PARLIAMENTARY DEBATES

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OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

Third Sitting

Thursday 21 June 2012

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Monday 25 June 2012

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: † Mr Christopher Chope, Mr Dai Havard

† Brake, Tom *(Carshalton and Wallington)* (LD)
† Djanogly, Mr Jonathan *(Parliamentary Under-Secretary of State for Justice)*
† Farrelly, Paul *(Newcastle-under-Lyme)* (Lab)
† Flello, Robert *(Stoke-on-Trent South)* (Lab)
† Fovargue, Yvonne *(Makerfield)* (Lab)
† Goodman, Helen *(Bishop Auckland)* (Lab)
† Grant, Mrs Helen *(Maidstone and The Weald)* (Con)
† Gummer, Ben *(Ipswich)* (Con)
† Heaton-Harris, Chris *(Daventry)* (Con)
† Hughes, Simon *(Bermondsey and Old Southwark)* (LD)
† Kwarteng, Kwasi *(Spelthorne)* (Con)
MacShane, Mr Denis *(Rotherham)* (Lab)
† Morris, David *(Morecambe and Lunesdale)* (Con)
† Paisley, Ian *(North Antrim)* (DUP)
† Pincher, Christopher *(Tamworth)* (Con)
† Slaughter, Mr Andy *(Hammersmith)* (Lab)
† Soubry, Anna *(Broxtowe)* (Con)
† Turner, Karl *(Kingston upon Hull East)* (Lab)
† Vara, Mr Shailesh *(North West Cambridgeshire)* (Con)

Sarah Thatcher, Eliot Barrass, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 21 June 2012

[Mr Christopher Chope *in the Chair*]

Defamation Bill

Written evidence to be reported to the House

D 01 Pirate Party

9 am

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): Good morning, Mr Chope. May I welcome you to the Chair? Due to events of national significance in the House today, I beg to move,

That the Order of the Committee of 19 June be amended as follows:

In paragraph (l)(b) leave out "and 1.00 pm".

Question put and agreed to.

Clause 5

Operators of websites

Paul Farrelly (Newcastle-under-Lyme) (Lab): I beg to move amendment 42, in clause 5, page 3, line 25, leave out paragraph (a) and insert—

'(a) it was not possible for the claimant to obtain sufficient identifying details relating to the person who posted the statement so as to be able to serve that person with legal process,'.

The Chair: With this it will be convenient to discuss the following:

Amendment 18, in clause 5, page 3, line 25, leave out from 'possible' to end of line 26 and insert—

(i) for the claimant to identify the person who posted the statement, and

(ii) for the claimant to contact the person who posted the statement.'.

Amendment 19, in clause 5, page 3, line 27, leave out 'the claimant gave the operator' and insert 'the operator was served with'.

Amendment 9, in clause 5, page 3, line 30, leave out 'any provision contained in regulations' and insert 'subsection (3A)'.

Amendment 10, in clause 5, page 3, line 30, at end insert—

'(3A) Where a complaint is received by an operator under subsection (3), the operator must publish a notice of complaint alongside the relevant statement and, if the operator fails to do so within seven days of notice of the complaint, the operator will only be entitled to rely on the standard defences available to a primary publisher, if sued for defamation.'.

Amendment 20, in clause 5, page 3, line 30, at end insert—

'(3A) The condition in sub-paragraph (3)(a)(ii) will be met if the claimant notified the web operator and the web operator did not elicit a reply (for whatever reason) from the author within a timescale provided for in regulations made under this section.'.

Amendment 43, in clause 5, page 3, line 33, leave out paragraph (b) and insert—

'(b) sets out the statement concerned and gives details as to why its publication is unlawful (including, for the avoidance of doubt, information as to why the statement is untrue or why other potential defences do not apply).'.

Amendment 21, in clause 5, page 3, line 35, leave out 'was' and insert 'is'.

Amendment 22, in clause 5, page 3, line 36, at end insert—

'(e) is authorised by a court, which is satisfied on the basis of the information that it has before it, that—

(i) the statement concerned is capable of being defamatory including having regard to section 1 (serious harm) and is capable of representing a real and substantial tort in the jurisdiction based on the extent of publication;

(ii) would not be likely to benefit from a defence to an action for defamation;

(iii) that the terms of subsection (3)(a) have been met.

(f) may specify a time limit by which the statement complained of should be removed in order to benefit from the defence in this section.'.

Amendment 23, in clause 5, page 3, line 37, at end insert—

'(aa) make provision as to the matters to be considered by the court when considering an application to authorise the issue of a notice of complaint, including the requirements needed to satisfy subsection (3A).'.

Amendment 33, in clause 5, page 3, line 45, at end add—

'(e) make provision to require website operators to set up and publicise a designated email address to receive notices of complaint;

(f) may require, without exception, authors to release their identities to website operators and complainants.'.

Paul Farrelly: Forgive me, Mr Chope. I am just ordering my papers.

