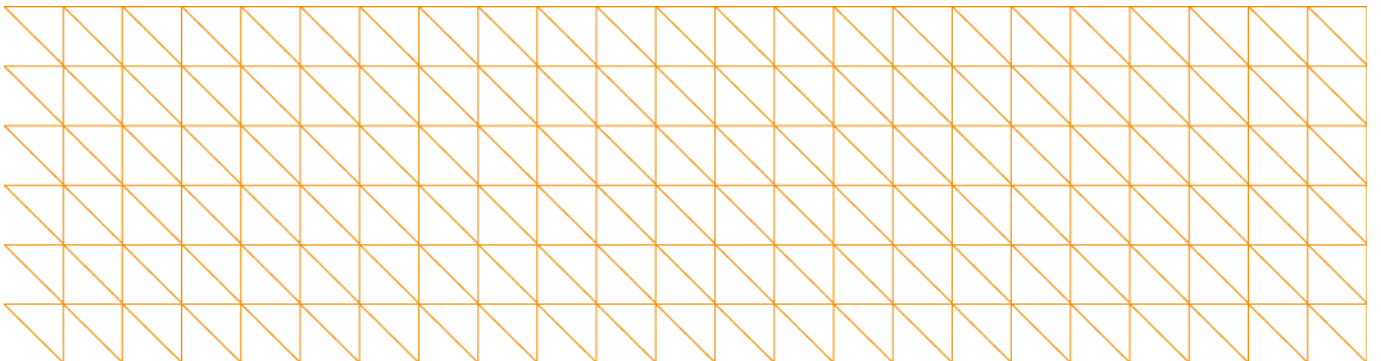


Ministry of
JUSTICE

Draft Defamation Bill

Summary of Responses to Consultation

Summary of responses to Consultation CP(R) 3/11
This response is published on 24 November 2011





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JUSTICE

Draft Defamation Bill

Summary of Responses to Consultation

Response to consultation carried out by the Ministry of Justice.

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk**

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Introduction and contact details

This document is a summary of the responses received to the draft Defamation Bill public consultation¹.

It will cover:

- the background to the report
- a summary of the responses to the report
- detailed responses to the specific questions raised in the report

Further copies of this report and the consultation paper can be obtained by contacting Paul Norris at the address below:

**Legal Policy Team
Ministry of Justice
102 Petty France
London SW1H 9AJ**

**Telephone: 0203 334 3220
Email: defamation@justice.gsi.gov.uk**

This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from Paul Norris via the contact details above.

¹ Consultation Paper CP3/11 - <http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consultation.pdf>

Background

The Draft Defamation Bill consultation paper was published on 15 March 2011. It invited comments on the draft Bill and a number of other proposals relating to reform of the law on defamation.

The consultation period closed on 10 June. This report provides a full summary of the responses received. The Government's conclusions in relation to the development of a substantive Bill and other policy proposals will be published in due course following further consideration of the responses together with the report of the Parliamentary Joint Committee on the Draft Defamation Bill published on 19 October 2011².

The information provided during the consultation relating to impacts and equality impacts will be considered in this process, and a revised Impact Assessment and Equality Impact Assessment will be published when the Government's conclusions are published.

² HL Paper 203, HC 930-I

Summary of responses

1. A total of 129 responses to the consultation paper were received. The largest group of respondents came from the legal profession (29). We also received significant numbers of responses from media organisations (23); individuals (18); the medical and scientific professions (16); academics (8); publishers, booksellers and journalism organisations (8); non-governmental organisations (6); internet organisations (5); libraries and research organisations (4); insurers (3); and public bodies (3). We also received responses from the senior judiciary; a media marketing organisation; a diversity group; a victims' support group; an intellectual property organisation and a public relations organisation. A full list of respondents is available at Annex A.
2. We also received 75 responses to a short form questionnaire which focused on 12 key questions and was made available on the Ministry of Justice website. A full list of those who responded to this questionnaire is available at Annex B.
3. Below is a brief summary of the views expressed in relation to the individual clauses in the draft Bill and the other issues raised in the consultation document. A more detailed summary of the responses to individual questions follows from page 11.

Clause 1 – Substantial Harm

4. Over two-thirds of responses agreed in principle with the inclusion of a form of substantial harm test in the Bill, but there were a wide range of views on how the test should be framed. Some argued for the provision to be strengthened to create a higher hurdle for making a claim. Others suggested different approaches to encapsulate the current law. The main areas of concern raised were about the ambiguity and consequent litigation that a new statutory test could create, and uncertainty as to how the test would need to be satisfied in evidential terms.

Clause 2 – Responsible publication on a matter of public interest

5. Over two-thirds of responses supported a new statutory defence in principle. Some of these supported the approach taken in the draft Bill of codifying the current law in a more flexible and inclusive way. However, others argued that the clause should provide greater protection for publications in the public interest. Those opposed to the clause argued that the common law is already clear and that a statutory provision would reduce flexibility and create additional litigation.

Clause 3 – Truth

6. Two-thirds of responses supported clarifying and simplifying the law by replacing the common law defence of justification with a statutory defence of truth, and most agreed with the wording used in the draft clause. The main concern raised by those opposing was that this was unnecessary and could lead to costly litigation.

Clause 4 – Honest opinion

7. About three-quarters of responses supported a new statutory defence to replace the common law defence of fair comment, and most of these agreed that it should be called “honest opinion”. There were a wide range of views on different aspects of the draft clause and a number of suggestions for amendments.

Clause 5 – Privilege

8. There was clear majority support for the proposals in the draft Bill to extend the availability of the defences of absolute and qualified privilege (for example to reports of proceedings internationally and to reports of scientific and academic conferences). A minority supported reviewing schedule 1 to the Defamation Act 1996 more generally to rationalise and clarify the existing provisions which are complex and difficult to interpret. There was also support for inclusion of a provision extending qualified privilege to archives and mixed views on whether a specific provision in relation to press conferences was necessary.

Clause 6 – Single publication rule

9. The great majority of responses supported the introduction of a single publication rule. A number of issues were raised on the drafting of the clause, for example, the circumstances in which the rule would be disapplied because of a subsequent publication being in a “materially different manner.”

Clause 7 - Action against a person not domiciled in the UK or a Member State

10. Views were divided between those who supported the provision in the draft Bill, those who wanted it to extend further to cover all cases with a foreign element, and those who didn't consider libel tourism to be a problem requiring attention. Overall around two-thirds of responses considered that some action was needed.

Clause 8 - Trial to be without a jury unless the court orders otherwise

11. About three-quarters of responses supported the proposal to remove the presumption in favour of jury trial. A majority did not consider that there was a need for guidelines on the face of the Bill to govern the courts'

exercise of their remaining discretion. However, there were a range of suggestions from those who did support guidelines.

Responsibility for Publication on the Internet

12. The majority of responses supported giving greater protection to internet intermediaries and discussion boards. Some expressed support for a system akin to that in US copyright law (where the intermediary acts as an “honest broker” between the defamed person and the poster of the material so that the former can bring an action against the latter if they wish and the internet body cannot be sued). However, others argued for an approach whereby a court order would be needed in all cases before the internet intermediary would be obliged to remove material. Other responses did not see any need for a change in the law, and some supported a provision akin to that in Lord Lester’s Bill clarifying the existing law.

A new procedure for defamation cases

13. Responses were largely supportive of the proposals for a new preliminary procedure. However, a range of suggestions were made on points of detail.

The summary disposal procedure

14. Just over half the responses supported the court being able to order publication of a summary of its judgment more widely than is currently the case, although only a few believed that they should also have the power to order publication of an apology. However, other responses were strongly opposed to both options on the basis that this would undermine editorial independence.

The ability of corporations to bring a defamation action

15. About two thirds of the responses argued for further provisions to address inequality of arms issues by restricting corporations’ ability to bring a claim. Most of these favoured a complete bar on corporations bringing a defamation action, and other suggestions included requiring corporations to show financial harm. Other responses opposed any change to the current law and considered that it would be wrong to deny corporations the right to protect their reputations.

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

16. About two thirds of responses considered that the Derbyshire principle (which prevents Government bodies, local authorities and political parties from bringing defamation claims) should be put into statute. However, a majority did not support the principle being extended to other public authorities. Others considered that it would be preferable to retain the flexibility that exists under the common law rather than to legislate.

Responses to specific questions

1. Do you agree with the inclusion of a substantial harm test in the Bill?

A total of 93 respondents answered this question. Of those 67 agreed in principle with the inclusion of a substantial harm test in the Bill (a range of views were expressed on how the test could best be framed, and these are set out under Question 2). This group of respondents was made up of individuals, media organisations, members of the legal profession, members of the scientific and medical professions, public bodies, non-governmental organisations, publishing and journalism organisations and media marketing companies.

These respondents argued that placing provisions based on recent developments in the common law on a statutory footing would provide extra certainty and authority. Many of them expressed the view that the clause would provide defendants with additional protection from frivolous claims and it was said that the current law can encourage protracted proceedings over publications that have caused little or no material damage. Members of the science community expressed the hope that it would allow for more transparent examination of scientific evidence and discussion of scientific disagreements by people with knowledge and expertise in the relevant area without the threat of libel proceedings.

Several responses, whilst expressing general support for the clause, acknowledged that there was a risk that requiring the claimant to prove substantial harm upfront could lead to some frontloading of costs. However, they argued that overall the requirement would enable cases to be resolved more cheaply and fairly and that this risk could be reduced by encouraging effective case management by judges.

24 respondents opposed the inclusion of clause 1 in the Bill. These included individuals, legal professionals and academics. 9 of these specifically opposed the clause on the basis that it is unnecessary in light of recent developments in case law. They expressed the view that to put a substantial harm test in statute may be too rigid and could result in limiting the scope of the defence. These respondents also argued that it would be likely to result in an increase and a frontloading of costs, and that it could be used either by defendants or in some cases by claimants as a mechanism for adding to costs and delay at an early stage.

Concern about cost was also raised by some of the 15 respondents that opposed the inclusion of clause 1 without referring specifically to the existing common law. A number of these respondents argued that it is very difficult to

ascertain what amounts to substantial harm and that the lack of an objective test could lead to significant litigation around the definition of “substantial”. There was also concern that the test might encourage the broader examination of a claimant’s existing reputation in determining whether substantial harm had actually been caused.

Certain individuals argued that there is a need to ensure that particularly vulnerable members of society, who may not be able to afford to pay large legal fees to prove harm, are not disproportionately disadvantaged by such a provision. Other respondents argued that a defamatory statement is, by definition, harmful and that the law shouldn’t seek to indicate otherwise. Another response argued that whilst the clause is well intentioned, as currently drafted it could unjustifiably impinge upon corporate entities’ ability to protect their reputations.

There were two respondents that didn’t express a firm view on whether they agreed with the inclusion of the substantial harm test. One of these argued that the purpose of including the clause is currently unclear, and without clearer explanation of its purpose this could be interpreted as limiting the protection offered to article 8 interests. The other expressed the view that there are cases where the substantial harm caused to a company could be deserved, for example, where medical products had caused serious harm to patients.

Short form Questionnaire

A further 74 responses to this question were received through the short form questionnaire. Of these 58 were in favour of including a substantial harm requirement in the Bill, with 16 opposed. Those in favour argued that the inclusion of such a clause would discourage vexatious litigation, and that allowing claims where no substantial harm has been caused increases the chances of people using the libel laws to chill free speech. Another argument was that the clause would create a distinction between serious allegations and comments made in jest that do not cause genuine harm to reputation.

Those opposed to the inclusion of the clause argued that substantial harm can be difficult to prove, especially up front, as there are often delayed effects upon claimants’ reputations. Another argument was that the concept of substantial harm is necessarily subjective and might leave claimants without proper remedy in some cases. Others expressed the view that the concept of substantial harm may overlook the very real emotional and mental distress that those who have been defamed may feel.

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

A total of 79 respondents answered this question. A wide range of views were expressed on the detail of the test used, but a number of general positions were established in relation to the drafting of the clause. 32 respondents made up mainly of media organisations, members of the scientific and medical professions and non-governmental organisations argued that the clause should be strengthened.

A number of suggestions were made by members of this group as to specific changes to be made. Many respondents, particularly non-governmental organisations, argued that the claimant should be required to demonstrate “serious and substantial harm.” They expressed the view that as currently drafted the clause could be interpreted as being a lower threshold than is currently available under the common law. It was also argued that the clause should incorporate the common law provision reflecting *Jameel v Dow Jones*³ to cover claims brought in respect of material which does constitute a sufficiently serious libel, but where the wider circumstances of the case are such that bringing the claim would nevertheless be disproportionate, having regard to the nature of the vindication which a claimant could realistically hope to achieve. It was also suggested that the clause should make clear that the harm must have been suffered in this jurisdiction and some indicated that regard should be had in this context to the extent of publication elsewhere. A preference was also expressed for a mandatory “strike out” requirement to be included on the face of the Bill and one body indicated that a definition of defamation would be helpful.

25 responses made up of legal professionals, individuals, a media organisation and a public relations organisation, raised questions either around how “substantial harm” might be defined or around how a claimant would be expected to prove substantial harm. Some of these respondents expressed concern that ambiguity could lead to an increase in litigation if the clause was enacted and that it could take up a significant amount of court time whilst the meaning of the new test is interpreted. Doubt was also expressed as to how a claimant would go about proving substantial harm should the clause be enacted as currently drafted. Several respondents specifically asked how corporate claimants would be expected to prove substantial harm under the new clause, and it was argued that guidance on that issue would be needed. A number of responses indicated that the court should not only seek to consider the financial loss that a corporate claimant has suffered or is likely to suffer, but also the effect on their reputation even though this is more difficult to quantify.

³ [2005] EWCA Civ 75

There were 10 respondents, made up of individuals, media insurers, legal professionals and a media marketing company who indicated their general agreement with the drafting of the current clause. These respondents expressed the view that the clause was sufficiently clear whilst still retaining the necessary flexibility in the test to not make it too prescriptive. However, one of these respondents restated their overarching view that clause 1 should not be enacted, and another urged the Government to provide a clear explanation of the relationship between the common law and the statutory substantial harm test.

Several responses, mainly from the legal profession, argued that in order fully to encapsulate the current law the clause should focus on whether a statement is actionable rather than on whether it is defamatory. This would mean that the focus would be on whether a defamatory statement had caused sufficient damage to a person's reputation to be considered a real and substantial tort and satisfy the "threshold of seriousness" test that has developed in the common law. A number of respondents also suggested that the Government consider a "triviality defence" either along the lines of that used in Australia or as an additional element to the existing provision.

Opposing views were expressed by certain members of the legal profession as to whether the test should encompass injury to the claimant's feelings. In addition, one legal body considered a substantial harm test would put the bar for bringing a claim disproportionately high and that the existing requirement for the defendant to apply for a claim to be struck out was fairer.

The remaining respondents expressed a range of views and some made minor drafting suggestions. General points raised were that the clause would tilt the law too far in favour of defendants and creates too great a restriction on the rights of claimants to protect their reputation and that proper, active, case management by judges was equally as important as a substantial harm clause.

3. 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?

A total of 68 respondents answered this question. Of these an overwhelming majority, 62, agreed that the Slander of Women Act 1891 and the common law rule relating to the imputation that a person is suffering from a venereal disease, leprosy or the plague should be included among the measures for repeal in the Repeals Bill. This group of respondents included individuals, academics, members of scientific and medical professions, legal professionals, media organisations, publishing and journalism trade organisations and media insurers.

Of those who expressed a detailed view the main argument was that the 1891 Act is a historical anomaly and no longer relevant or appropriate to modern society. 5 responses (2 of which supported the proposal) argued that wider action to abolish the distinction between libel and slander in relation to the need to prove special damage would be appropriate.

There were three responses opposing the repeal of the 1891 Act and the common law rule. This group was made up of two legal professionals and one academic. Arguments used were that the repeal could result in some women being left unfairly without a proper remedy; that the common law rules still cover relevant situations such as where there are slanderous allegations that a person is suffering from HIV/AIDS; and that the Act should instead be amended to protect men as well.

4. 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?

A total of 93 respondents answered this question. Of those 69 agreed in principle with the inclusion of a new public interest defence in the Bill, and that this would be an improvement on the existing common law defence. This group of respondents was made up of individuals, media organisations, academics, members of the legal profession, members of the scientific and medical professions, non-governmental organisations, publishing and journalism trade organisations, media insurers and media marketing companies.