Robert Flello (Stoke-on-Trent South) (Lab): On a point of order, Mr Chope. May I check that we will discuss clause stand part at the end of the groups of amendments, as we agreed in the previous sitting?

The Chair: If that has been agreed, that will remain the case.

Robert Flello: I am most grateful.

The Chair: I call Paul Farrelly.

Paul Farrelly: Thank you, Mr Chope. I am still ordering my papers, so if anyone wishes to make another point of order, it will give me even more time.

Tom Brake (Carshalton and Wallington) (LD): On a point of order, Mr Chope. Is amendment 42 on page 24 the one we will consider this morning?

The Chair: Is the right hon. Gentleman referring to page 24?

Tom Brake: That is correct.

The Chair: My amendment paper starts at page 35.

Tom Brake: I stand corrected, Mr Chope.

The Chair: Paul Farrelly, are you ready?

Paul Farrelly: Thank you, Mr Chope. I was not aware that we had finished consideration of amendment 17. I was a little caught out because I was expecting my hon. Friend the Member for Stoke-on-Trent South to be asked to conclude our discussions of that amendment.

The purpose of amendment 42 is to clarify any ambiguity in the meaning of the word "identify". Let me give the Committee an example. Somebody posts something defamatory on a website; the website operator is asked for the identity of the person and goes back to the complainant and says, "The person is John Smith", whether or not the person is really named John Smith. The amendment seeks to amplify the meaning of "identify" regarding the amount of identifying detail that the website operator is required to produce.

Mr Djanogly: The amendments would make a number of changes to the circumstances in which the defence under clause 5 may be used, the procedure for notices of complaint and the content of regulations.

Clause 5 provides website operators with a defence against a defamation action, provided that they did not themselves post the statement complained about. Subsection (3) sets out the circumstances of the defence. As the note I have provided to the Committee makes clear, the policy intention is that regulations will set out a process for website operators to put complainants in touch with the author of allegedly defamatory material.

Amendments 9 and 10 would place on the Bill the process that website operators must follow should they wish to avail themselves of the defence. An operator would be required to publish a notice of complaint alongside the material complained of within seven days of receipt of the complaint. Failure to do so would mean that he could rely only on the standard defences available to a primary publisher.

The amendment appears to be based on a recommendation from the Joint Committee, but there are a number of difficulties with the approach. When my officials met with internet organisations following the publication of the Joint Committee's report, those organisations identified significant practical and technical difficulties with posting a notice of complaint alongside defamatory material.

Robert Flello: On a point of order, Mr Chope. I think there is a little bit of confusion on the Opposition Benches, and I beg your indulgence to clarify it. Are we moving through each amendment separately, with the Minister responding to each one, or is it your intention to allow me to go through my amendments in the group before moving back to the Minister? I think there is a bit of confusion this morning.

The Chair: As the hon. Gentleman knows, in Committee, it is open to Members to speak more than once if they want to. In a sense, the way in which we proceed is in the hands of the Committee. Normally, a group of amendments is taken together, and when Members rise to speak, they address all the amendments. Obviously, the hon. Member for Newcastle-under-Lyme who moved the lead amendment did not feel the need to address the other amendments. The only person who indicated that he wished to participate in the debate after the hon. Gentleman sat down was the Minister, so I called him. The Minister is now making his speech, and I am sure that if he anticipates some of the arguments the hon. Member for Stoke-on-Trent South will make in due course, it will not prevent the hon. Gentleman from making those arguments again.

Robert Flello: I am most grateful.

Paul Farrelly: Further to that point of order, Mr Chope. I am afraid that while shuffling my papers, I only spoke to amendment 42. Thank you for the clarification that Members may rise to speak a second time if the Committee agrees that they may do so.

Mr Djanogly: May I ask your opinion, Mr Chope? Given the circumstances that have arisen, it looks as though it may be best if I sit down now and allow other hon. Members to have their say. I will then respond to them, as I should have done in the first place—unfortunately, other people were perhaps not as on the ball as they should have been. Would that be in order?

The Chair: That would absolutely be in order, but it has gone 9 o'clock so it is not that early in the morning, and I hope the Committee collectively will get its act together.

Robert Flello: I am most grateful, Mr Chope. If I seem a little tired this morning, it is because the Department for Transport decided that it must have a fire alarm test in its building at half 2 this morning, and its building is immediately behind my flat. The fire alarm lasted at least an hour. [Hon. Members: "Ah."] I hear cries of sympathy from the Committee, which I certainly appreciate.

I tabled amendments 18, 19, 9, 10 and 20 to 24. I will come to amendment 24 later in the scheme of things, as it is in a separate group. First, I repeat the comments that I made in Tuesday's sitting. Despite the Minister's generosity and good humour on Tuesday and a moment ago, the clause is, sadly, one of the weakest parts of the Bill and therefore needs the most amendments, as can be seen.

My amendments seek to make the best of the situation. I would like the Minister to reconsider the whole clause, taking advice from the many organisations that have expressed concern over it, and return with legislation that better addresses the concerns. Amendment 18 seeks to clarify the situations in which the defence created by the clause may be defeated, mainly by ensuring that the claimant is not only identifiable, but contactable before the defence is available to the defendant.

In order to explain my amendment and its intention, the clause requires a little bit of discussion. The internet today truly has spread; it is a global phenomenon and it is very much at the frontiers of free speech, which is something to be welcomed and encouraged.

As one Committee member mentioned, free speech is the very bedrock of an open and democratic society. I certainly would not dream of standing here for the many hours it would take to list all the quotes and

[Robert Flello]

witticisms of the most famous politicians and orators through the years on that subject—although I could. The internet has blurred national borders and the old boundaries that used to govern how far a statement could be published. A hundred years ago few individuals would have needed to worry that someone sitting at a desk on the other side of the world could write a damaging statement about them in, say, *The Times,* which would require legal action. Nowadays, it takes only as long as someone can type 140 characters into a mobile phone for their hundreds of followers to read a defamatory statement, and even less time for the re-tweets to begin to spread it to a far wider audience.

The Bill ensures that if a defamatory comment is posted on the website of one of our daily newspapers, that newspaper would be required to take steps to identify the individual. But what if, even were the individual to be contacted, they were in a country that would be of little assistance in bringing them to account? With well over 2 billion internet users and nearly 200 countries in the world, it stands to reason that some are going to prove more difficult than others to deal with and to contact. As it stands, the Bill would mean that users in some countries, in theory, could still post with impunity, and while I appreciate that the issue is not simple, I hope the Minister can tell us whether it could be better addressed in the legislation.

What if the individual posting on the website was normally a resident of a particular country but was on holiday in another, far flung, part of the world and using an internet cafe? There will of course also be data protection implications in the subsection. What if the author of the posting was a whistleblower, although one would of course expect whistleblowing protection to come into play? But the whistleblower might not live in a jurisdiction where he or she is protected by law in such circumstances.

My amendment seeks to address those issues. Would the website operator be able to provide the identity and contact details if that would breach data protection legislation in the jurisdiction? In any event, under amendment 18 the claimant is at least given a sporting chance of taking action against an identifiable and contactable author, or would be able to come back to the website operator when that is not the case. The amendment is designed to ensure that it is not sufficient merely for a website operator to identify the person; the claimant must also be able to contact them.

Amendment 19 is fairly simple and should give the Government few concerns as to its likely impact on the Bill. It would replace the phrase

"the claimant gave the operator"

in line 27 with

"the operator was served with".

We feel that the language needs formalising so as to make it a more official process with the operator being served with a notice of complaint in relation to the statement. That should ensure that the notice is given properly, and that there can be no grounds for ambiguity in any case where one side or the other could argue over whether a notice of complaint was given correctly. Amendment 19 paves the way for amendment 22 which I shall come to shortly.

9.15 am

Amendments 9 and 10 deal with a proposed new subsection (3A). They would require website operators to publish a notice of complaint alongside a complained-about statement, so that the operator was not simply able to leave the offending article on the website in perpetuity until ordered to take it down by a court. It need not lead to a situation whereby a website was littered with such notices. Indeed, we would begin to ask serious questions about a website's content if it had to publish such numbers of notices; we would wonder what the website was doing to produce so many potentially defamatory statements.

The provision would provide a form of protection for a claimant, ensuring that there is a record of a statement having given rise to cause for concern in the mind of a claimant. That is not easy to do in hard copy—say, a newspaper—but that is not the technology we are talking about. Clause 5 specifically deals with websites, where it is much more straightforward to post such a notice. The explanatory notes provide little help. I will not incur your ire, Mr Chope—I have already tried hard to do that this morning anyway—by referring at this stage to the letter written by the Minister to the Committee Chairs, which seems to be a quick stab at the regulations. I will come back to that letter in the stand part debate later today. Amendment 10, set up by amendment 9, would ensure that there is a quick and easy method of putting readers of the posting subject to challenge on notice that the claimant believes it to be a defamatory statement. It provides a backstop while the website operator contacts the author and obtains their permission to disclose contact details. Not only that, if the previous amendment is agreed to, it also provides a backstop while the claimant is actually trying to contact the author.

I suspect and fear that when the Minister gets to his feet he will not feel inclined to accept the amendments, no doubt citing his paper on unprofitable regulations. However, I am afraid that they will be subject to criticism later in the stand part debate, so I hope that the Minister will seek to widen his argument when he comes back to it.

Amendment 20 deals with broadly the same topic as amendment 18. I considered taking it out of sequence and dealing with it along with amendment 18. I will deal with it now in the sequence we have before us. It proposes an alternative subsection (3A):

> "The condition in sub-paragraph (3)(a)(ii) will be met if the claimant notified the web operator and the web operator did not elicit a reply (for whatever reason) from the author within a timescale provided for in regulations made under this section".