Those in favour of a statutory public interest defence argued that it would provide greater certainty and clarity than the current common law defence. They expressed the view that the added clarity would assist the general public to understand the boundaries of the defence and that in the internet age it was vital that the defence was easily understandable and applicable beyond the confines of mainstream journalism. Responses from media bodies indicated that uncertainty in the formulation and application of the defence in *Reynolds v Times Newspapers*⁴ had had a restrictive effect on freedom of expression. It was also argued that to include a statutory public interest defence in the Bill would provide an important opportunity for Parliament to recognise formally the existence of the defence which until now has been developed entirely by the courts, and that it would recognise the importance to democracy of publication of matters of public interest.

⁴ [1999] UKHL 45

However, among those who agreed with the inclusion of a public interest defence in the Bill there were some who expressed their concern that the defence shouldn't simply be seen as codification of the current common law. A number of respondents argued that it was important that the list of factors that a court could consider when deciding on whether a publisher has acted responsibly should not be treated as a checklist, nor should the list be considered exhaustive. A number of responses from media organisations argued that they preferred a test based around the "reasonable belief" of the publisher. They proposed that if the publisher can objectively justify that they reasonably believed, at the time of publication, that publication would be in the public interest, then as long as they have not acted recklessly or with malice the defence should succeed.

There was also a number of responses, mainly from non-governmental organisations and members of the scientific and medical professions, which argued that the burden of proof in public interest cases should be reversed and that it should fall to the claimant to prove that the defendant had acted recklessly or with malice in publishing the defamatory material.

18 respondents argued against the inclusion of a statutory public interest defence in the Bill. These respondents included members of the legal profession, individuals and legal academics. Many of these respondents argued that the common law was already clear and that placing the defence in statute would remove the essential flexibility of the courts to develop the defence further as appropriate. In addition, they argued that legislating would create a period of uncertainty whilst cases were brought to test the meaning and boundaries of the new statute which would result in an increase in litigation and costs. The view was also expressed that the approach taken in the draft Bill would give the media greater protection to publish untruths on public interest grounds.

There were 6 respondents who didn't express a strong view either way on whether a statutory public interest defence should be included in the Bill. These respondents were made up of individuals, legal professionals and members of the scientific community. Some of these expressed the view that the main problem in this area of the law is the current common law defence being used to defend stories that are "of interest to the public" but are not genuinely "in the public interest". One respondent argued that there would be little difference in practice between the existing common law and the proposed statutory defence and therefore it was simply for the Government to decide on the desirability of legislating on this issue.

Several respondents to this question, made up of both those who supported and those who opposed the inclusion of a statutory public interest defence in the Bill, pointed out that difficulties and confusion would be created if the existing common law defence was allowed to continue to exist in parallel to the new statutory defence and argued it should be formally abolished.

A number of those who supported, in principle, the inclusion of a public interest test in the Bill, but who felt that the defence required strengthening expressed the view that in order to achieve this without unduly harming claimants there should be a right for claimants who are able to prove a defamatory allegation of fact to be false to receive a declaration of falsity from the court. They argued that a free standing declaration of falsity could be sought as an alternative to a libel action but that it should also be an option within any case where a defence of truth fails or is not attempted.

Short form Questionnaire

A further 72 responses to this question were received through the short form questionnaire. Of these 63 were in favour of including a new statutory public interest defence in the Bill, with 9 opposed. Arguments made by those in favour included; that a statutory public interest defence would allow the media to run more stories that challenge the rich and powerful; that the distribution of information relating to issues such as public safety should always outweigh any harm to a claimant; and that it would strengthen protection for responsible journalism in the area of scientific research. A number of these respondents argued that the defence should extend further than the current common law defence in *Reynolds*.

Arguments against the clause largely centred around the difficulties in defining the concept of the public interest. One response argued that it was too broad and vague and another argued that the mass media often confuse public interest with the interest in sensationalism. Another argument was that the clause could make it too easy for the public interest defence to be used by people acting maliciously to spread defamatory material widely.

5. 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?

A total of 73 respondents answered question 5a). Of those, 56 agreed that it would not be appropriate to define “public interest” in the Bill. This group of respondents included members of the scientific and medical professions, non-governmental organisations, legal professionals, media organisations, individuals, publishers and academics.

The main arguments used were that the concept of “public interest” is clearly understood by the courts in many different contexts and that therefore it is not necessary to provide a definition in statute. In addition, it was considered that the concept could change and develop over time and that a fixed definition by the courts would remove the flexibility for the courts to apply and develop the

concept and could result in a narrowing of the scope and effect of the public interest defence. The risk of satellite litigation over any definition used was also identified.

There were 13 respondents who disagreed and argued that there was a need to define “public interest” in the Bill. This group of respondents included individuals, members of the scientific community, publishers, media insurers and members of the internet industry. A number of these respondents expressed the view that the failure of the Bill to provide a definition of “public interest” could result in the courts needing to work out their own definition at, potentially, great length and expense. Others argued that a failure to provide a clear distinction between “public interest” and “of interest to the public” would provide the opportunity for publishers to misuse the defence in future. A number of possible definitions were put forward, including that used in the Press Complaints Commission Code of Practice and the use of a non-exhaustive list of categories of publication deemed to be in the public interest.

4 respondents did not express a strong view as to whether a definition should be included in the Bill or not. However, these respondents did express the view that there exist major difficulties in attempting to provide a definition and that if the Government were minded to do so then careful consideration would need to be given as to how best to frame it. One respondent expressed the view that “public importance” would be a more accurate term than “public interest” and would be clearer in relation to the types of cases in which the defence could be run. Another drew attention to provisions in the Employment Rights Act 1996 providing protection for whistleblowers and indicated that it would be helpful for the Bill to confirm that the instances covered by the 1996 Act are in the public interest.

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?

A total of 66 respondents answered question 5b). Of those, 45 respondents did not consider that the non-exhaustive list of circumstances in clause 2(2) should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines. These included individuals, members of the scientific and medical professions, legal professionals, media organisations and academics.

Many of these respondents expressed the view that to include a reference to the defendant’s compliance with a code of conduct or guidelines would give the impression that the defence is only available to those in the mainstream media that are covered by such guidelines. A number also pointed out that even within the mainstream media not all media organisations are signatories to voluntary codes of conduct and that could create anomalies in the way that the law

applies to rival media companies. Some argued that including compliance with a code of conduct in the list of factors might deter people from developing voluntary codes of practice in the future. Others expressed the view that including it as a factor could result in increased costs and litigation over its application in individual cases and that so long as the list was non-exhaustive there would be scope for a court to consider compliance regardless.

19 responses indicated that the non-exhaustive list of circumstances in clause 2(2) should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines. This group of respondents included members of the legal profession, publishing and journalism trade organisations and individuals.

It was argued that where codes of conduct exist the fact that a defendant has complied with them is a relevant consideration when deciding whether the journalist or publisher has behaved responsibly in the preparation and publication of the material. The view was expressed that to ignore the level of compliance with relevant codes of conduct and guidelines could have the effect of weakening the position of those codes and in the long run encouraging defendants to ignore them. Reference was made as a precedent to the fact that section 12 of the Human Rights Act 1998 requires the court to have regard to any relevant privacy code.

Several respondents argued that there should not be a list of factors at all, non-exhaustive or otherwise, because even if it was not the intended outcome, it would result in the list being treated as a checklist by the courts, which would recreate the problem that they consider has developed with the common law defence.

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?

A total of 65 respondents answered question 5c). Of those, 45 did not believe that the nature and context of a publication should be given greater weight than other circumstances in the list of factors for the court to consider. This group included academics, individuals, legal professionals, non-governmental organisations, media organisations and members of the scientific and medical professions.

This group of respondents argued that whilst nature and context is something that should be considered it should not be treated as more important and should not attract greater weighting in the courts' consideration. The main argument expressed by the great majority of these respondents was that the considerations that are most relevant will differ depending on the circumstances of the individual case and that the courts should be able to apply various factors flexibly on a case by case basis depending on all the relevant circumstances.

19 responses indicated that the nature and context of a publication should be given greater weight than other circumstances in the list of factors for the court to consider. This group of respondents included individuals, members of the scientific and medical profession, internet organisations, publishers, media organisations and non-governmental organisations.

Arguments put forward by this group of respondents came from two main perspectives. Firstly, some respondents, including non-governmental organisations argued that the defence would need to be applied differently depending on the type of publication concerned, and that for example, the same standard of background research should not be expected from a lone online blogger raising a matter of public interest as from a journalist working for a major newspaper chain. They argue that the nature and context of the publication is of particular importance in considering this. One respondent expressed the view that the general public when reading material would take into account where it has come from and would not consider the material posted by a lone blogger to be as authoritative as that of a newspaper journalist.

The second viewpoint that is expressed by some media organisations is that in the age of 24 hour rolling news the context of the publication is particularly important, and that the information that might be reported on the wires or on 24 hour news channels as a story breaks is not always considered as being as authoritative as when the story is reported more fully as further details become available. They argue that this should be reflected in the public interest defence.

One further respondent argued that the focus of the factors in the list approaches the public interest defence from the wrong perspective and that the factors for the court to consider should focus less on the responsibility of the journalist or publisher and more on the effect that the defamatory publication is likely to have on the claimant.

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?

A total of 61 respondents answered question 5d). Of those, 53 agreed that the public interest defence should extend to inferences and opinions as well as statements of fact. This group of respondents included individuals, legal professionals, members of the scientific and medical profession, publishers, media organisations and non-governmental organisations.

These respondents argued that it is sensible for the defence to protect opinions and inferences where they are related to facts that have been published responsibly. This would avoid it being argued on a technicality that part of a publication falls outside the defence simply because it is not factual in

nature, and because it is sometimes difficult to draw a distinction between fact and opinion. Views expressed included that it will often be the case that publications on matters of public interest will include a mixture of fact and opinion, and that it is important for the defence to cover not only news articles but also opinion articles in connection with them. In general these respondents did not see a problem caused by any overlap with the new defence of honest opinion, and a number indicated that there are already overlaps between the common law and the existing defence of fair comment which have not caused difficulties. Of these 53 respondents, 30 expressed the view that a specific reference to the extension of the defence to inferences and opinions was needed to provide clarity and for the avoidance of any doubt.

7 respondents did not believe that the defence should apply to inferences and opinions. This group was made up of individuals, legal professionals and academics. The argument was made that the honest opinion defence would cover the expression of opinion and that it would be wrong to blur the defences and extend so far the circumstances in which untrue claims can be defended. One respondent also expressed the view that it is difficult to see how an opinion could be in the public interest, as it amounted in effect to a private view publically expressed.

One further respondent, whilst not indicating a preference for or against the defence extending to inferences and opinions, expressed the view that this was a matter that required very careful consideration as inferences and opinions are not verifiable as true or false in the same way that facts are, and the public interest defence could apply where the defendant acted responsibly without the requirement for a basis of fact as for honest opinion.

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

A total of 68 respondents answered question 5e). Of those, 49 were in general agreement with the approach taken on reportage in the Bill. This group of respondents included media organisations, legal professionals, non-governmental organisations, individuals, members of the scientific and medical professions, publishing and journalism trade organisations and academics.

One of the main arguments put forward by this group of respondents was the need to be able to report impartially, fairly and accurately on disputes between parties on a matter of public interest. A number of respondents expressed the view that this was vitally important for the publication of public interest news reports and for democracy and accountability. However, within this group a range of media organisations argued that the clause should be amended to make clear that it applies to rolling news coverage, (whether online, broadcast or in other forms) because a rolling news station should not be required to report on every allegation and counter allegation as a dispute develops in order to avail itself of the defence.

There were 17 respondents that argued against the approach taken on the issue of “reportage”. These included individuals, legal professionals and academics. Most of these came from the perspective that the provision was inappropriate or unnecessary. It was argued that the provision was in conflict with the repetition rule by allowing for the repetition of defamatory claims so that one newspaper could pass on the defamation contained in another paper. A number of other responses suggested that the relationship between reportage and the repetition rule should be clarified. Certain responses questioned the need for legislation on the issue, and there was also concern at the potential for litigation over whether statements were accurate and impartial. It was also argued that the reporting of allegations in a national newspaper would give them publicity and legitimacy which could cause serious harm to a claimant’s reputation.

It was argued that to reflect the current law accurately the provision should link to at least some of the list of factors relating to responsible publication, and that discretion should be given to the court to decide that a defendant using the reportage defence had not acted responsibly (eg because there was no urgency in reporting the issue, or the statement in question came from an unreliable source). Other drafting issues raised were the need to make clearer that the provision only applied to matters of public interest, and one response suggested that the word “neutral” would be preferable to “impartial”. Another suggestion was that an explicit provision was needed to require each side of the dispute to be given.

Two further respondents simply expressed the view that this issue required careful consideration by the Government and did not express a strong view one way or the other on the approach taken in the Bill.

6. 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?

A total of 78 respondents answered this question. Of those 52 agreed that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth. This group of respondents was made up of individuals, media organisations, members of the legal profession, academics and publishing and journalism trade organisations.

Arguments used by these respondents included that the proposal would make the defence simpler and clearer and would result in greater clarity both for practitioners and for the general public. Several expressed the view that while the clause would make very little, if any, difference to the nature of the existing defence, the name change was appropriate in the interests of clarity. The need for procedural reform as discussed elsewhere in the consultation paper

to make the provisions more effective in practice was also raised. A small number of those who agreed with the inclusion of clause 3 in principle argued that it was important that the defence makes clear that “truth” does not require “absolute truth” to be proven, but that proving that something is “substantially true” should be sufficient for a defendant to mount a successful defence.

There were 21 respondents that disagreed with the proposal. This group of respondents was made up of individuals, members of the legal profession, academics and publishing and journalism trade organisations. The main argument used by these respondents was that placing the defence in statute was unnecessary and that codification of the common law would not lead to clarity, but rather to expensive satellite litigation over the extent to which Parliament intended to change the common law position. There were mixed views about the merits of renaming the defence, as some argued that this would lead to further confusion whereas others expressed the view that the name change from “justification” to “truth” was sensible, but could be effected by the courts without the need for legislation. Two responses expressed concern that the change could affect the extension of the defence to statements made in good faith and in the reasonable belief that they were true.

A small number of non-governmental organisations, whilst not opposing the clause itself, expressed concern that the term “truth” might be regarded in the minds of the public and the courts as being narrower than that of justification. Other respondents who didn’t give a strong view one way or the other on the proposal to legislate raised a number of points. One of these stated that they were not opposed to the proposal but didn’t see what it would add and another expressed the view that the real problem stems from the burden of proof in defamation cases and that the Government should consider reversing the burden of proof to replicate the American system. A further respondent pointed out that in Australia the statutory defences of truth and contextual truth run alongside a common law defence of justification.

Short form Questionnaire

A further 69 responses to this question were received through the short form questionnaire. Of these 54 were in favour of replacing the existing common law defence of justification with a new statutory defence of truth, with 15 opposed. A number of those in favour argued that a new statutory defence of truth would provide extra clarity to the law and would help reduce inconsistency. Some expressed the view that a statutory defence would be useful so long as it was purely a codification of the existing law, whilst others felt that codification risked generating satellite litigation around the relationship between the existing common law and the new statute.

Several of those who opposed the new statutory defence also argued that the new defence would lead to significant litigation and unnecessary costs, as the

courts interpret the new law. They also questioned whether it was necessary to legislate purely to codify the existing common law. Another raised concerns in relation to the way in which the concept of truth would be approached by the courts, arguing that a defendant should not be afforded a defence of truth where what they have said is true, but where they have omitted to mention a number of true facts in order to impute something defamatory.

7. 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?

A total of 67 respondents answered this question. 51 of them agreed that the common law defence of justification should be abolished. This group of respondents included individuals, legal professionals, non-governmental organisations, media organisations and academics.

Many of these respondents did not give detailed reasons. Those that did argued that maintaining the common law defence of justification alongside the statutory defence of truth would be likely to lead to confusion, complications and potentially lengthy and costly litigation regarding any possible inconsistencies. However, they also expressed the view that allowing the body of common law that has developed to continue to be seen as a helpful, but not binding guide for the courts in interpreting the new clause would be sensible. One response argued for a provision explicitly permitting the courts to take into account existing case law where appropriate.

14 respondents disagreed and argued that the common law should not be abolished. This group was made up of legal professionals, individuals and academics. Several of these reiterated their view expressed in answer to question 6, that it is not appropriate to replace the common law with a statutory provision. However, it was also argued that even if clause 3 were enacted, there was still a need for the existing case law to remain binding on the courts when considering future cases and it was questioned how it could be assumed that the case law would be helpful if it were not binding. One respondent argued that the Bill should follow the approach of legislation in Australia and Ireland by providing for the new legislation not to affect the operation of the general law except to the extent that it provides otherwise.

2 respondents did not express strong views either way in relation to whether the common law defence of justification should be abolished. One sought clarification on the extent to which the common law would be used to aid the courts in decisions in respect of the new statutory defence. The other argued that in reality it mattered little whether the common law defence was abolished or not, and reiterated the need for the burden of proof in defamation to be reversed.

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

A total of 65 responded to this question. Of these 44 offered support to wording similar to that in the draft clause. This group included legal professionals, academics, members of the scientific and medical professions, individuals and a media marketing company. Most did not provide any specific comments, but those who did indicated that the drafting was clear.

There were 8 respondents who raised specific drafting issues. 4 of these expressed the view that there is potential confusion between the use of the term “materially injure” in this clause, and “substantial harm” in clause 1 of the Bill, and argued that greater clarity would be provided by using consistent language. 3 of these respondents argued that further definition of the term “substantially true” would add clarity to the clause and another expressed the view that the word “imputation” might benefit from being defined.

4 respondents argued that the clause is not necessary, is unduly complicated and that it would be preferable to retain the common law. Two of these respondents argued that they were content with legislating to change the name of the defence to “truth” but that the substance of the defence should remain a matter of common law. Another argued that because the nature of truth can itself be argued and debated it would be more sensible to retain the existing principles of the justification defence available under the common law. 3 respondents called for a reversal of the burden of proof so that the claimant had to prove that any statement complained of is false.

Another respondent to this question argued that the legislation should include a further change to abolish the long standing common law “repetition rule”, which provides that it is not a defence for the defendant simply to show that he was repeating what someone else had said. Other views expressed were that the Government should reconsider section 8 of the Rehabilitation of Offenders Act, which relates to the defamation of rehabilitated offenders in relation to spent convictions, and that where the truth is hard to determine there should be a role for reasonable hypothesis to be allowed.

9. 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?

A total of 62 responded to this question. Of these, 37 expressed the view that the current law is producing unfair results where there is a single defamatory imputation with different shades of meaning. This group of respondents was made up of individuals, legal professionals, media organisations, academics, publishing and journalism trade organisations and members of the science and medical professions.

It was argued that the key is to deal with situations where the facts established by a defendant do not absolutely prove the imputation but come very close to doing so, and that the judge should be focused on what a defendant has established rather than permitting all consequences to flow from the small gap between the proved facts and the defamatory sting.

Several respondents specifically supported a provision similar to that in Lord Lester's Private Member's Bill, to the effect that where there is a single defamatory imputation with more than one possible meaning the defence should not necessarily fail only because a particular meaning alleged by the claimant is not shown to be substantially true if that meaning would not materially injure the claimant's reputation having regard to the truth of what the defendant has shown to be substantially true. However, few examples were given of actual difficulties in practice.

It was argued that difficulties that currently arise from attempts to establish meaning are onerous enough to create in themselves a chilling effect, and several responses indicated that early determination of meaning and the proposed procedural changes would be essential to the effective implementation of these provisions. A number of responses referred to problems arising from the single meaning rule, but it was also recognised that in practical terms a rule of this nature enabled cases to be resolved more quickly and easily than would otherwise be the case.

A group of 14 respondents, made up largely of legal professionals, argued that the current law was not producing unfair results where there is a single defamatory imputation with different shades of meaning. It was argued that there is no evidence to suggest that there are significant problems in the area, and that due to the complexity of this issue it is best left to the courts to interpret the common law in the circumstances of each individual case rather than attempting to deal with any problem that may exist through legislation. The view was also expressed that it is inequitable that a claimant accused of lying should not be vindicated merely because the defendant can establish that he was reckless, as the higher imputation clearly carries a greater

defamatory sting. A further view expressed was that a number of first instance decisions around shades of meaning may have been unfair, but that these have been corrected by the Court of Appeal.

10. 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?

A total of 82 respondents answered this question. Of those 61 agreed in principle 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. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, academics and non-governmental organisations.

Several of these respondents argued that the new statutory test would be clearer than the existing common law defence of fair comment because honest opinion more accurately reflects the purpose of the defence. They argued that the fair comment defence has become complex and that the term fair comment itself is misleading. However, several responses, whilst agreeing with the principle of introducing the statutory test, and renaming the defence, argued for alternative wording to “honest opinion.” Some of these argued “honest comment” would be a better name, as it would clarify that something doesn’t have to be clearly identifiable as an opinion in order to fall within the scope of the defence. Other possible names suggested included “earnest opinion”, “genuine opinion” and simply “opinion”. Another view expressed was that whilst the Bill rightly extends protection to honest opinions based upon some factual evidence, it still doesn’t go far enough in terms of protecting “pure opinion”, which is unlinked to facts.

17 respondents, mainly legal professionals and academics, argued against replacing the existing common law defence with a new statutory defence. Of these 7 indicated that they were not opposed in principle to the renaming of the defence either to honest opinion or honest comment, but that this change could be made through the common law without any need for a statutory provision. A number expressed the view that the statutory provision is unnecessary as it makes no significant change to the common law position. Others argued that clause 4 would tilt the balance of the law too far towards defendants and gives too much weight to freedom of expression to the extent that it risks creating serious unfairness to claimants. Another view expressed was that, as in attempting to codify the common law in relation to justification in clause 3, there would be a significant risk of creating costly litigation around the meaning of any new statutory provision.

Three respondents didn't express a clear view on whether it is appropriate to legislate in this area. One argued that a clearer explanation was needed of the purpose of the clause and that whilst the underlying law on the existing fair comment defence is arguably in more need of reform than the law on the other defences, there exists a real risk that the statutory provision is overtaken by developments in the common law, rendering it a purely symbolic exercise. Another argued that there is a middle ground between the existing defences of fair comment and justification that could provide a simpler defence. They expressed the view that there should be available a defence of reasonable hypothesis, which provides a defence where the comment is an opinion that is reasonable to make on the balance of the available evidence.

Short form Questionnaire

A further 71 responses to this question were received through the short form questionnaire. Of these 58 were in favour of replacing the existing common law defence of fair comment with a new statutory defence of honest opinion, with 13 opposed. Some of those arguing in favour of a new statutory defence expressed the view that it would be a helpful clarification, although several did indicate that there was a need to look very carefully at the drafting of the clause. One respondent expressed the view that it should help rectify the current position where those offering honest scientific opinions can be threatened by libel actions, whilst another hoped the clause might help resolve some of the current issues around the distinction between fact and opinion.

A number of those who opposed a new statutory defence argued that this was not a simplification or consolidation of the existing law, and could further complicate the defence and create grey areas in the law. Others expressed concerns over the fact that the term "opinion" is by its nature about subjectivity and that this could lead to extremist groups defending defamatory statements as "opinion."

11. 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?

A total of 66 respondents answered this question. Of those 52 agreed that the common law defence should be abolished. This group of respondents included academics, legal professionals, non-governmental organisations, media organisations and members of the scientific and medical professions.

A number of these respondents argued that any other approach would create complexity and uncertainty around the relationship between the existing common law and the new statute. Others argued, more specifically, that to prevent the courts from referring to common law authorities where appropriate

would create a real risk of litigation to re-argue points that had previously been settled under the common law.

There were 13 respondents who disagreed that the common law defence should be abolished. These responses were mainly from legal professionals. The majority of these responses were opposed to any statutory provision being introduced and argued that attempting to retain the existing case law as a guide which is not in any way binding would only result in increased confusion and uncertainty, and that abolition could remove a body of case law that is well understood and has developed over a period of time. However, one respondent argued that the case law should be abolished totally as it is contradictory and difficult to apply and there would be no benefit in retaining it in any form.

One respondent didn't express a specific view one way or the other on whether to abolish the existing common law defence, but indicated that in Australia the common law defence continues to exist alongside a new statutory defence, although in practical terms the common law has in fact been superseded by the more liberal statutory honest opinion defence.

12. 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?

A total of 62 respondents answered this question. Of those 32 argued that amendments were needed to ensure that condition 1 of the clause adequately reflects the current law that the statement must be recognisable as comment. This group of respondents was made up largely of legal professionals, academics and media organisations.

Condition 1 is that "the statement complained of is a statement of opinion." Some argued that there should be a specific reference to the statement being recognisable as opinion. A number of respondents also argued that the clause should refer to the context and circumstances in which the statement is made including, for example, the entire article in cases where only certain words are being complained of. A number of responses considered that there should be greater clarity about the interface between allegations and imputations of fact and statements of opinion and some sought confirmation that the defence would cover all of these.

A number argued that the draft provision included in Lord Lester's Private Member's Bill was preferable (which refers to whether an ordinary person would reasonably consider the words to be an opinion). Another respondent argued that the condition would be clearer if instead of referring to a statement of opinion it referred to an expression of opinion.

There were 25 respondents who considered that condition 1 of the clause does adequately reflect the current law that the statement must be recognisable as comment. This group of respondents was made up of legal professionals, individuals, academics, members of the scientific and medical professions and non-governmental organisations. Most of these respondents did not offer any further explanation of their opinion, however, a small number did express the view that as drafted the condition reflects the clear distinction between statements of fact and statements of opinion.

There were 5 respondents that didn't offer a firm view as to whether or not condition 1 adequately reflects the current law. However, one of these did express support for the drafting in the Bill, whether or not condition 1 adequately reflects the common law. Another view given was that condition 1 would simply add to uncertainty and increased litigation and costs.

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?

A total of 66 respondents answered this question. Of those 45 expressed the view that the requirement in condition 2 should not be retained. This group of respondents included individuals, media organisations, legal professionals, members of the scientific and medical professions and non-governmental organisations.

The majority of these respondents considered that to retain the condition that the matter on which an honest opinion is expressed must be a matter of public interest would unnecessarily and undesirably restrict the application of the defence. Several argued that this adds an unnecessary complication and that the defence should be kept as simple as possible. The view was also expressed that to retain the public interest requirement would be anachronistic and would potentially prevent the defence from being applied to comment made through online forums, such as blogs and discussion boards, where often the matters under discussion are not of strict public interest. It was also suggested that the tort of misuse of private information could provide a remedy where a publication intruded into private matters. Another respondent argued that under the common law "public interest" refers to anything that is "not private" and therefore the draft Bill should reflect that and ensure that people are free to express an opinion, without the risk of liability, on any matter in the public realm, not just matters in the public interest.

However, 21 respondents argued that the public interest requirement should be retained. This group of respondents included individuals, academics and legal professionals. Several of these respondents expressed the view that the requirement should be retained, but that "public interest" should be interpreted widely, as it is under the common law defence. It was also argued that if the requirement were to be removed then there would be broad scope for

inappropriate personal criticisms on private matters to be protected by the defence and that a public interest requirement was clearly appropriate where there had been publication to the public in general. One respondent believed that retaining the public interest requirement in an honest opinion defence was vital in the balancing of Article 10 and Article 8 ECHR rights and that removing the requirement could infringe claimants' Article 8 rights.

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?

A total of 63 respondents answered this question. Of those 48 agreed with the approach taken 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. This group included individuals, legal professionals, publishers, media organisations and non-governmental organisations. There were 15 respondents who opposed the approach taken in relation to condition 3. This group of respondents included legal professionals, academics and non-governmental organisations.

A range of views were expressed by those in both groups about the detail of the provision. Many respondents, mainly media organisations, agreed that the fact or facts relied upon must have existed at the time of the comment, but took the view that the test should not take into account whether the author of the opinion was actually aware of the facts relied upon at the time. Others argued that condition 3, as drafted, goes too far in favour of freedom of expression, and that the defendant should only be able to rely on facts which were known at the time, not just on a fact which existed, as this would encourage retrospective fact-gathering exercises and wouldn't allow countervailing facts to be considered. A number of respondents in both groups expressed the view that as currently drafted it was unclear as to whether a defendant needed to be aware of the fact on which they are relying at the time of the statement in order to avail themselves of the defence.

A number of responses considered that there was a need to identify the subject-matter and context of the opinion as otherwise it would not be possible to reach a view on what the opinion meant (eg a statement that a person is a racist without any indication of the basis for that view). It was also argued that the formulation in *Spiller v Joseph*⁵ of explicit or implicit reference to the facts on which the opinion was based should be used. Several responses questioned the extent of the protection offered to privileged statements and whether it was right for this to extend to common law privilege as well as statutory privilege.

⁵ [2010] UKSC 53

One response indicated that where an opinion has been expressed on a matter that is generally believed to be true, but later turns out to be false, provided the opinion is not voiced again after the matter has been proved false then such circumstances should not be actionable. However, another response opposed the defence being available in these circumstances. Other views expressed included that it shouldn't be necessary for the evidence of the fact upon which the statement is based to be available at the time of the statement, as this could lead to issues around disclosure of information; and that often in more traditional media the time of publication will be later than the time when the facts are observed by the reporter, and that the drafting could be amended better to recognise that fact.

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?

A total of 64 respondents answered this question. Of those 46 considered 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. This group was made up largely of media organisations, non-governmental organisations, members of publishing and journalism bodies, a public body, and individuals.

A number of these respondents argued that provided that views are honestly held, there shouldn't be any requirement for the defendant to prove the truth of the underlying facts. Others agreed in principle, but argued that it may be sensible to add a reasonableness requirement, so that the defendant must show reasonable grounds for believing the facts that turned out to be mistaken, in order better to balance the interests of the claimant with those of the defendant. One considered that it should be necessary for the defendant to show they have acted responsibly in taking appropriate steps to try and check their assertions.

A member of the scientific community argued that a provision of this nature is particularly important in scientific matters where one is often dealing with incomplete data, or where the data comes from generally reliable sources and a reasonable effort is made to verify the findings. They expressed the view that in these circumstances unless the person was acting maliciously or recklessly in reaching their opinion or in their belief in the underlying facts they should have the protection of the honest opinion defence.

There were 17 responses who did not consider that the defendant should be allowed to rely on the honest opinion defence in these circumstances. These were made up largely of legal professionals, individuals, academics and non-governmental organisations. Arguments put forward included that it would be too onerous to require claimants to have to prove the defendant did not have

an honest belief in the underlying facts, particularly in cases relating to defamatory statements made by anonymous internet users in chat rooms and on message boards; that situations where an honest mistake has been made can already be quickly and inexpensively dealt with through the offer of amends procedure; that it would undermine the need for the opinion to have a factual basis; that it could potentially allow a defendant retrospectively to identify allegations of fact and claim that they had honestly believed them; and that it would be shifting the balance too far in favour of the defendant to provide a defence in these cases and potentially leave the claimant without any remedy. It was also suggested that rather than provide the defendant with a defence where they have made an honest mistake, it would be more appropriate for that to be an issue in mitigation when considering damages.

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?

A total of 59 respondents answered this question. Of those 45 disagreed with a provision of this nature being excluded from the Bill and argued that the new defence should apply to statements to which the public interest defence in clause 2 of the Bill applies. This group of respondents included legal professionals, media organisations, publishing and journalism bodies and non-governmental organisations.

A number of these respondents expressed the view that this would reflect the current position in relation to privileged statements and the judgment in *Galloway v Telegraph Group Ltd*⁶ which held that opinion could be based on an article protected by *Reynolds* privilege. Other respondents rejected the view expressed in the consultation paper that to allow the honest opinion defence to apply to statements to which the public interest defence applies would be problematic due to the overlap of defences that this would create. They argued that there was no problem with the overlap, and that restricting defendants to one or the other defence would cause complications and possible injustice in some cases. Other respondents agreed that the defences should be available concurrently in cases where both were relevant.

There were 14 respondents who considered that the new defence should not apply to statements to which the public interest defence in clause 2 of the Bill applies. These included legal professionals, academics and individuals. Arguments used included that in cases where the defendant had expressed an opinion based on allegations in another newspaper, it would be difficult for them to prove that the original publication satisfied the responsible publication test in clause 2; that subsequent information could affect the view of whether the original article on which the defendant was offering an honest opinion was

⁶ [2006] EWCA Civ 17

responsibly published; and that allowing the new defence to apply to statements to which the public interest defence applies would mean that a defendant could publish with impunity a defamatory opinion based on false information and would create a complex and unwieldy double defence. One response drew a distinction between the honest opinion defence based on provable fact and the clause 2 defence which could be based on mistaken facts where it was reasonable for a mistake to have been made.