In other words, responsibility remains with the website operator to contact the author to obtain contact details or permission to provide the author's contact details to the claimant. The amendment would make much clearer the conditions under which the non-contactability provision, mentioned previously in amendment 18, would come into play, thereby defeating the defence. For the sake of clarity, amendment 18 should be adopted in conjunction with amendment 20.

Helen Goodman (Bishop Auckland) (Lab): I want to emphasise the importance of amendment 20. Without it, we might quickly reach a place where no one would

be liable for the defamation; neither the author nor the web operator. This is a massive legal loophole and quite unacceptable.

Robert Flello: I am grateful for the point that my hon. Friend makes. In the stand part debate I will develop my concerns about clause 5(2), and perhaps I might return to her point then. Amendment 21 would delete "was" from subsection (4)(c) and insert "is". Perhaps that is one of the more straightforward and simple challenges that we propose, alongside the attempt on Tuesday to insert "or", but I will not return to the poor puns of Tuesday. Amendment 21 is simple, and would change the wording of paragraph (c) to "where on the website the statement is posted".

It might seem a trivial amendment, but the change is necessary because the word "was" implies that a post used to be on the website but has since been taken down. That might be the case, and concern might be expressed about such a post, but clause 5 seems to operate in the context of a claimant being gravely concerned that a live and active posting on the website in question is defamatory; the language of subsection (4)(c) suggests that the post has already gone.

David Morris (Morecambe and Lunesdale) (Con): Will the hon. Gentleman clarify whether images have been considered in that context?

Helen Goodman: That is a very good point.

Robert Flello: The hon. Member for Morecambe and Lunesdale indeed makes a very good point, to which I will return in the clause stand part debate with a startling statistic on video coverage. Clause 5 seems to be incredibly narrow in addressing only website operators, but I will not stray into the stand part debate now—I am sure I would not be allowed to do so.

Helen Goodman: The hon. Member for Morecambe and Lunesdale has made a good point. There was a famous, now notorious, example of that in a newspaper photograph of Sienna Miller. She was kneeling down to talk to a child, and the photograph was clipped, with the caption underneath giving the impression that she was drunk. The hon. Gentleman raised an important issue, and I am sure my hon. Friend will elaborate on that when we get to the stand part debate.

Robert Flello: I am grateful to my hon. Friend, and I ask her to raise that point again when we reach the stand part debate because there is a lot more to be said. The word "was" suggests that a post used to be on the website and has since been taken down. In that situation, there may be no need to serve a notice of complaint, although, of course, circumstances cannot easily be predicted. To avoid any confusion, we believe the word "is" to be far more suitable.

I am delighted to say that we are almost there. Amendment 22 is perhaps the most substantial of all the amendments I have tabled on Clause 5 and, therefore, warrants a substantial degree of explanation. Subsection (4) has four paragraphs, and my amendment would insert a new paragraph (e), which has several sub-paragraphs, and a new paragraph (f). Subsection (4) states:

> "A notice of complaint is a notice which—
>
> (a) specifies the complainant's name,
>
> (b) sets out the statement concerned and…why it is defamatory…,
>
> (c) specifies where on the website the statement was posted, and
>
> (d) contains such other information as may be specified in regulations"—

whatever those regulations might be.

Amendment 22 would add further requirements to the conditions that need to be met by a notice of complaint and would provide a little more protection to website operators and claimants.

Simon Hughes (Bermondsey and Old Southwark) (LD): I am not an expert on this, but it strikes me that if an allegation is made that a teacher, doctor or police officer has done something seriously wrong, they are usually suspended while the matter is investigated. I am just opening up an idea for the hon. Gentleman and colleagues to think about: in such circumstances, it might be logical that when a notice comes from a court saying, "We think there is a case," there is an obligation immediately to remove the "offending material", rather than waiting for a resolution or a delayed removal.

Robert Flello: The right hon. Gentleman makes a good point. With reference to my previous amendments this morning, the teacher in that example would be able to put on the website the fact that they were going to take action because they felt the statement was defamatory.

Paragraphs (e) and (f) that I seek to add to subsection (4) would allow such an individual to approach the court and ideally get an early ruling that the statement was capable of being defamatory and that there were unlikely to be defences to it. Paragraph (f) on the time limit for removal of the statement is important, because the longer the statement making the allegation that the claimant believes is defamatory is on the site and not withdrawn, the more the problem for the claimant is compounded. I certainly hope that the Minister has taken that on board, and that he will address it when he responds, because it further demonstrates the weakness of clause 5.

Simon Hughes: Given what the hon. Gentleman has said, perhaps I might give a precise example: a complaint is made internally to the police that an officer has shown inappropriate sexual behaviour, either to a member of the public or to a colleague, and the officer is suspended while the matter is investigated. At the same time, the allegation is posted on a website. The police officer's reputation will not easily be corrected from that posting even if it may be corrected after an internal investigation. Waiting for a long time before action is taken could be hugely prejudicial to the career and reputation of such an individual.

Robert Flello: Indeed, and we could even consider the example of the Flood case, which involved allegations against a senior police officer. I am sure that that officer would have appreciated such amendments being available

[Robert Flello]

at the time, because there would have been a mechanism whereby the website concerned—*The Times*—was required to put up a notice and the steps quickly gone through to try to protect his reputation.

Helen Goodman: The point that the right hon. Member for Bermondsey and Old Southwark makes illustrates a further drafting problem with the clause. It seems to have been drafted in isolation from other areas of Government policy, the rules in the public services, for example. The Minister does not seem to have considered the interaction with other activity of the courts and professional bodies. Does my hon. Friend agree that the focus seems incredibly narrow?

Robert Flello: I do. That points yet again to the fundamental weaknesses of the clause. It is too narrow in its focus on website operators, does not seem to address any of the issues and, time and again, refers to regulations, which the Committee will not have the chance to consider, but I shall return to that in the stand part debate.

9.30 am

Amendment 22 states that a court should authorise a notice only if it is satisfied that the statement in question

"is capable of being defamatory",

and—it is worth repeating—is

"capable of representing a real and substantial tort in the jurisdiction based on the extent on publication",

and

"would not be likely to benefit from a defence to an action for defamation".

under clause 5(3). For the sake of clarity, I am talking about subsection (3)(a), as it would be amended by the amendment.

Amendment 21 is important, because it makes it clear that a website operator is not liable for a comment until they have knowledge that a statement is unlawful and not simply defamatory. Crucially, that would reflect the European Union e-commerce directive, which in my view and that of groups such as the Libel Reform Campaign is important. That directive is relevant to the amendment, as will become clear.

The Electronic Commerce (EC Directive) Regulations 2002, commonly known as the e-commerce regulations, introduced a number of provisions setting out the circumstances in which internet intermediaries should not be held accountable for material that is hosted, cached or carried by them. For instance, regulation 17 provides that a service provider shall not be liable for unlawful or illegal content sent or posted by any of its users, so long as the service provider does not initiate the transmission, does not select the receiver of the transmission and does not select or modify the information contained in the transmission. That is relevant to the amendment. In other words, if the above criteria are met, a service provider will be treated as a mere conduit, as opposed to an author, editor or publisher.

Further protection is offered in respect of caching information. Again, provided that certain criteria are fulfilled, the e-commerce regulations relieve service providers of liability for the automatic, intermediate or temporary storage of information, where such activities are performed for the sole purpose of more efficient onward transmission of the information to other recipients of the service upon such recipients' requests.

Service providers must ensure that they comply with any conditions that are imposed on access to the information, so they could still be liable if the owner of the site specifically prohibits caching. The other key element is the obligation on service providers to ensure that the information is updated. One criticism of caches is that the most up-to-date version of the site is not necessarily available to people using that particular service provider. Service providers need to be aware of that.

Regulation 19 addresses the issue of a service provider's liability in connection with the storing of information, where such information relates to unlawful activity. That is relevant to the amendment. The e-commerce regulations provide that the service provider shall not be liable if it does not have actual knowledge of the information or the unlawful activity. Again, my amendment deals with that point. Where a claim for damages is made, the service provider will be protected, so long as it is not aware of facts or circumstances that would have made it apparent that the information or the activity to which it relates is unlawful. It is not liable if it acts expeditiously to remove or disable access to the information on obtaining such knowledge or awareness, and providing that the recipient of the service was not acting under the authority or the control of the service provider.

The main point is to do with knowledge. If the service provider is made aware of the unlawful nature of the material, it is obliged to remove such material or disable access to it expeditiously. Regulation 22 provides that, in determining whether a service provider has actual knowledge, a court shall look at all matters that appear relevant in the circumstances and lists those particular things that a court shall take into account when reaching a decision. I am grateful to the Out-law.com website for that summary of the e-commerce regulations. The Bill does not deal with points raised in the e-commerce regulations, and no doubt the Minister will explain assiduously why that is so. I look forward his response.

The unamended Bill mirrors section 1 of the Defamation Act 1996. Section 1(3)(c) is relevant to the amendment. It states that someone involved only

"in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form",

is not to be considered the author, editor or publisher of a statement. Subsection (3)(e) makes the same provision when someone is involved only

"as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control."

As they stand, the provisions, we believe, mirror section 1 of the 1996 Act. The section has been found to be inconsistent with the e-commerce directive and, furthermore, is unjust, as website operators should know the nature of the defences that exist and that the statement in question is able to cause serious harm to an individual's reputation. The involvement of a court at the stage in question—and it need not be based on anything more

than a brief view, and could even be done electronically—should provide an early deterrent to the trivial and vexatious claims that the Bill is intended to prevent. At the same time, as the right hon. Member for Bermondsey and Old Southwark points out, it should also provide a quick and easy remedy, or the start of a remedy, for a claimant who feels that they have been defamed.