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?

A total of 63 respondents answered this question. Of those 42 agreed that an objective test of whether an honest person could have held the opinion should apply. This group of respondents included media organisations, legal professionals, academics, members of the scientific and medical professions and individuals.

A number of these respondents argued that an objective test is more appropriate because it could apply where, for example, a media defendant is not the original commentator, whereas a subjective one would mean that where two people said the same thing the outcome could be different solely depending on each one's state of mind. In circumstances where the defendant was not the original commentator difficulties were identified in showing whether the defendant believed that the opinion was justified. Some responses argued that a subjective test would tip the balance too far in favour of defendants and could create unfairness for claimants, whereas the objective test, as it currently operates, is not unduly harsh on defendants. It was also argued that an objective test would be much simpler to apply than a subjective test and that it is much more reasonable to make a more general, objective judgment, rather than trying to assess what is inside the mind of an individual defendant.

There were 18 respondents who argued against the objective test, and indicated that they preferred a subjective test. This group included media organisations, publishing and journalism bodies, legal professionals, academics and non-governmental organisations. A number of these respondents argued that a subjective test is a better alternative to an objective test as the only person who can ever truly say whether the opinion was honestly held is the author of that opinion. Others argued that opinions are as a matter of course subjective and it is therefore not fair to require the kind of reasonableness threshold envisaged in an objective test (although one response indicated that an objective test would only be suitable if a reasonableness requirement were added). It was also argued that the onus should fall upon the defendant to prove that they honestly held the opinion and that as currently drafted the objective test puts the onus on the claimant to prove that the opinion is not

one that could have been held by an “honest man”. It was suggested that the approach taken in New Zealand and Ireland should be followed, where the defendant is required to satisfy a subjective test.

There were three respondents that didn’t argue strongly for either a subjective or an objective test. One argued that the concept of an “honest man” was not necessarily a satisfactory basis for an objective test, as it is still possible for an honest man to be unreasonable and prejudiced. Another argued that the whole concept of whether to have an objective or a subjective test just perpetuates complexities and that the law would be made much simpler by introducing a right to correct inaccuracies. A further respondent argued that the consequences of each option were not immediately clear, but that they would be inclined to support whichever option best reflects the existing case law.

13. 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?

A total of 71 respondents answered this question. Of those 56 agreed that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, and non-governmental organisations.

Many of these respondents argued that it was anomalous that the current law only applied to UK courts and that an extension to courts in other parts of the world was a fair and proportionate reform. Others expressed the view that it is important to offer protection to organisations in relation to material such as court reports that are and should be in the public domain.

5 responses, from legal professionals, a media marketing company and an individual agreed that there should be some extension to the existing provisions but considered that protection should only be extended to reports of proceedings before recognisable and genuine courts and tribunals and not more widely.

8 respondents opposed extending absolute privilege as proposed. This group of respondents included legal professionals, members of the scientific and medical profession and individuals. It was argued that the extension risked protecting reports of judgments from regimes and judiciaries that are not as trustworthy as those in the United Kingdom and did not adequately respect human rights or the principles of natural justice, and that this could lead to

major unfairness for claimants. A number of these responses expressed the view that whilst it is right to offer some protection to reports of such proceedings, qualified privilege would be more appropriate than absolute privilege.

One respondent, whilst not answering specifically on any of the parts to question 13 argued that the whole privilege regime would benefit from some necessary updating.

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?

A total of 56 respondents answered this question. Of those 52 did not believe that it would be helpful to define the term “contemporaneous” in relation to absolute privilege for reports of court proceedings. This group of respondents included individuals, media organisations, legal professionals, members of the scientific and medical professions, and non-governmental organisations.

A number of these respondents didn't give reasons for their opposition to defining the term “contemporaneous”, however, the majority of those that did argued that there would be inherent difficulties in attempting to draft a definition of this kind. Several were concerned that any definition that was attempted would only lead to satellite litigation and others indicated that it was unnecessary as the term is adequately defined in section 14 of the Defamation Act 1996.

There were four respondents who considered that a definition would be helpful. Two of these were of the view that a definition in statute would provide a desirable clarification of the term if it were to be retained. One respondent suggested a possible way of defining contemporaneous as “reports or notes which are made in synchronicity or in tandem with, for example, court pleadings or deliberations.”

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

A total of 58 respondents answered this question. Of those 43 believed that the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports should be removed. This group of respondents included individuals, media organisations, members of the scientific and medical professions, legal professionals and non-governmental organisations.

This group of respondents argued that there is no justification for retaining a requirement that reports are contemporaneous. Not all of these respondents expressed a preference for whether absolute privilege or qualified privilege

should apply although of those that did express a preference 32 argued for absolute privilege to apply and only one response preferred qualified privilege. One respondent argued that what mattered was not whether the report was contemporaneous or non-contemporaneous, but that the focus should instead be on the relevance of the report at the time of its publication. It was also suggested that criteria could be introduced for print publications to be required to include reference to the outcome of any subsequent hearings at the date of publication, and for online publishers to provide a link to these.

15 respondents, made up mainly of legal professionals and academics opposed removing the distinction. A number of these respondents didn't further develop their arguments, but those that did expressed the view that there would be a real risk that to allow absolute privilege to apply both to contemporaneous and non-contemporaneous reports would unjustifiably remove the possibility of a remedy for a claimant. For this reason they argued that absolute privilege situations should be very carefully circumscribed. It was also suggested that a distinction was valid as publishers of non-contemporaneous reports have more opportunity to consider the matter and take other relevant facts into account.

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?

A total of 61 respondents answered this question. Of those 58 agreed that Part 2 qualified privilege should be extended to summaries of material. This group of respondents included individuals, legal professionals, members of the publishing and journalism professions, media organisations, members of the scientific and medical professions, and non-governmental organisations.

Many of these respondents simply expressed their agreement with the proposal without articulating their arguments further. Arguments which were put forward included that it was anomalous for protection to be extended to extracts of reports but not to summaries when both could be equally fair and accurate. The view was expressed that fairness and accuracy should be the only test that needs to be met and that the proposed extension would satisfy a legitimate public interest.

Three responses from legal professionals did not agree that Part 2 qualified privilege should be extended to summaries of material. It was argued that there is already sufficient allowance for copies or extracts of proceedings; that it would be difficult to see how a report of any real degree of complexity could be fairly and accurately represented in summary form; that "summaries" was too broad as a significant proportion of material could fall within the definition; and that on many occasions the reportage defence in clause 2 of the Bill would be available.

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?

A total of 68 respondents answered this question. Of those 57 agreed that Part 2 qualified privilege should be extended to fair and accurate reports of scientific and academic conferences. This group of respondents included individuals, legal professionals, media organisations, members of the scientific and medical professions, and non-governmental organisations.

20 of those that agreed with this extension considered that it would be appropriate to leave the definition of what constitutes an academic and scientific conference to the courts. Four respondents felt that it was necessary to define “scientific and academic conferences” and argued that whilst the extension was justified, it was important to ensure that it only applies to genuine scientific conferences. Three responses supported the extension proposed but felt that it should go further to cover scientific and medical peer reviewed journals as these are an equally, if not more, important means of fostering proper scientific discourse and debate. One respondent argued that the provision should extend further to conferences of other types, for example legal conferences.

10 responses, mainly from legal professionals and academics, opposed the extension. One of the arguments made by this group of respondents was that the provision would be open to abuse, as not all those with academic tenure or who pursue knowledge through experimentation are reputable or authentic practitioners, nor is it true that all scientific and academic pursuits are aimed at finding the truth. Concern was also expressed that the debate at such events often focused on speculative ideas and that it could be damaging to science to allow the circulation of unfounded accusations made in the heat of debate. Another argument was that the courts already have the flexibility to apply common law qualified privilege to such conferences and that the availability of this and other defences such as fair comment and *Reynolds* already provide protection for responsible scientific and academic debate. A further respondent expressed the view that any situation that such a provision could legitimately protect would have a sufficient defence in the law anyway through the public interest defence in Clause 2.

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?

A total of 62 respondents answered this question. Of those 54 agreed that Part 2 qualified privilege should extend to cover proceedings in other countries as proposed. This group of respondents included individuals, legal professionals, media organisations, members of the scientific and medical

professions, members of the publishing and journalism professions and non-governmental organisations.

Arguments in favour of this proposed extension generally centred around the need to ensure that publishers should be protected when publishing fair and accurate copies of, extracts from, or summaries of public documents from countries anywhere in the world and that the protection should not be restricted just to EU countries. Several argued that this would enable publishers to be more confident in exposing corruption in foreign jurisdictions. One response supporting the extension indicated that the ultimate purpose of defamation law should be to protect the truth and that the onus of proving that the report of proceedings in a foreign country is wrong should lie with the claimant.

There were 5 respondents including legal professionals, academics and an individual who whilst being generally supportive of the proposal did express concerns about the dangers of the extension applying too widely. One of these argued that it should only apply to reports or information issued by governments and bodies which are subject to the jurisdiction of the ECHR, and another that it should only extend to reports of proceedings before an international court or tribunal. The others suggested that the scope of the extension merited further discussion and consideration, for example in relation to material issued for the information of the public by an international organisation or an international conference, and in relation to reports of public meetings.

2 respondents, a legal professional and an individual opposed any extension. One argued that not all courts are equal and it would not be appropriate to extend the protection to reports of proceedings in courts under the jurisdiction of corrupt regimes. The other respondent opposed on the ground that they believed that English libel laws should cease to have any extra-territorial effect.

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?

A total of 60 respondents answered this question. Of those 54 agreed 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. This group of respondents included individuals, legal professionals, media organisations, members of the scientific and medical professions, members of the publishing and journalism professions and non-governmental organisations.

This group of respondents expressed the view that it is particularly important to allow people to report fairly and accurately on matters relating to public companies in other countries in this age of globalisation where information is often disseminated extremely widely. However, concerns were highlighted

about the scope of the extension and the definition used in the draft Bill, which defined public companies by reference to section 385(2) of the Companies Act 2006. 24 responses primarily from media organisations argued that this was too narrow, and that the provision should extend to all public companies anywhere in the world, not just quoted companies within scope of the 2006 Act. A non-governmental organisation supported this approach and indicated that if it used company documents in its reports it should not have to prove a further basis for the statements made than by reference to the document in question.

Responses from a non-governmental organisation and a legal professional argued that there was a case for extension to any public company quoted on a recognised stock exchange anywhere in the world. Other responses expressed concerns that the drafting might be too wide and would extend to state-owned corporations in authoritarian administrations, or to documents circulated by anyone to members of a quoted company, for example making allegations about the appointment of a director.

There were 6 respondents who opposed the extension proposed. These included legal professionals, a member of the scientific and medical professions and a media marketing company. One of these respondents argued that it would not be appropriate to extend qualified privilege to reports on companies in countries where the judicial balance between freedom of expression and right to reputation may be very different to that in England and Wales. Others argued that there was no justification in granting a specific extension to the reports of meetings or documents relating to public companies over and above other forms of corporation, and that this might allow public companies to publish partisan material under the protection of qualified privilege.

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.

A total of 57 respondents answered this question. Of those 32 believed that a specific reference to press conferences should be included in the draft Bill. This group of respondents included individuals, legal professionals, media organisations, members of the publishing and journalism professions and non-governmental organisations.

A majority of these respondents accepted that press conferences would generally fall within the definition of public meetings that already attract qualified privilege. However, this group felt that it was desirable to make specific reference to press conferences for the avoidance of doubt. There were a small number of respondents, however, who argued that it was not clear whether press conferences were currently covered and that therefore specific action addressing this in the Bill was not just desirable but also necessary.

23 respondents agreed with the position taken in the consultation paper that no specific action was needed in relation to press conferences. This group was made up mainly of legal professionals and academics. The majority of these argued that the current law was sufficiently clear that the reporting of statements delivered at press conferences was protected by qualified privilege and the view was expressed that this privilege should not be extended any further to cover the makers of statements at press conferences.

Two respondents did not give a clear view on whether there was a need for specific action to address the position of press conferences, but both argued that the issue merited further discussion and consideration in the context of any other reforms made to privilege. One of these respondents recommended asking the Law Commission to consider the issue.

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?

A total of 61 respondents answered this question. Of those 47 considered 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. This group of respondents included legal professionals, media organisations, individuals, members of the publishing and journalism professions, members of the scientific and medical professions and non-governmental organisations.

It was argued that there is an intrinsic and important public interest in the maintenance of accurate archives and it is vital that such archives are protected from libel actions. Media organisations which supported extending qualified privilege in this way argued that the Government should also consider a cut off point for actions in relation to archive material, whereby after material had been available in an archive for 6 years or more it would become subject to absolute privilege as a matter of public record. One respondent indicated that if something in an archive is proven to be inaccurate the claimant should be entitled to request a correction but should not be able to bring a libel action years after publication.

Few of these respondents put forward suggestions for defining an archive for these purposes, and a number indicated that no definition was necessary. However a few suggested definitions were put forward. One response suggested that an archive should be defined as “any collection of previously published content,” and another argued that article 1(2) of the EU Database Directive which defines an archive as “a collection of independent works, data

or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” should be followed. It was also suggested that the provision should extend to any archive which is publicly accessible, and that the provisions in the Charities Act 2006 relating to public benefit could assist in this regard.

13 respondents argued against extending qualified privilege to fair and accurate copies of, extracts from or summaries of archived material. These responses came largely from legal professionals and academics. Several expressed the view that the concept of an archive was too broad and would extend qualified privilege too widely. It was also argued that in the internet age an archived report is often as easily available as any contemporary report and therefore does not justify specific protection. Other respondents argued that it is the nature of the information that should be the deciding factor in whether or not material justifies protection rather than whether or not it is part of an archive, and one respondent argued that if the information is of public interest then it already has sufficient protection under Clause 2 of the draft Bill. Another suggested that it could be made clear that the Clause 2 defence covers the act of publishing material in an archive as well as the original publication so that any inherent value of the archive could be taken into account.

One respondent did not express a firm view either way in relation to archives, but did indicate that it had not previously been brought to their attention as being a problem that requires addressing.

Short form Questionnaire

The short form questionnaire asked “Do you think it is appropriate to extend the scope of qualified and absolute privilege to cover a wider range of material including reporting of court and other proceedings in other countries and at scientific and academic conferences?”

We received 70 responses to this question, of which 57 were in favour of extending the scope of qualified and absolute privilege in this way, with 13 opposed. The majority of those that were in favour focused their answers on the need to protect reports of scientific and academic conferences. They argued that such fora are important opportunities for engagement in free discourse and that the reports of such events should be protected from chilling libel actions.

Those that opposed such extensions expressed a range of views. One indicated that they were opposing primarily the extension to reporting of court proceedings in other countries, whilst accepting that an extension to reports of scientific and academic conferences was worthy of consideration. Another view expressed was that it is inequitable to protect these specific circumstances in such a way, whilst offering no greater protection to ordinary citizens on online blogs or social media sites. A further argument was that an

alternative approach to extending privilege would be to focus on better controlling the costs of defamation proceedings.

14. Do you consider that any further rationalisation and clarification of the provisions in schedule 1 to the 1996 Act is needed? If so, please indicate any particular aspects which you think require attention.

A total of 33 respondents answered this question. Of those 20 did not consider that any further rationalisation and clarification of the provisions in Schedule 1 to the 1996 Act was needed. This group of respondents was made up of legal professionals, individuals, academics, non-governmental organisations and a member of the scientific and medical professions.

The majority of these respondents simply expressed the view that no further clarification was required. However, one respondent did develop on this arguing that the reason that no further rationalisation or clarification was required was that the central principles on which privilege is established have been considered in long standing case law and the development of this is better left to judicial consideration. Another of these respondents, while arguing that nothing further was required, expressed the view that if changes to the privilege regime are made it may be sensible to prepare a fresh consolidated schedule rather than make amendments to Schedule 1 to the 1996 Act.

10 respondents did feel that further rationalisation and clarification was necessary. These included individuals, media organisations, academics, legal professionals, a consumer organisation, an internet organisation and a media marketing company. A number of these argued that it would be sensible for the provisions to be set out as part of a new schedule where all the statutory provisions relating to privilege could be consolidated in a single place. Another respondent argued that the provisions should be modernised in light of developments in technology. Other suggestions were for qualified privilege to extend to material released by public bodies; peer-reviewed journals; and to protect reports and summaries of conferences and judicial decisions anywhere in the world.

Three respondents didn't offer specific views on whether Schedule 1 to the 1996 Act needed further clarification. Two of these did, however, argue that there is an overlap between the approach taken with regard to privilege and the approach taken to responsibility for publication and the liability of internet service providers.

15. 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?

A total of 54 respondents answered this question. Of those 16 respondents thought that there should be a new form of qualified privilege covering material in archives. This group of respondents included legal professionals, individuals, academics, non-governmental organisations, members of the publishing and journalism professions, the senior judiciary, and a library.

6 of those respondents argued that any protection offered should be restricted to the National Archives. This group expressed the view that the National Archives is in a unique position and may merit the creation of a special form of privilege, as there is a public interest in the continued maintenance of the National Archives and therefore a public interest in ensuring that the material that is contained there is protected. However, 10 of those who believed that a new form of privilege should be created did not agree that it should apply only to the National Archives and argued that it should extend wider. It was argued that the privilege should extend to any library or archive subject to them taking reasonable care to ensure that the publication is for legitimate research purposes. Others suggested that there are other comparable forms of archive such as university library collections and public record office documents that should attract the same protection as the National Archives. One respondent expressed the view that many of the problems relate to the publication of online archives, and that this issue needs further consideration but that the Defamation Bill might not be the most appropriate place for any changes.

There were a further 23 respondents, mainly from media organisations, that whilst not specifically arguing that a new form of privilege should be created argued that any protection that is given to the National Archives should be extended to all organisations under a legal duty to maintain an archive. They also argued that qualified privilege should be extended to cover fair and accurate summaries or extracts of material held in an archive.

12 respondents, including legal professionals, academics and non-governmental organisations opposed creating any new form of privilege either to cover the National Archives specifically or archives more generally. Several of these argued that they were not aware of any practical problems that needed addressing through an extension of privilege and some expressed the view that the concept of “an archive” is too broad to attract a general protection. One respondent raised concerns that to extend privilege in this way could leave claimants at risk of the publication of dormant defamatory material resurrected years after the original publication. Others argued that the National Archives are already protected, either under section 10 of the Legal

Deposit Libraries Act 2003 or by the statutory qualified privilege created by section 79 of the Freedom of Information Act 2000.

Three respondents didn't express strong views on whether qualified privilege should be extended to cover either the National Archives or archives more generally. One suggested that an alternative approach might be to make clear that the public interest defence applies to the act of publishing an archive, and another argued that the proposed changes to the multiple publication rule should assist. Another view was that it should be the case that any library or archive should be willing to update or correct material when a material change in relevant circumstances is brought to their attention.

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

A total of 86 respondents answered this question. Of those 74 agreed with the inclusion of a clause in the Bill providing for a single publication rule. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, academics and non-governmental organisations.

A number of these respondents agreed without elaborating on their reasoning. However, of those that did develop their arguments in favour of a single publication rule, a large number expressed the view that the current multiple publication rule was outdated and of no practical purpose in the multimedia age. Another argument was that the current position creates open ended liability for defendants and that this can cause serious injustice. A number also referred to the current interpretation of the law in relation to internet publication, where a new cause of action is created each time a web page is opened and argued that this is particularly problematic for online publishers.

There were 10 respondents who opposed the inclusion of a clause providing for a single publication rule in the Bill. A number of these argued that there does not exist a genuine problem that requires rectifying. One argued that actions in relation to material that is more than a year old are extremely rare, and another that the courts will already take into account the lack of prompt action when considering a libel claim relating to very old material. Others argued that the multiple publication rule should be retained, whilst accepting that it may be in need of modernisation. Two responses, both from individuals, argued that the central purpose of defamation law is to protect reputations, and that moving away from the multiple publication rule would make it easier for people to do damage to the reputations of others.

Two respondents didn't express a strong view either way as to whether the clause should be included in the Bill. One expressed concern that content on

internet blogs or social networks was open to defamation proceedings and the other referred to the fact that the clause as drafted does not address the recommendation of the Culture, Media and Sport Select Committee that claimants prevented from bringing an action by a single publication rule should be entitled to a court order to correct a defamatory statement.

Short form Questionnaire

A further 72 responses to this question were received through the short form questionnaire. Of these 53 were in favour of including a clause providing for a single publication rule in the Bill, with 19 opposed. A number of those in favour argued that if a publication has not done the claimant substantial harm within a year of publication then it is unlikely to do so in the future. Others argued that given the nature of the internet the current position essentially has the effect of negating impact of the statute of limitations. Another indicated that similar provisions have been successfully implemented in other jurisdictions, for example Ireland.

Conversely, those opposed to the inclusion of the clause argued that there is no reason why material cannot damage a claimant's reputation long after it is first published, and therefore to restrict claimants from bringing a claim in the way proposed would potentially leave them without a remedy. Another view expressed was that such a clause would be tantamount to giving irresponsible journalists the opportunity to publish further, or repeated, falsehoods.

17. 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?

A total of 58 respondents answered this question. Of those 37 identified potential problems with the rule applying to publications to the public (including a section of the public). This group of respondents included media organisations, a library, legal professionals, individuals and a diversity group.

The view expressed by the majority of those in this group, primarily from the media, was that the words "to the public" should be removed. It was argued that the justification for this requirement was unclear and would cause uncertainty, and that it would be difficult to apply as technology develops, as more user-focused content will be available on a bespoke basis to individuals or small groups rather than through mass publication to the public at large. They argued that situations such as a defamatory tweet by a person with a very small number of followers on Twitter, a defamatory comment on a closed social networking site to a handful of "friends" and a blog on a niche subject

area which is only read by one person (though technically available to all) should all be covered by the rule, and that it was unclear whether this was the case under the draft clause.

Another argument was that “a section” of the public was unclear and ill defined and that it would be fairer to allow judicial discretion to decide what constitutes publication in individual cases. One response suggested that publication “to a third party” would be preferable. Another suggested that clause 6(2) should be omitted altogether so that the courts could decide whether there had been publication in any given situation.

19 respondents did not consider that problems would be caused by the current provision in the draft Bill. This group included non-governmental organisations, academics, members of medical and scientific professions and legal professionals. One argument expressed by members of this group was that the drafting of the clause is sensible and leaves sufficient room for the courts to deal flexibly with the different circumstances that may arise in relation to small circulation publications. One respondent indicated that not excluding a first publication to one person or a very small group could allow defendants to place initial publications obscurely in order to attract the protection of the rule before proceeding with a wider publication after one year, leaving the claimant without sufficient remedy.

Two respondents did not express strong views one way or the other in relation to this question but did raise potential practical issues. One expressed the view that due to the way that the courts have interpreted publication in an online context, working out the date and location of a first publication can be difficult in some cases. The other indicated that it would be difficult to predict the impact any provision would have on the behavioural patterns of internet users.

A number of responses made other comments or suggestions on the substance of the clause. One considered that the clause could be too limited in scope, as if a publishing house went out of business and was taken over by another publisher, the new publisher would be a different legal entity and the publication (albeit of the same material) would fall outside scope. Another concern was that the clause as currently drafted doesn't deal with the situation where a defamatory publication is either accepted or found to be libellous but the publisher republishes or continues to allow publication after one year. The view was also expressed that the Bill should make clear that the “date of first publication” is also the relevant date when considering defences which take into account knowledge, intent and the public interest at the date of publication, and that this should not be subject to reassessment as a result of continuing publication. Otherwise, it was argued, where the public interest has dissipated this could undermine a publisher's ability to defend its original publication.

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?

A total of 72 respondents answered this question. 31 respondents agreed 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. This group of respondents included academics, legal professionals, non-governmental organisations and individuals. A number of these suggested additional provisions to limit the circumstances in which the single publication rule would apply. 36 respondents did not agree and considered that the test was too restrictive. This group was made up of media organisations, academics, legal professionals, non-governmental organisations and individuals. Many of these proposed amendments to make the single publication rule more broadly applicable.

One of the main arguments expressed by those wishing to extend the applicability of the single publication rule was that the words “the manner of” should be deleted from the clause. They expressed the view that whilst they agreed that the rule should not apply where content is materially different, the multimedia publication age requires that often material is published in many different formats and that for the purpose of the single publication rule these different formats should be treated as one. Another argument for this change was that the existing provision would undermine the purpose of providing for a single publication rule in the first place, as it would still fail to provide protection for material that is placed online in an electronic format after being in the public domain for many years. Several respondent also expressed the view that the single publication rule only applying to publication by the original publisher also undermined that purpose of the rule and that the protection of the single publication rule should apply to future publications by any publisher.

A small number of respondents argued that it would be preferable to remove clause 6(5) from the Bill entirely and instead allow the courts to use their discretion under section 32A of the Limitation Act 1980 to allow for claimants to bring actions in exceptional cases. Others expressed the view that the phrase “level of prominence and extent of publication” could cause confusion around what constitutes a new publication online. It was suggested that if prominence and extent were the only areas of concern, it would be better just to refer to those and omit the “materially different manner” test. Other concerns raised related to the impact of the provision on material republished as part of an archive or where material originally in a scientific or academic journal was given a wider audience. A number of suggestions were made to prevent the provision applying where changes were only made to the format or method of publication and not to the content, or where the only changes were to the content or format of surrounding material and not the article itself.

Arguments put forward by those who wished to narrow the scope of the single publication rule included that the risk of extending the rule to cover circumstances where the manner of the publication has changed could in some circumstances leave claimants without sufficient means of protecting their reputation against material republished across the internet. Several of these respondents argued that the manner of the publication should also include the “extent” of the publication, expressing the view that the rule should not allow defendants to gain the protection of the single publication rule through an initial limited publication before broadening the extent of publication. A number of suggestions were made for additions to Clause 6(5) including the identity of the person or persons to whom the subsequent publication was made, and where the damage suffered by the claimant was materially different.

There were 5 respondents that didn’t express a clear view either way but raised a range of issues. Two of these argued that the current drafting of the clause would be likely to lead to significant litigation and that clarification of its intention was needed. One response argued that the single publication rule shouldn’t apply where new facts come to light after the first publication and another that the rule shouldn’t apply where the material had only previously been published in another jurisdiction.

18. 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?

A total of 68 respondents answered this question. Of those 56 did not 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. This group of respondents included media organisations, individuals, academics, legal professionals, non-governmental organisations, members of the scientific and medical professions and individuals.

These respondents argued that section 32A gives the judiciary sufficiently wide discretion to disapply the limitation period if to do so would be in the interests of justice. One argument put forward was that to draft a specific provision in addition to section 32A could create confusion around the scope of the judicial discretion. A small number whilst arguing that no specific provision was needed did express the opinion that guidance could usefully be issued to provide greater clarity as to the scope of the court’s discretion in relation to limitation in defamation actions.

12 respondents argued that a specific provision is needed. This group was made up mainly of legal professionals. One argued that there should be a provision to allow actions to be brought after one year in specified circumstances, for example when there were alterations to the article which change the meaning, and another that the limitation period should be increased to 3 years, perhaps with an overall backstop of 10 or 15 years. A further view was that the provision could set out factors for the court to consider in exercising its discretion such as the prominence and extent of the original publication; whether the original author or publisher was identifiable; and whether the claimant had taken any active steps within the limitation period. It was also argued that a claimant should still be able to get a court order correcting a defamatory article outside the limitation period, even if he or she couldn't recover damages because of the protection given by the single publication rule.

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

A total of 80 respondents answered this question. Of those 56 agreed that provisions on libel tourism should be included in the draft Bill. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, academics, members of the scientific and medical professions and non-governmental organisations.

A number of these respondents argued that provisions on libel tourism are needed to prevent rich foreign individuals who have very little connection with this jurisdiction from using our courts to prevent public criticism of their actions. Several expressed the view that although there are not many known cases of libel tourism that reach court, the threat of libel proceedings is creating a "chilling effect" on freedom of expression. Conversely some responses, whilst supporting the provisions, expressed the opinion that libel tourism is not as great a problem as has been argued in some quarters, but that the provisions in the Bill are sensible and proportionate and would act as a helpful reassurance for publishers. There were also a number of respondents who whilst supporting the principle of including provisions on libel tourism in the Bill do not agree with the provisions as currently drafted (see question 20).

There were 22 respondents who opposed including provisions on libel tourism in the draft Bill. This group of respondents was made up largely of the legal profession and academics. The main argument used by this group of respondents was that the problem of libel tourism has been greatly exaggerated. They expressed the view that in reality very few cases that are brought can truly be classified as "libel tourism" cases and a number indicated that there were hardly any such cases in 2009 and 2010. Two respondents cited the Ministry of Justice's Libel Working Group report published in 2010, which found little evidence of cases of this sort coming to court. Several of

these respondents argued that the current doctrine of *forum non conveniens* already provides sufficient protection from forum shopping. It was also argued that anecdotal evidence of threats of proceedings was not a reasonable basis for changing the law.

Two respondents didn't express a strong view either way as to whether the clause should be included in the Bill. These respondents both agreed with those who believe that there is little evidence that libel tourism is a genuine problem, but indicated that they had no strong objections to the clause being included in the Bill.

Short form Questionnaire

A further 72 responses to this question were received through the short form questionnaire. Of these 64 were in favour of including libel tourism provisions in the Bill, with 8 opposed. Those in favour argued that the current situation allows for claims with no real connection to this jurisdiction being brought here, with costs to the justice system of England and Wales. One argued that claimants should have to prove that damage has occurred to them in the United Kingdom or that the defendant is based here in order to bring a claim in this jurisdiction. Others expressed the view that the current position is damaging for the United Kingdom's reputation in relation to freedom of expression.

Those opposed to such provisions argued that they could have serious and damaging effects on those from overseas seeking a fair and just remedy for damage to their reputation. Another view expressed was that the courts are better placed to rule on the development of jurisdictional law as the case law develops.

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

A total of 65 respondents answered this question. A wide range of views were expressed but it was possible to identify three general positions. There were 31 respondents that felt the provisions on libel tourism should go further, 14 who felt that the provisions in the Bill go too far and 15 who were generally supportive of the provisions as they stand, with a further 5 respondents making more general comments and drafting suggestions.

The group of 31 respondents that considered the provisions on libel tourism should go further included members of the scientific and medical professions, non-governmental organisations, media organisations and media insurers. One of the main views expressed was that the approach take to the issue in Lord Lester's Private Member's Bill should be adopted, as it extended protection to defendants based in England and Wales against claimants suing in England over international publications where it is more appropriate for proceedings to be brought in a different jurisdiction. It was considered that

Lord Lester's clause was effective as it was aimed at preventing overseas based libel tourists seeking to use the English courts even though they have not suffered any real harm to their reputations in this jurisdiction. Concerns were raised over how the provision allowing a claim to proceed only where England and Wales was "clearly the most appropriate place" to bring the claim would be interpreted, and the argument was made that this should be a test that is applied strictly.

The group of 14 respondents who considered that the provisions in the Bill go too far was made up largely of legal professionals, academics and individuals. A number of these respondents argued that the clause as currently drafted places too high a burden on the claimant, and that it could prevent an English domiciled claimant from bringing a claim in England, which would not be appropriate. Some responses argued for the retention of the current *forum non conveniens* test as an alternative to legislation. A further argument was that the clause seeks to treat the matter of jurisdiction as purely a numbers game and that in reality it should not be a defence to a libel action in this jurisdiction that you have defamed the claimant more seriously elsewhere. One respondent expressed the view that the premise that seeking redress for a libel in one jurisdiction would always be sufficient to vindicate a claimant's reputation is false, as a sports star or entertainment personality may have a worldwide reputation and should be able to bring an action in this jurisdiction where there is a real and substantial tort.

15 respondents, including individuals, a diversity group, academics and non-governmental organisations either offered no specific comments on the drafting of the clause or expressly supported the current drafting. One of these respondents in particular recognised that European law prevents the clause from dealing with libel tourism in situations where the defendant is domiciled in the EU. Another suggested that a provision be added to make a link with the clause on the single publication rule, and provide that a statement which is substantially the same as a statement complained of should be regarded as that statement. This would prevent unreasonable arguments that statements published in other jurisdictions should be treated as different publications.

A further 5 responses offered general comments on the clause, but did not seem to be expressly supporting the existing drafting or arguing that it either extended too far or should go wider. Of these one asked for further guidance to be provided on the factors that a court would consider in deciding matters of jurisdiction, another argued that the problem with the current law is that it leads to self-censorship which often goes under the radar and others suggested drafting amendments, whilst also accepting that the scope of the clause is limited by the need to comply with European law relating to cases where the defendant is domiciled within the EU.