It could easily be argued that, without the amendment, the Bill will deliver even less protection to website operators than the current law, and I would urge the Government to accept it for that reason alone. The Committee will note that consequentially the wording of the 1996 Act would have to be changed. The details appear in amendment 25, which I will come on to—or rather, I think I will not, as I do not think it has been selected.

Along with campaign groups and other individuals, I believe strongly that amendment 22 is needed to improve the Bill dramatically. I hope that the Minister will give a detailed explanation, with his usual detailed reasoning—and I beg him to go into even more detail than he usually has the urge to do—about why he feels it is inappropriate. I am sure that the Committee has been listening carefully, and I urge him to deal properly with the point under discussion.

Amendment 23 is the last of my amendments, but I want also to comment on amendments 42, 43 and 33. Amendment 23 is linked to and complementary to amendment 22. It would ensure the required flexibility within the regulations to allow court orders to be issued correctly, and to provide the conditions under which a defence could be defeated.

Under the amendment, the Bill would provide for regulations to

"make provision as to the matters to be considered by the court when considering an application to authorise the issue of a notice of complaint, including the requirements needed to satisfy subsection (3A)".

Subsection (3A) denotes the new subsection that would be inserted by amendment 20.

To turn to the other amendments in the group, amendment 42, tabled by my hon. Friend the Member for Newcastle-under-Lyme, is similar to my amendment 18, and is equally worthy of the Committee's consideration. The Minister may feel able to accept one and not the other, although I suspect he will explain why he feels unable to accept either.

My hon. Friend's amendment 43 would change the wording of subsection (4) on notices of complaint, so that instead of providing that a notice

"sets out the statement concerned and explains why it is defamatory of the complainant"

the Bill would provide that it

"sets out the statement concerned and gives details as to why its publication is unlawful"—

which again refers back to the e-commerce regulations—

"(including, for the avoidance of doubt, information as to why the statement is untrue or why other potential defences do not apply)".

That tries to widen the provision and put a little bit more meat and detail into what is already in the Bill.

The Libel Reform Campaign believes that amendment 22 is, perhaps, a slightly stronger version, but it seeks to solve the same issue: the problem of EU law requiring the web operator to do something in relation to an unlawful comment, and not merely something that is asserted to be defamatory. The LRC believes that the problem with that approach is that it still relies on mere assertion by the complainant and not on an independent authority, after however brief an analysis.

Paul Farrelly: I thank my hon. Friend for speaking to amendment 43, as it gives me an opportunity to intervene. As he said, the amendments seek to provide more clarity and to bring the Bill into line with the current legal position on the e-commerce directive. I assure my hon. Friend that these are not competitive amendments, but alternative probing amendments for the Minister to consider.

Robert Flello: I am grateful to my hon. Friend and neighbour for that clarification. We are trying to deal with the problem in the same spirit. We are trying to crack the same nut, which is the weak and sadly—I genuinely mean sadly—missed opportunity that is clause 5. I will return to that later.

Amendment 33 was tabled by my hon. Friend the Member for Bishop Auckland, and seeks to amend subsection (5), which states:

"Regulations may…make provision as to the action required …make provision specifying a time limit…make provision conferring on the court a discretion…make any other provision".

The proposed amendment would add:

"(e) make provision to require website operators to set up and publicise a designated email address to receive notices of complaint".

That is an extremely good idea and I am sure that my hon. Friend will catch your eye, Mr Chope, to expand on it. Trying to fathom one's way around even the best websites is not always easy or straightforward. Trying to find an e-mail account to contact, even in some of the best websites, can often take some trawling; with particularly poor, badly designed websites it can be nigh on impossible to find out even whose website it is. I am sure my hon. Friend is itching to speak on that in a few moments' time.

Amendment 33 would create a new subsection (5)(f) that would

"require, without exception, authors to release their identities to website operators and complainants."

I am interested to hear what my hon. Friend has to say about that, as concerns about data protection again come into play. It is reasonable for an author to be required to release their identity to a website operator. I cannot immediately envisage, although I am sure that right hon. and hon. Members will leap to their feet and tell me otherwise, a reason why a website operator should not know who is posting on their website. Whether that information is subsequently disclosed or disclosable is another matter. The issue in question in the first part of proposed subsection (5)(f) is whether, without exception, authors have to release their identities to website operators. I believe that that should be the case. Data protection is in place to counter the situation where a website operator acts unlawfully to release that information. I will listen with great interest to what my hon. Friend says about the phrase, "and complainants", because there is a potential problem which, in some ways, goes through the heart of clause 5, and I shall return to that.

9.45 am

The Libel Reform Campaign has commented on the matter. Its observation is that proposed new paragraph (e) represents a vital need for complainants. The measure is already provided for by paragraph 6 of the e-commerce regulations, which state:

"A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information—

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner".