A number of suggestions were made from various perspectives as to factors which should be considered when deciding whether the claim should be brought in England and Wales. These included whether the publication was targeted at a readership here or had been specifically promoted here; whether the defendant had a significant presence here; the extent of the claimant's connections here; whether the subject matter related to the UK; the extent of publication in England and Wales compared to elsewhere; and whether the alternative forum would provide the claimant with a remedy.

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

A total of 78 respondents answered this question. Of those 64 agreed that the presumption in favour of jury trial in defamation proceedings should be removed. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, and non-governmental organisations.

Arguments used by this group of respondents included that this would reflect the fact that in reality juries are now rarely used in defamation cases and therefore to make this change would properly reflect the development of the law. It was argued that the presumption in favour of jury trial as it currently operates can lead to significant delay in proceedings and an increase in costs, as judges are not able to make early determinations on meaning in the event that the case goes on to be heard by a jury. A substantial majority of respondents arguing for the removal of the current presumption expressed the view that the approach taken in the draft Bill was correct and that there should remain circumstances in which a court could order a jury trial in exceptional cases. However, there were a small number of respondents who argued that the provision should go further and abolish the right to jury trial in defamation proceedings entirely.

11 respondents argued that the presumption in favour of jury trial should not be removed. This group included individuals, legal professionals and academics. Several of these respondents argued that the judiciary are not always representative of society in general and are not always in a position to judge the meaning that the public are likely to give to the words complained of and the likely impact on a person's reputation within society. Others argued that issues such as truth and the quantum of damages are often best decided by a jury. A small number of these respondents objected on a matter of principle, on the grounds that they believe that the right to trial by jury is a fundamental principle of the law.

Three respondents didn't express a strong opinion either way in relation to whether the presumption for trial by jury should be removed, but made a number of related points. One respondent argued that it would be necessary to assess the balance between the desirability of reducing costs against the possible benefits of lay participation in determining cases. Another argued that it would be necessary to evaluate these provisions in the context of the other changes to the substantive law included within the Bill before reaching a definitive view.

Short form Questionnaire

A further 71 responses to this question were received through the short form questionnaire. Of these 43 agreed with removing the presumption in favour of jury trial in defamation proceedings, whereas 28 opposed this. A majority of those in favour expressed the view that juries make cases more costly and often it would be quicker and simpler for a judge to decide the case alone. However, a small number argued that it was important that the right to jury trial was retained in some form where it is considered in the interests of justice, or where there is widespread public interest in a particular case.

A number of those who opposed removing the presumption in favour of jury trial argued that jury trials should be retained as a matter of principle, expressing the view that it is a mainstay of UK law to allow one to be judged by a jury of one's peers. Another argument was that judges often come from one social background, whereas juries can contain a cross section of society who might have different views on whether a statement is defamatory or not.

22. 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.

A total of 51 respondents answered this question. Of those 33 did not 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. This group of respondents included individuals, media organisations, legal professionals, members of the publishing and journalism professions, media insurers and the senior judiciary.

Most of these expressed concern that including guidelines in this way could generate further disputes. Others argued that as very few cases that proceed to trial use juries, the courts are already able to exercise their discretion to order jury trial only where appropriate without the need for further guidance.

10 respondents believed 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. This group included media organisations, academics, individuals and legal professionals. It was argued that this would provide necessary added clarity. Some of these respondents supported the guidelines included in Lord Lester's Private Member's Bill and expressed the view that these could be incorporated (although one response did not support certain of the provisions which were considered to imply that juries would be more appropriate to actions involving politicians and other significant people). Others argued that guidance should support jury trial where there was large scale publication including to the public at large, and by public authorities; where there were allegations or imputations of criminality; on matters of great public interest; or in cases involving the police and government agencies.

A number of responses, while not supporting guidance on the face of the Bill, made suggestions as to factors which the court should consider. These included the nature of the allegations in terms of the parties, subject matter and degree of public importance; whether costs could be saved by the judge dealing with preliminary issues; and whether the case related to political figures or the performance of public functions generally. Other responses called for the public interest or the interests of justice to be an overarching factor; and for the courts to be required to have regard to all the circumstances of the case.

8 respondents answered the question without expressing a particular view on whether guidelines should be included on the face of the Bill. Three of these reiterated their desire to retain the presumption for jury trial, and two reiterated their desire to abolish jury trial altogether in defamation cases. One respondent expressed the view that the defendant should have the right to elect for trial by jury, and another argued that irrespective of whether there were guidelines on the face of the Bill the court would nevertheless have to consider all the relevant circumstances of the case when deciding whether to allow trial by jury. A further respondent expressed the opinion that malicious falsehood should be added to the category of cases for which the presumption in favour of jury trial is removed.

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)?

A total of 52 respondents answered this question. Of those, 30 expressed the view that the approach taken by the Bill is the appropriate one and that no further provisions are required to clarify which issues should be for a judge to decide and which for the jury. This group of respondents included media organisations, legal professionals and a non-governmental organisation.

Several of these respondents argued that the appropriate division of issues between the judge and the jury, in cases where a jury is required, is already clearly understood under the common law and that it is not necessary to include specific provisions in the Bill. Five respondents specifically argued that there should be provisions in the draft Bill to clarify which issues should be for the judge and which for the jury. Two of these respondents argued that such a provision should provide for meaning to be determined by a judge, however, another argued that there is no need to change the current role of the jury but simply to clarify the current position in the Bill.

A further 12 respondents did not specifically call for provisions to be included in the Bill, but did express views in relation to which issues should be for the judge and which for the jury. This group of respondents included individuals, members of the scientific and medical professions and legal professionals. There were also five respondents who answered the question simply by restating their general position on clause 8. Four of these favoured removing juries from defamation trials altogether, whereas one opposed the proposal to reverse the presumption in favour of jury trial.

A range of views were expressed in relation to which issues should be for the judge and which for the jury. Three respondents felt that all issues of fact should be left for the jury to decide. However, another felt that as many issues as possible should be decided by the judge. A small number of respondents felt that it was appropriate that juries should continue to be responsible for deciding on meaning, but several others considered that in order for any early determination of issues to be possible the judge must be in a position to rule on the meaning of the words complained of. Many responses, primarily from media organisations, considered that there was merit in judges being able to determine the amount of damages to be awarded but a small number of responses considered that this should remain a matter for the jury (where used). One response suggested a flexible approach under which, where a judge considered that jury trial was appropriate the issues for determination by a jury should depend on the basis for this view.

A group of media organisations that responded to this question also raised two issues in relation to clause 9, on which the consultation paper did not include a specific question. These were that the definition of the word “statement” should be removed as it could cause confusion, and that the Bill should define what is meant by defamatory.

23. 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?

A total of 86 respondents answered this question. Of those 63 considered that it would be appropriate to provide greater protection against liability to internet service providers and other secondary publishers. This group of respondents was made up of individuals, media organisations, members of the legal profession, internet organisations, a non-governmental organisation, a public body, members of the scientific and medical professions and publishing and journalism trade organisations.

Several of these responses argued that the current position is unfair as it forces internet intermediaries into making a choice between defending material as though they had written it themselves (which they were ill-placed to do) or taking material down immediately. Another view that was expressed by a number of these respondents was that the current law is not fit for purpose in an age where the internet is increasingly becoming the dominant medium, and that the existing provisions are complicated and unclear. A number of respondents argued that the law should be changed to encourage claimants to pursue the original authors of material, and that until a claimant has done that or can prove they've taken steps to attempt to do so the secondary publisher should not be liable. One respondent suggested that there should be no liability where web links to sites containing defamatory material have been published without malice, and another that the secondary publisher should have had to have acted recklessly for there to be liability.

There were 19 respondents who opposed changing the law to provide greater protection to internet service providers and other secondary publishers. This included individuals, academics, legal professionals, a media marketing company, a publishing organisation and a medical insurer. They argued that there should be no move towards granting greater immunity to internet intermediaries and several of these indicated their belief that the current provisions work well. Some of these respondents also expressed the view that any change could lead to under-protection for claimants, as often the internet intermediary is the only party that can remove material quickly, and that should a claimant not be allowed to challenge the provider they may have no other recourse to obtain a remedy. Difficulties were identified where postings were anonymous and the need for a simple way for the claimant to identify the author of material on the internet was also raised.

There were 4 respondents that did not offer a firm view on whether the existing protection should be extended. Of these, one argued that the section 1 defence in the 1996 Act was essentially a reasonable conduct defence and that since that time the *Reynolds* defence had developed as an alternative reasonable conduct defence. Another argued that whatever protection was

offered to internet service providers should be extended more widely to all secondary publishers.

Short form Questionnaire

A further 71 responses to this question were received through the short form questionnaire. Of these 56 were in favour of changing to law to provide greater protection against liability to internet service providers, with 15 opposed. Those in favour argued that allowing claimants to pursue secondary publishers can have the effect of suppressing free speech. Several indicated that the law should be changed in light of the digital age. Another argument was that providing greater protection to intermediaries would end the ability of claimants to censor criticism extra-judicially by forcing web hosts to remove content in order to avoid being held liable, and that reducing this pressure to censor would be a desirable outcome.

Those against providing intermediaries with greater protection argued that if a publisher is willing to publish material, even as an intermediary, then they should be accountable and should be willing to remove material. One argued that to offer greater protection would risk creating a free for all where intermediaries can act entirely without the risk of any consequences.

24. 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?

A total of 65 respondents answered this question. There was mixed support for the options put forward in the consultation paper. 25 responses, mainly from media organisations, favoured a statutory system similar to that which currently applies in relation to copyright disputes in the USA, which involves the internet intermediary being protected against liability if they act as a liaison point between the claimant and the defendant. Some of these expressed concern that a court order based approach would add an extra layer of bureaucracy and cost and could create difficulties in terms of court resources. 11 responses, including non-governmental organisations, academics, members of the scientific and medical professions and internet organisations, favoured the option of requiring a claimant to obtain a court order before any obligation could be placed on internet intermediaries to remove material. Non-governmental organisations calling for libel reform put forward a detailed scheme for a “court-mediated liability gateway” which they argued would provide a suitable alternative framework. An additional 5 responses indicated that either a copyright type approach or a court order type approach would be acceptable.

A small number of respondents, representing booksellers and publishers argued for a system requiring claimants to pursue the author, editor or primary

publisher before issuing proceedings against the secondary publisher or intermediary, unless they were not within the jurisdiction or it was otherwise impractical to do so. Whilst these respondents did not specifically argue that this defence should only apply to booksellers or publishers they did highlight the distinction between these forms of secondary publisher and others such as internet service providers, in that it is normal practice for the publisher and author's details to be included in a published book, as opposed to online where the originator of material can often be anonymous and untraceable. This group also called for the restoration of the common law defence of innocent dissemination, which they indicated had been superseded by a narrower defence under section 1 of the 1996 Act. There were only 2 respondents who felt that internet intermediaries should be protected against liability entirely, by way of an absolute bar on them being sued, and there was no support for an approach which distinguished between smaller scale local forums and blogs and larger corporate intermediaries.

There were 8 respondents, mainly legal professionals and academics, who opposed providing greater protection against liability to internet service providers and did not believe that any of the alternative approaches discussed in the consultation paper were attractive solutions. Some of these respondents argued that all of the options in the consultation paper would create difficulties for claimants and would create more problems than retaining the current system. Others argued that they would risk tipping the balance too far in favour of defendants and would seriously harm claimants' rights to protect their reputations. There were also a further 5 respondents, including individuals and legal professionals who indicated that the only change that it would be appropriate to make would be around codification of the current notice and takedown procedures as had been provided for in Lord Lester's Private Member's Bill.

There were numerous other comments and suggestions made by a range of respondents. A number of these focused on the intermediary being able to avoid liability by complying more readily and promptly with requests from the claimant to provide details of the primary publisher or author of the material, including one suggestion that intermediaries should limit the scope for the publication of anonymous material on their websites. One response from a legal professional suggested detailed provisions focused on providing a defence to an intermediary if it acts expeditiously to remove material, with the option of immunity by posting a reasonable cautionary notice on the site pending action by the claimant against the author of the material. An internet organisation proposed a range of actions including a separate definition for online intermediaries under section 1; a definition of what constitutes "actual

knowledge” under the E-Commerce Directive⁷ together with inclusion of the Directive’s liability framework on the face of the Bill; and a defined notice and takedown process.

Other responses focused on a need for the intermediary to give the claimant a proportionate right to reply, and it was suggested that this should be enforceable by a body such as the Information Commissioner, or appealable to the Press Complaints Commission or Ofcom. Another suggestion was to apply the Clause 2 defence to secondary publishers, possibly with an assumed public interest element, with a list of factors for assessing responsible conduct. It was also argued that there should be different levels of responsibility applicable to news sources and to private individuals, and that Clause 7 of the draft Bill should clarify where the “most appropriate place to hear a claim” would be for internet publications, due to the worldwide nature of the internet.

25. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?

A total of 49 respondents answered this question. Of those 35 indicated that they had experienced difficulties in interpreting how the existing law in relation to section 1 of the 1996 Act and E-Commerce Directive applies in relation to internet publications. This group of respondents was made up of media organisations, research organisations, members of the legal profession, media insurers, internet organisations and academics.

A number of these respondents argued that difficulties arise primarily as a result of the uncertainty in attempting to predict how the courts would apply section 1 and the lack of clarity in relation to what is required under the E-Commerce Directive for intermediaries to be aware that material is “unlawful,” as opposed to the different terminology of “defamatory” used in section 1. Several respondents argued that under the current law it is unclear what practical measures a web host or intermediary can take in relation to moderation of material without losing the protection of the section 1 defence, and one respondent expressed the view that as soon as a respondent checks copy from a third party they may potentially be open to liability. One response indicated that the current law forces intermediaries to adopt a defensive attitude without access to critical information in order to avoid being held liable. Another argument was that there has been significant uncertainty over

⁷ Directive 2000/31/EC of the European Parliament and of the Council on 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

how “reasonable care” and “reason to believe” in section 1 and the requirement in the E-Commerce Directive Regulations for “expeditious” removal of material are to be interpreted.

12 respondents indicated that they had not experienced problems with the current law. This group included individuals, legal professionals, academics and a media marketing company. They expressed the view that the law is sufficiently clear and that there are no significant difficulties being experienced in practice. One respondent argued that in practical terms both section 1 and the E-Commerce Directive have the same effect in that once a complaint is received the intermediary is considered to be on notice. Another expressed the view that whilst section 1 is poorly drafted the courts have done a good job in interpreting it and have prevented significant difficulties from arising.

26. Do you consider that clause 9 of Lord Lester’s Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?

A total of 53 respondents answered this question. Of those 30 were generally positive and argued that clause 9 of Lord Lester’s Bill was helpful in clarifying the law in this area. However, most of these proposed various changes to the clause. This group of respondents was made up of media organisations, media insurers, and publishing and journalism organisations.

A number of those that were generally supportive of Lord Lester’s clause agreed with this approach relating to the revised defence for live broadcasting, but suggested that the burden should be shifted to the claimant to show that the broadcaster knew or had reason to believe that the defamatory statement would be published. They also suggested a number of more general drafting changes. These were that in addition to giving notice, the claimant should have either to initiate legal proceedings against the originator of material; or establish via the intermediary that the originator no longer supports the posting or has failed to engage with them; or make the intermediary aware of circumstances from which it is apparent that the information is unlawful. A further suggestion was that the clause could provide the option of a fair and accurate summary of the claimant’s position being added to an online forum. Other responses supported the clause but suggested drafting amendments to its provisions on broadcasting and notice and takedown, and that the defence should be fortified in the event of failure to publish a reasonable statement in contradiction or explanation by the claimant.

There were 10 respondents who argued that Lord Lester’s clause was not helpful. Some felt that the current law is sufficient and that further clarification is not needed, while others argued that the clause simply adds a further layer

of complexity and confusion. Others opposed the 14 day notice period for facilitators to remove content, arguing that significant reputational damage could be done to a claimant in that period.

There were a further 9 respondents who took the view that while there was some merit in Lord Lester's clause, it should go further in protecting intermediaries. This group was largely made up of non-governmental organisations, legal professionals and members of the scientific and medical professions. A number of these felt that the clause as drafted still imposes liability on certain types of intermediary and that it should go further in protecting them. One respondent considered it an excellent starting point but feared that as drafted it was biased in favour of claimants. Others argued that the clause could go further in respect of clarifying the current notice and takedown procedures and that as currently drafted there is still room for uncertainty in the language.