The paragraph includes other things such as where the service provider is registered in a trade. The e-commerce directive already addresses the matter, so it is amazing that the Bill does not do so. I will happily give way to the Minister if he can direct me to where clause 5 says the e-commerce directive will apply. I wait with great interest to hear what my hon. Friend says.

Finally, the LRC believes that proposed new paragraph (f) is perhaps not practical, irrespective of whether it is desirable in a free society, but again I wait with great anticipation to hear what my hon. Friend says. I look forward to the stand part debate, but in conclusion, I simply reiterate my comments on the unsuitability of the clause for the task it sets out to achieve. I do not expect the Minister to stand up shortly and agree that the clause is weak—I am sure that he will say that it is an extremely good clause and will do everything that we hope—but I hope that the simple fact that so many amendments have been tabled, and the fact that a number of organisations and individuals have expressed concerns about it, warrants a fresh look at the clause and an adoption of at least some of the amendments that we have discussed.

At the very least, I hope that the Minister—I look again at his officials—will give a full and proper explanation and discourse on the amendments, taking the time that the Committee needs to go through forensically why he feels that they are not required and why the Bill as it stands will do all the things that we are asking for. With the greatest respect to the Minister, I hope that he will not say that all those matters will be covered in regulations. Saying that when we do not have sight of those regulations does not allow the Committee to scrutinise the measure in a way that it needs to. I will conclude for the moment and look forward to speaking again shortly on new clause 2.

Helen Goodman: I rise to speak to my amendment 33, which would require website operators to have a complaints e-mail address and authors to release their identities to both website operators and complainants.

I agree with my hon. Friend's remarks, particularly on amendments 18 and 20, which would ensure that the provisions give a clear basis for a claimant to get in touch with the author of a defamatory statement and give a proper process and entitlements to a claimant. I also agree with amendment 42, tabled by my hon. Friend the Member for Newcastle-under-Lyme, which I think drives at something similar.

My amendment was triggered by the attachment to the letter the Minister sent to all members of the Committee at the end of last week. I shall refer to that attachment in explaining my amendments in a little more detail. In the attachment, the Minister sets out not a draft of the regulations referred to in clause 5, but what he thinks those regulations should cover. One sentence leapt out at me:

"Website operators will be encouraged to set up and publicise a designated email address for this purpose as a matter of good practice."

Encouragement is far too weak. If we are to have a system that enables people who have been defamed to contact website operators in order to get in touch with the authors of allegedly defamatory statements, it has to be clear cut. If the Minister tells me that the first part of my amendment is otiose because it already exists in another piece of legislation, I can accept it, but his regulations should make it clear, because they appear to be in conflict with provisions that are found elsewhere, so they would lead to confusion about the obligations on website operators.

As my hon. Friend the Member for Stoke-on-Trent South said, there is another question that I hope the Minister will address. Who are the website operators? Nowhere in the Bill do we see who the website operators are. There is a further problem: what happens if the website operator is not in the UK? I think clause 9 refers to cases where the claimant is in this country and the author is overseas in another jurisdiction.

David Morris: I see an anomaly here. I have had personal experience where a fabricated image appeared in a tabloid newspaper—obviously that would be covered under clause 1—but then it appeared on an internet site and the operator was one and the same. Will we look at different forms of limited company protecting one another that are in effect the same media outlet? How do we police that and how do we undo the damage that would have been linked with clause 1 in clause 5 when the refute has gone online? There is an anomaly that needs to be dealt with.

Helen Goodman: I am grateful to the hon. Gentleman for his remarks. The jurisdiction of the website operator is also significant. I am not as familiar with e-commerce legislation as my hon. Friend the Member for Stoke-on-Trent South but perhaps with respect to European websites there is coverage. Is the Minister aware that at the moment the regulation of website operators is done by a private body called ICANN in California? According to ICANN, it only knows the provenance of between one third and two thirds of all websites. That is a huge and serious problem, but the fact that it is a big problem does not lead me to the view that we should not tackle it.

Robert Flello: My hon. Friend raises an extremely good point. It is worth putting on record that, as I understand it, the number of websites ICANN has registered as Mickey Mouse stretches into tens of thousands, if not millions.

Helen Goodman: My hon. Friend is right. What I conclude is not that we should let that chaotic and anarchic system continue, but that the Minister should talk to his opposite numbers in the United States to find out what they are doing about that private regulatory system. Although we have issues about websites and

authors overseas, that does not mean we should have defamation in one country—a Leninist approach. We need proper international regulation. I hope the Minister will, perhaps with colleagues from the Foreign Office, take forward some proper international negotiations on how we address the issue.

The technology is new, and it has developed very rapidly, in unexpected ways. The law has not kept up with technological change, and it is important that we have an intelligent and comprehensive approach. As it is an international problem, we need to agree with our international partners on a framework under which we can make national legislation.