Particular concerns were raised by a number of respondents, both among those broadly supportive of the clause and those opposed to it, in relation to the use of the term 'facilitator'. A number argued that the terms in the E-Commerce Directive are already well understood and that it would be confusing to add an additional term. Others were unclear as to what the definition of 'facilitator' would be in an online context and argued that there was a need to clarify the exact scope of the term and who might fall within it.

One further response emphasised that any provisions in this area needed to take into account ongoing technological advances and queried whether, for example, Lord Lester's clause would address situations that occur in the context of cloud computing systems where server capacity is often rented from third party hosts.

Short form Questionnaire

The short form questionnaire asked "Would it be helpful to update and clarify (but not change) how the existing law applies in relation to the internet?"

We received 72 responses to this question, of which 58 were in favour of updating and clarifying how the existing law applies in relation to the internet. A number of these argued that the current law is unclear and confusing and often difficult to apply to modern communication on the internet through mediums such as social networking. A small number expressed the view that many individual bloggers would benefit from clarification and guidelines. Several indicated that the rate of change on the internet requires that the law be clarified and updated on a regular basis. There were, however, a small number who felt that there was a need for some change in the law alongside clarification of the current position.

There were 14 respondents who opposed updating and clarifying the current law. The majority opposed these measures on the basis that they believed that they were insufficient, and argued that the law required changing to offer greater protection to internet intermediaries. One respondent whilst not arguing strongly against clarification expressed the view that the Government should be clear exactly what it would be trying to achieve through clarification.

27. If Lord Lester's approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?

A total of 41 respondents answered this question. This included academics, members of the legal profession, publishing and journalism organisations, individuals, academics, and non-governmental organisations.

Most responses reiterated and emphasised arguments used in response to earlier questions, and there were very few additional views or suggestions expressed. Some of the arguments made included encouraging claimants to initiate legal proceedings against the author of the material; clarifying the scope of the term 'facilitator'; introducing an adaptation of the US copyright system and introducing a court-mediated liability gateway.

There were a small number of new suggestions. One respondent suggested that intermediaries should be exempted from any obligation to pay costs where they act promptly to remove defamatory material. Another indicated that a fast-track libel tribunal should be established to consider applications from claimants for removal of material, and a further respondent argued for a safe-harbour to be created for blog owners who intentionally don't exercise any editorial control over user-generated comments on their site.

28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.

A total of 29 respondents answered this question. Of these 24 considered that difficulties have arisen from the present voluntary notice and takedown arrangements. This group included legal professionals, academics, individuals, media insurers, media organisations, and non-governmental organisations.

Six of these respondents argued that the majority of the problems that have arisen relate to foreign web hosts refusing to cooperate with reasonable notice and takedown requests, with one respondent in particular indicating that US based internet service providers argue that US law should apply to them. Others argued that the main problem is that the law is not sufficiently clear or protective of internet service providers who often feel obliged to remove content as they are not in a position to judge whether there is any merit to the

complaint and are afraid of being held liable for defamatory content. Another expressed the view that the current system was leading to bloggers blogging on public interest issues having their content removed by web hosts worried by vexatious complaints on points that the bloggers themselves may have been willing to defend. It was suggested that the need to remove material unnecessarily was caused by the lack of a grace period under section 1 of the 1996 Act and the vagaries of the requirement in the E-Commerce Directive for the material to be removed expeditiously. Concern was also expressed by one respondent that a two-tier system had developed whereby individual bloggers could easily ignore requests but bigger sites took material down without question, leaving posters without a remedy or appeal.

5 respondents indicated that they were not aware of any particular problems caused by the present system. This group included legal professionals, academics and a member of the scientific and medical profession. However, none of these respondents expanded on their response any further.

29. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?

A total of 41 respondents answered this question. Of these 19 did not believe that a statutory notice and takedown procedure would be beneficial. This group included legal professionals, academics, individuals, non-governmental organisations and members of the scientific and medical professions.

A number of these respondents argued that current voluntary notice and takedown procedures work adequately and that there is no necessity for these to be put on a statutory footing. One respondent expressed the view that it might be more appropriate to amend the pre-action protocol to deal specifically with notice and takedown procedures. There were 5 respondents within this group who argued that a statutory notice and takedown procedure should be considered only in the context of proposals for a court order based procedure for material to be removed. They argued that simply putting the existing framework on a statutory footing would not improve the current position for secondary publishers.

There were 16 respondents that argued in favour of a statutory notice and takedown procedure. This group included academics, members of the legal profession, media organisations, and internet organisations. One argument was that while there are benefits to a voluntary approach, a statutory procedure is better suited to dealing with defamatory content as it is not possible for laymen to objectively assess the merits of a defamation complaint

against legal standards. Another view expressed was that a statutory procedure would help to clarify what amounts to actual knowledge under the Electronic Commerce (EC Directive) Regulations 2002.⁸

There were also views expressed on both sides, and by 4 respondents who made no comment on whether there should be a statutory procedure, about the length of the notice period in any procedure that was introduced. Several respondents argued that the 14 day period in Lord Lester's Bill was too long and that considerable reputational damage could be suffered in that time. Suggestions for shorter periods included 7 days and 24 hours. Two responses however, argued that the period should be longer, one suggesting 28 days as an alternative. Others felt to specify a time frame for the notice period would create too many difficulties and suggested that a more flexible approach should be taken, for example allowing removal as soon as reasonably practicable. It was also argued that as too short a period could discriminate against smaller intermediaries and too long a period against claimants, no legislation on the issue is appropriate.

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

A total of 71 respondents answered this question. Of those 56 considered that a new court procedure to resolve key preliminary issues at an early stage would be helpful. This group of respondents included academics, media organisations, legal professionals, members of the scientific and medical professions and non-governmental organisations.

This group of respondents argued that the proposed new procedure aimed at speeding up defamation proceedings is one of the most important elements of any proposed reform of the law as it would allow for key preliminary issues to be resolved at an early stage. A large number of these respondents, mainly from media organisations, expressed the view that the new procedure must involve a full case and cost management hearing where the court from a very early stage manages all aspects of cases, including costs. Others argued that there is a need for a new emphasis on judicial case management in defamation proceedings and that the proposed new procedure, allied with the reversal of the presumption for jury trial included in the draft Bill, was a positive step towards that. Several respondents also expressed the view that the new procedure would have the effect of reducing costs, which can under the current system become a real problem in defamation proceedings.

⁸ S.I. 2002/2013

9 respondents did not consider that a new procedure would be helpful. These responses came largely from legal professionals. A number of these respondents argued that a new procedure is not necessary on the basis that there is already scope within the existing procedures through the Civil Procedure Rules 1998⁹, and others that introducing a new system as proposed would only add further unnecessary complexity. Another argument made by this group of respondents was that it might significantly increase expense as litigants may attempt to use the procedure to delay proceedings in the hope of exhausting their opponent's resources before the trial stage.

Six respondents offered a range of other opinions without expressly supporting or opposing the proposed new procedure. One proposed that smaller defamation cases should be allowed to proceed in the county courts, and another argued that a better solution would be to develop a specialist libel tribunal. Another indicated that when a similar procedure was tried in an Australian state, it led to cases having two separate trials, one to determine meaning and the other to consider possible defences and, if appropriate, the level of damages.

Short form Questionnaire

A further 70 responses to this question were received through the short form questionnaire. Of these 65 were in favour of introducing a new court procedure to resolve key preliminary issues at an early stage, with 5 opposed. The two main arguments made by those in favour of the new procedure were that it would lower costs and considerably speed up the process. Several argued that the current system disproportionately favours parties with greater resources and that such a procedure may reduce the scope for large corporate entities from bullying individuals by building up huge costs. One respondent argued that any procedure should take place in the lower courts, whilst another argued that it should be done through the tribunals system.

Arguments against the new procedure were that there is no guarantee that parties would be motivated to resolve such issues at an early stage; that it would be preferable if mediation services could be used prior to cases progressing as far as to require a preliminary court hearing; and that the Press Complaints Commission already provides an alternative procedure.

⁹ S.I. 1998/3132

31. If so, do you agree that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute?

A total of 56 respondents answered this question. Of those 47 agreed that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute. This group of respondents included individuals, media organisations, legal professionals, members of the scientific and medical professions and non-governmental organisations.

This group of respondents argued that the substantial harm test, the meaning of the words complained of and whether the words complained of are fact or opinion are all issues which are capable of being determined as preliminary issues and where early determination will assist in the efficient conduct of the proceedings. Another argument was that making the procedure automatic in such cases is likely to assist in encouraging the early resolution of claims. Two respondents agreed that the procedure should be automatic, however, with the reservation that they remained opposed in principle to the substantial harm test being included in the Bill. Another view was that if combined with a limit on recoverable costs, an automatic procedure would save thousands of pounds in costs and hundreds of working days for both claimants and defendants by providing an opportunity for parties to settle claims more quickly.

However, 9 respondents were not in favour of the procedure being automatic in such cases. This group of respondents was largely made up of legal professionals but also included the Judicial Steering Group on the Review of Civil Litigation Costs. Three of these respondents argued that to make the procedure automatic would remove the necessary flexibility for judges to case manage cases in the most appropriate way depending on the individual circumstances of the case. Three other respondents expressed the view that it should be for the parties (one argued specifically for the defendant) to determine whether the new procedure would be an appropriate way of progressing the case, and that there should be no obligation upon them to enter into the new procedure automatically. Another view specifically related to the substantial harm test, and argued that this is not a matter that could conveniently be dealt with by the new procedure.

32. Do you consider that the issues identified in paragraph 127 of the consultation paper should also be determined (where relevant) under the new procedure? Please give your reasons.

Paragraph 127 of the consultation paper identified three additional issues that may be suitable to be determined under the new procedure. These were whether the publication is on a matter of public interest; whether the publication falls within the categories of publication in Schedule 1 to the Defamation Act 1996 for which the defence of qualified privilege is available; and consideration of costs budgeting in appropriate cases.

A total of 54 respondents answered this question. 20 respondents considered that all of the issues identified in paragraph 127 of the consultation paper should also be determined (where relevant) under the new procedure. This group of respondents included individuals, academics, legal professionals, members of the scientific and medical professions and non-governmental organisations. This group of respondents argued that by determining these issues at an early stage, the costs for all parties would be reduced and the process would allow defendants to make a decision at an early stage as to whether it is worth attempting to defend themselves at a full trial.

24 respondents, made up largely of media organisations, agreed that the issue of whether publications fall within the categories in Schedule 1 to the Defamation Act 1996 and consideration of cost budgeting should be considered under the new procedure, but expressed reservations about attempting to deal with the issue of public interest at a preliminary stage.

This group of respondents argued that there are circumstances in which it would be necessary to undertake a detailed examination of the facts and the evidence in relation to the issue of public interest and that this does not fit alongside the idea of quick determination of issues under the new procedure and could better be considered at a full trial. There were, however, two respondents who argued that public interest should be considered under the new procedure, but that Schedule 1 and cost budgeting issues should not.

6 respondents did not consider that the issues of public interest, section 1 and cost budgeting were suitable for determination at an early stage. This group was made up largely of legal professionals and argued that these issues require fuller consideration on a case by case basis and therefore would not be appropriate for determination under the new procedure. One of these respondents argued in particular that whether a matter is of public interest is reasonably clear and is better undertaken at trial. However, this respondent did agree that the issue of whether a publication falls within the categories in Schedule 1 to the Defamation Act 1996 could be considered as a preliminary issue.

One further response, from the Judicial Steering Group on the Review of Civil Litigation Costs particularly focused on the issue of cost budgeting. They indicated that the defamation costs management pilot had been extended and that they would make recommendations on this issue to the Ministry of Justice after discussing the outcomes with libel judges.

33. Do you consider that the issues identified in paragraph 127 of the consultation paper should also be determined (where relevant) under the new procedure? Please give your reasons.

A total of 42 respondents answered this question. There were 30 respondents who felt that there were other issues that could usefully be determined by the new procedure. However, there was a wide range of views expressed as to which other issues should be considered.

23 respondents, made up mainly of media organisations, argued that the new procedure should also be used to determine whether a publication falls within the category of absolute privilege where an absolute privilege defence is raised, but is disputed by the claimant. One respondent argued that the new procedure should also consider possible remedies available to claimants. They expressed the view that interim injunctions should be available to claimants in defamation cases and that these could be granted at a preliminary stage pending the defendant having the opportunity to prove a defence at a full trial. Other respondents, including legal professionals, academics and individuals suggested that issues to be considered under the new procedure could include different shades of meaning; the truth or falsity of a statement; and the responsibility for publication of intermediaries.

12 respondents did not believe that there were any other issues that could usefully be determined under the new procedure. This group was made up largely of legal professionals and academics. One argument made by this group was that matters which turn on the consideration and examination of oral evidence are often better left to the trial stage of the proceedings and that this limits expense. Another argued that to try to resolve too many issues in a preliminary procedure would result in a mini trial taking place before the full trial and that this seems to be at odds with the reasons given for introducing the new procedure.

34. Do you have any comments on the procedural issues raised in the note at Annex D and on how the new procedure could best operate in practice?

A total of 43 respondents answered this question and a wide range of views were expressed relating to the practical operation of the new procedure. Respondents to this question included individuals, media organisations, legal

professionals, members of the journalism and publishing professions, members of the scientific and medical professions and non-governmental organisations.

A group of 22 responses, made up largely of media organisations, made a number of suggestions. They argued for compulsory mediation to be built into the process in all publication proceedings, with attendance being mandatory. They also expressed the view that preliminary issues should be dealt with by a specialist judge and that the parties should consider whether the preliminary issues can be determined on paper. A further argument made by this group of respondents was that strict time limits should be applied to the filing of submissions where the new procedure is required and that judges should actively case manage this process. Their final suggestion was that the government should give consideration to expanding the Patents County Court to include publication proceedings.

8 respondents offered no further comments relating to the practical operation of the new procedure, or expressed their general support for the considerations raised in Annex D of the consultation paper. Two of these respondents specifically urged the government to strengthen the Pre-Action Protocol for Defamation in the way suggested in Annex D.

A range of other views were also expressed. A small number of respondents argued that it would be preferable for the preliminary issues to be the result of agreement between the parties, with the judge offering a preliminary view where appropriate with a view to focusing the minds of the parties. Two other respondents argued that the most important condition for any procedure is the speed with which it can be applied in order to get resolution of issues at as early a stage as possible. Another argued that the Bill should allow defamation claims to be heard in the county court, and a further respondent opposed the proposal to strengthen the Pre-Action Protocol as they felt there may be cases where this could cause unnecessary costs, delay or injustice.

35. Do you consider that the summary disposal procedure under sections 8 and 9 of the 1996 Act should be retained?

A total of 54 respondents answered this question. These were split equally, with 27 in favour of retaining the summary disposal procedure and 27 against doing so. The group of respondents in favour of retaining the summary disposal procedure included individuals, academics, legal professionals, and members of the publishing and journalism professions.

A number of those in favour of retaining the summary disposal procedure did not make any specific argument for doing so. However, those that did argued that the procedure allows for claims with little chance of succeeding to be

dismissed at an early stage. Others expressed the view that the procedure should not only be retained, but should be used more often than it is presently.

The group of respondents who opposed the retention of the summary disposal procedure was mainly made up of media organisations and legal professionals. Most of these did not provide any specific reason for their position. However a number argued that it is not necessary in addition to the summary judgment procedure in Part 24 of the Civil Procedure Rules. One of these respondents argued that a new provision should be introduced to allow the remedy of the defendant publishing a suitable correction or apology, or that the court should order a declaration of falsity.

36. If so, do you consider that any amendments could be made to the procedure to make it more useful in practice, and if so, what? In particular, should the Lord Chancellor exercise his power to amend the level of damages which can be ordered under the summary procedure? If so, what level should be set?

A total of 43 respondents answered this question. Of these 28 did not consider that amendments should be made to the summary or that the Lord Chancellor should exercise his power to amend the level of damages which can be ordered. This group of respondents was made up mainly of media organisations and legal professionals.

A large number of these respondents indicated that they had already expressed their opposition to retaining the summary disposal procedure in their answer to question 35. One argued that the procedure is not necessary or relevant in view of the existing summary judgment procedure and the application of judicial discretion. The remainder argued that the current level of damages available is sufficient and one in particular argued that their understanding was that claimants pursue defamation actions primarily for vindication of their reputation and not for financial reasons and that they were not aware of any evidence that suggests that claimants avoid using the procedure due to the existing cap on damages.

There were 15 respondents who did consider that amendments could be made. This group included individuals, legal professionals, media organisations and non-governmental organisations. 14 of these focused on the level of damages with 13 of those believing that the level of damages should be increased. There were a number of suggestions on the level to which damages should be increased. These ranged from £15,000 to £50,000 with £20,000 being the most commonly suggested figure. One respondent felt that the damages should be reduced in cases where the defendant was a member of the public to £3,000, with the £10,000 limit retained where the

defendant is a media company. The only respondent who argued for any amendments not relating to the level of damages indicated that the requirement in the summary procedure for there to be “no reasonable chance of success” should be removed, and expressed the view that this would make the procedure quicker and cheaper.

37. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?

A total of 66 respondents answered this question. Of these 34 considered that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally. This group of respondents included individuals, legal professionals, non-governmental organisations, members of the scientific and medical professions, and academics.

A number of this group of respondents argued that this would provide a greater balance to the Bill as it would be a positive measure in favour of claimants. A small number indicated that the Bill should include specific provisions relating to the remedies available to claimants in defamation proceedings in the same way that it includes provisions relating to the defences available to defendants. Others expressed the view that it is a matter of public policy to require that factual inaccuracies are corrected, either through publication of a court judgment or through a declaration of falsity. A small number of these respondents went further and argued that the court should have the power to order the publication of an apology, but others expressed the view that this would not be an appropriate measure. There was also significant disagreement from this group of respondents with the suggestion in the consultation paper that the Press Complaints Commission (PCC) already provides sufficient scope for the publication of summary judgments. Several argued that the PCC only covers the mainstream media and does not extend to situations involving the numerous forms of online publication, for example blogs and social networking sites.

30 respondents, made up primarily of media organisations and publishing and journalism organisations did not believe that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally. The main argument used by this group of respondents was that to extend the court’s power to order publication of its judgment would be a major interference with freedom of expression and the editorial freedom and integrity of the press. They expressed the view that such a measure could not be justified as either proportionate or necessary. One argued that to order publishers to publish court judgments is in contravention of Article 10 of the European Convention on Human Rights. Another pointed out that the Press Complaints Commission already has a similar power under

its self-regulatory framework and that to place a similar provision on a statutory footing would be at odds with the principle of self-regulation.

Two respondents did not express a particular view the question. One of these suggested that the court should be given the power to order the defendant to give an apology by way of a statement in open court and the other questioned whether it might not be preferable for courts to order the publication of their judgments online.

38. 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?

A total of 79 respondents answered this question. Of those 52 considered that further provisions to address situations where an inequality of arms exists between the parties would be helpful, and a number of these focused particularly on cases brought by corporations. This group of respondents was made up of individuals, media organisations, academics, non-governmental organisations, a public body and publishing and journalism trade organisations.

The majority of respondents in this group expressed their preference for a complete bar preventing any corporate claimant from suing in defamation, with the effect that corporate claimants would only be able to sue to protect their reputation where they were able to use the tort of malicious falsehood. Of these a small number argued in support of the Australian model, which prevents any company that employs more than 10 employees from suing in defamation. A number of the respondents arguing for a complete bar on corporations suing in defamation expressed a second preference for requiring corporations to show actual financial loss if the Government were not minded to consider a complete bar.

There was a smaller number of respondents who did believe that further action was necessary to restrict corporations bringing defamation actions but stopped short of calling for a complete bar. These respondents focused on requiring corporate claimants to show financial loss, although there were variations in the suggested terminology for example, “actual financial loss”; “substantial actual or likely financial loss”; and “serious and substantial likely or actual financial loss”. One of these respondents expressed the view that this requirement should not extend to non-profit corporations or entities with charitable purposes.

Two respondents who were arguing for action on corporations addressed the question of whether such provisions might cause difficulties in relation to the

European Convention on Human Rights. They argued that corporations do not have any Article 8 rights as they do not have the same family life or psychological integrity to uphold and therefore cannot benefit from Article 8 protection.

There were 16 respondents, largely legal professionals, who opposed any further action relating to corporations, or inequality of arms more generally. Several of these respondents argued that in reality the substantial harm provision proposed at clause 1 of the Bill would have the effect of requiring corporations to show financial loss, as it is the only viable way for a company to prove harm, and therefore no further action is required. One of these respondents specifically raised concerns that any action could inadvertently catch charitable and not for profit companies and questioned whether this would be appropriate.

Another argument was that there is a public interest in companies being able to protect their reputations and no public interest in companies being defenceless against unfounded defamatory allegations. This respondent also rejected the argument that companies can use public relations methods to restore their reputations, on the basis that public relations activity is viewed with much greater suspicion by the public, who would attach more weight to a court judgment. They also argued that the law already recognises the difference between individuals and companies as companies are entitled to lower damages that don't cover injury to feelings. Another argument made by this group of respondents was that it is important to recognise that companies do not always possess greater resources than individuals and often face defamatory attacks from other companies as well as from individuals.

There was a third group of respondents who raised issues around inequality of arms, but focused primarily on costs issues. Six respondents specifically argued that the costs proposals stemming from Lord Justice Jackson's report currently being taken forward by the Government are likely to increase inequality of arms issues in defamation proceedings and that action is required to redress the balance. One respondent argued that there should be qualified one way costs shifting until key issues in libel actions have been determined, and that this would result in a claimant only paying costs to determine preliminary issues where he or she is either extremely wealthy or happy to pay some of the costs. Conversely two respondents argued that the new costs proposals would improve the current situation as they will prevent recovery for unnecessary work and will go some way to protecting defendants from disproportionately expensive claims.

Short form Questionnaire

A further 71 responses to this question were received through the short form questionnaire. Of these 61 argued that further action should be taken in relation to addressing the equality of arms issue, with 10 arguing against. A number of those supporting further action argued that corporations should be prevented from suing for libel, as they do not suffer from reputational damage

in the same way as an individual. Many of these respondents argued that it should be a basic principle of access to justice that the law should not be biased in favour of those with the deepest pockets and that action to resolve such inequalities should be taken. Two respondents argued that legal aid should be available to the 'smaller' parties, and one argued that conditional fee agreements should be abolished. One respondent argued that the Bill should include provisions allowing for defamation actions to be brought on behalf of homicide victims by relatives of the victim.

A number of those that argued against taking further action did so on the basis that they were not aware of problems with the current system. Others argued that public money should not be spent to support people in defamation actions whilst another expressed the view that beyond the various funding options available to impecunious claimants or defendants (for example conditional fee agreements) there were no other substantive changes that could reasonably help in equality of arms situations.

39. 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.

A total of 61 respondents answered this question. Of those 42 did not agree with the suggestion that it would not be appropriate to legislate to place the *Derbyshire* principle¹⁰ in statute. This group of respondents included media organisations, academics, non-governmental organisations and publishing and journalism trade organisations.

The main argument used by this group of respondents was that the *Derbyshire* principle is extremely important and merited establishing in statute via codification of the common law, and that this would offer valuable protection to people who criticise Governmental institutions. A small number of those who felt that the *Derbyshire* principle should be codified went further and expressed the view that all non-natural persons should be prevented from suing for defamation. One respondent argued that it would be helpful in codifying *Derbyshire* to cross-refer to Article 6(3) of the Local Authorities (Indemnities for Members and Officers) Order 2004¹¹, which prevents local councils indemnifying its members and officers in respect of defamation proceedings, as many cases had arisen where local authority members and

¹⁰ Stemming from *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534

¹¹ S.I. 2004/3082

officers had been victims of online defamatory attacks and the scope of the *Derbyshire* principle in relation to such cases has not always been clear.

There were 19 respondents that agreed that it would not be appropriate to legislate to codify the *Derbyshire* principle. This group of respondents included legal professionals, individuals and academics. Many of these expressed the view that there is no significant problem in practice with the way in which the common law in this area operates and that codification may take away an element of the flexibility that exists under the common law. A small number of these respondents argued that to place the *Derbyshire* principle in statute would be unlikely to create any obvious problems, but that codification was unnecessary.

40. 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.

A total of 59 respondents answered this question. Of those 43 agreed 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. This group of respondents included legal professionals, media organisations, academics, individuals and publishing and journalism trade organisations.

One argument used by a number of these respondents was that it would be unhelpful for statute to try to introduce a comprehensive definition of other types of authority or individuals that should be covered by the *Derbyshire* principle as it would remove the ability of the courts to determine how this principle applied to other public authorities and individuals based on the facts of individual cases. Others argued that there is no problem with the current position and the case for extending the principle is not sufficiently strong. Another expressed the view that extending the principle would not strike the correct balance and might potentially leave individuals unable to protect their personal and professional reputations.

16 respondents including individuals, non-governmental organisations, academics, members of the scientific and medical professions, publishing and journalism organisations, and a media marketing company argued that the *Derbyshire* principle should be extended through legislation. A number of these argued that non-natural persons should not be able to bring a defamation action, or that failing that the principle should at least be extended to cover all public bodies or any body carrying out a public function. Another argued that even though no problems have been experienced with the

Derbyshire principle so far, problems may occur in the future and it is vital that all publically funded bodies are totally transparent and accountable. A further respondent expressed the view that it would be wrong for private companies performing public functions to have a reputational advantage over public authorities.

41. Do you have any comments on the costs and benefits analysis as set out in the Impact Assessment?

36 respondents answered this question. Many of these indicated that they did not have any specific comments on the costs and benefits analysis as set out in the Impact Assessment.

A number of media organisations argued that the range of individuals affected positively by these proposals will be much wider than those stated. They also disagreed with the view that the proposals would be likely to lead to an initial increase in court case volumes as they argued that any judicial decisions on the interpretation of the new law would simply replace similar decisions being made at the moment.

42. Do you have any information that you believe would be useful in assisting us in developing a more detailed Impact Assessment?

13 respondents answered this question. However, none of these respondents offered any firm statistical information that could be used in developing the Impact Assessment. However, one view that was expressed was that the benefits to society of the Bill should be considered over and above any economic considerations.

43. Do you consider that any of the proposals could have impacts upon equality?

9 respondents answered this question. The majority of these did not consider that the proposals could have impacts upon equality.

However, one respondent did argue that disabled people are often people without means living on benefits and consequently there is no way for them to access the libel laws even when they are seriously defamed, and another that the publication of defamatory material can have a serious, negative effect on transgender and intersex people.

Conclusion and next steps

1. The Government will consider the responses received to consultation carefully together with the recommendations of the Parliamentary Joint Committee on the draft Bill in deciding the way forward.
2. The Government's response to the Joint Committee's report and its conclusions in relation to the development of a substantive Bill and other policy proposals will be published early in the new year, together with a revised Impact Assessment and Equality Impact Assessment, and work will be taken forward in preparing a substantive Defamation Bill for introduction as soon as Parliamentary time allows.

Consultation Co-ordinator contact details

If you have any comments about the way this consultation was conducted you should contact the Ministry of Justice Consultation Co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Ministry of Justice
Consultation Co-ordinator
Better Regulation Unit
Analytical Services
7th Floor, 7:02
102 Petty France
London SW1H 9AJ**

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Legal Profession

5 Raymond Buildings

Addleshaw Goddard LLP

Alistair Brett

Bar Council Law Reform Committee

Berrymans Lace Mawer

Berwin, Leighton, Paisner LLP

British and Irish Law, Education and Technology Association

Carter-Ruck

City of London Law Society Litigation Committee

Clifford Chance

Law Council of Australia

Law Society

Lawyers for Media Standards

Lewissilkin

London Solicitors Litigation Association

Melkonian & Company Consulting Solicitors

Michael Hall

Minter Ellison Lawyers

Mishcon de Reya Solicitors

Motor Accident Solicitors Society

National Accident Helpline

Olswang LLP

One Brick Court

Reynolds Porter Chamberlain

Schillings

Simons Muirhead & Burton

Wales Commercial Law Association and Public Law Wales

Wiggin LLP

Withers LLP

Media Organisations

Associated Newspapers
BBC
BSkyB
Channel 4 Television
Channel 5
Economist Group
Express Newspapers
Guardian Media Group
Haymarket Media Group
Independent Print (Newspapers) Limited
ITN
ITV
Media Lawyers Association
National Magazine Company
News International
Newspaper Society
Press Association
Telegraph Media Group
Thomson Reuters
The Times
Trinity Mirror
Society of Editors
U.S. News Organizations

Individuals

John Andrews
Norman Bartlett
Mike Bennett
Adam Cain
John Clarkson
Freddy Crabbe
Mr & Mrs Cresswell-Plant
Brian Deer
Alexander Hilton
Robin Horton

John Lanasis
Richard Middleton
David Olivier
David Powell
Hardeep Singh
Des Thomas
David Vincent Smith
Jill Wallace

Medical & Scientific Professions

Association of British Science Writers
British Medical Journal
Dr Alex Bazin
Professor David Colquhoun, University College London
Professor Stephen Curry, Imperial College London
Professor Donna Dickenson, University of London
Simon Land, Royal College of Physicians
Dr Felicity Mellor, Imperial College London
Nature
Nightingale Collaboration
Professor David Norman
Physics World
Simon Singh
Connie St Louis, City University
Professor Charles W Turner, King's College London
Dr Peter Wilmshurst, Royal Shrewsbury Hospital

Academics

Professor Eric Barendt, University College London
Professor Trevor Hartley, London School of Economics
David Howarth, University of Cambridge
Professor David Lewis, Middlesex University
David Radlett, University of Kent
Professor Horton Rogers, University of Nottingham
Gavin Sutter, University of London
Professor Russell L Weaver, University of Louisville

Publishers, Booksellers & Journalism Organisations

Booksellers' Association
Chartered Institute of Journalists
Macmillan Publishers Ltd
National Union of Journalists
Professional Publishers' Association
The Publishers' Association
Reed Elsevier
Society of Authors

Non-Governmental Organisations

Global Witness
JUSTICE
The Lawfare Project
Libel Reform Campaign
Media Law Resource Center
Which?

Internet Organisations

Google
Internet Service Providers' Association
Mumsnet
Whatdotheyknow.com
Yahoo!

Libraries & Research Organisations

The British Library
JANET(UK) Education and Research Network
National Library of Scotland
Research Councils UK

Public Bodies

Information Commissioner's Office
Office of Fair Trading
The Civil Justice Council

Insurers

Markel International

HISCOX

Medical Protection Society

Judiciary

Judicial Steering Group on Review of Civil Litigation Costs

Diversity Group

Trans Media Watch

Media Marketing Company

Meridian Delta

Intellectual Property Organisation

Licensing Executives Society

Public Relations Organisation

Public Relations Consultants Association

Victims' Support Organisation

UK False Allegations Support Organisation

Annex B – List of respondents to the short questionnaire on the Ministry of Justice Website

Jonathan Agar	James Esiri	Stephen Pape
Paul Alderson	Sharon Fennell	Edward Pugh
Chris Anderson	Hayley Fletcher	Bob Roberts
Iain Armstrong	Alistair Frith	Sid Rodrigues
Clare Baitup	Ansie Ganbold	Roger Rumm
Robert Blackstone	Josie Grey	Ray Russell
Malcolm Boura	Blaise Grimes-Viort	Huw Sayer
Amanda Brodie	Kenneth Harrison	John A Shaw
David Brooks	Karen Heath	Hardeep Singh
Matthew Bolt	Ian Hemingway	Nigel Smith
Dave Bush	William Hetherington	Bob Smith
Xuanlun Cai	Trevor Hunter	Ishwaree Sockalingum
Jonathan Capper	Gavin Hughes	Sean Spillane
Adam Casey	Arfon Jones	Jack Stansfield
Sue Charles	George Kitson	Ian Stronge
Kim Child	Frank Lewin	Chris Swayze
John Clarkson	Harlan Leyside	David Tatham
Gregory Corden	Richard Lyons	Kevin Thurlow
Graham Cross	Dr Brooke Magnanti	Tracey Washbrooke
Danielle Curvy	Benjamin Maydon	Margaret Watson
Paul Daly	Eoghan Pádraig McSwiney	Christopher Webb
Stephanie Davy-Jow	Richard Middleton	David Allen Wieberg
Summer Decker	Sylvie Montgomery	Richard Wilson
Steven DeGroof	Alexandra Muotoh	Maria Klara Wolters
Nikolaos Diamantis	Thomas George Nippres	Andrew Wood

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defamation@justice.gsi.gov.uk.