The situation we face at the moment is a bit like that of sailors in the 16th century. Once they were beyond their national limits, there were lots of pirates—precisely the situation we are in with the web. Over time, we have developed the international law of the sea, and we need to do something similar for the web. I hope the Minister can respond to the issue. If he has not thought very deeply about it before, I hope he will talk to colleagues in other parts of Government about it.

The second part of my amendment, which requires authors to give their identity to web operators and claimants, was triggered by reading the other parts of the Minister's proposed procedure. In stage 2, as set out by the Minister in the attachment to his letter, he says:

"The communication to the author should indicate what the terms of the complaint are, ask whether the author wishes to contest the removal of the posting"—

that is perfectly reasonable—

"and if so, whether he is content for his identity and contact details to be released to the complainant."

Without my hon. Friend's amendment 20, that would mean that there was a massive legal loophole, where if the author did not want to pass on his details, the website operator would not be liable, and nobody would take responsibility for the defamatory statements. I do not think I need to elaborate on why that is problematic.

10 am

The Minister needs to take the issue seriously. His rules will induce behaviour change. Anyone who has been trolling will immediately rush to that position, whether they have a good reason—the kind set out by the right hon. Member for Bermondsey and Old Southwark—for keeping their identity private from the claimant, or a bad reason. This seems to be a troll's charter. In the Minister's description of situation c in stage 3, he deals with what happens if the author replies and refuses to agree to the removal of the material:

"If the author indicates that he does not wish his identity and contact details to be released then the website operator must contact the complainant…to inform him that the author refuses to agree to removal of the material and has requested that his contact details are not released.

If the complainant wishes to take further action he will need to seek a court order for the website operator to release the identity and contact details that it has in relation to the author."

It is highly likely that many people will simply take the option of refusing to hand over their identity details, which will raise the bar significantly for the complainant. That is a massive loophole, although I am sure the intention was to provide a fairly easy, straightforward regime and set of rules that could be used at low cost. The Minister has agreed that we need to bring down the costs relating to defamation.

If everybody who posts allegedly defamatory statements moves immediately to the position in stage 3, situation c, and the complainant is required to get a court order, we are immediately back in the world of high legal costs, difficulty and slow progress. I am sure that the Minister will not be enthusiastic about extending legal aid in respect of such court orders. Such a loophole is unacceptable.

An important matter of principle is at stake, and there is an important issue to consider about the nature of free speech. Sometimes we hear that in an open democracy with free speech, people should be allowed to say whatever they like. Free speech rights, as Committee members know, are qualified by issues of morality. One such issue must surely be that if someone is old enough and big enough to make statements in public about another person, they are old enough and big enough to say who they are. The net has opened up the possibility of behaviour that is different from the kind that we find acceptable in the real world. We need to align our approach to the web with our approach in normal life.

I hope that the Minister will think about that matter, because the provision is a short cut to no improvement at all and to the web remaining a zone outside the law. Furthermore, it was implicit in the remarks of the hon. Member for Morecambe and Lunesdale that such a free zone, where people are allowed to do whatever they like, continues the current unfair competitive advantage that website operators and bloggers have over print and broadcast media, which are inherently and of necessity easier to regulate and control. If the Minister thinks that paragraph (f) of my amendment, which says that in all circumstances the identity of the author should be given to the claimant, goes too far, I suggest that specific exceptions are included in the Bill, relating for example to whistleblowing, not a general loophole.

Proponents of the new technology often draw an analogy between the web and driving. May I tell the Minister that when someone drives down the road, they have a driving licence and it is illegal to give a false name and address when we acquire a licence. It is a criminal offence. We need to consider taking a similar position with e-mail accounts and SIM cards. That is the case in France, where people have to give their true identity when they get an e-mail address. It is not an outlandish approach. Before I get lots of wild criticism, I am not suggesting that people should not be allowed to use nicknames, or that they can post things only using their full personal name and address on everything they do on the net. However, we should have a system to find out who people are, akin to the police phoning up the Driving and Vehicle Licensing Agency and saying "Car registration 684 BGH belongs to John Smith".

I am afraid I come back to the point that the Government are not taking a sufficiently strategic approach. It must be possible to trace people. They must be required to give their names and addresses to internet service providers so that they can be traced; otherwise we shall have an area of life where it becomes increasingly difficult to have a normal, legal system. The more people use the web, the more important it is that we have a principle-based approach.

Mr Andy Slaughter (Hammersmith) (Lab): It is a pleasure to be here under your chairmanship this morning, Mr Chope, and to follow what my hon. Friends the Members for Stoke-on-Trent South and for Bishop Auckland have said so far on the first set of amendments. Whatever the intentions of the Government, it is already clear that there are real problems with the practicalities of the execution of the defence they wish to give to the operators of websites.

I have a number of concerns about the practicalities in relation to how in fact it will be possible for a wronged person, a potential claimant, to take effective action against the person who put defamatory statements about them on to a website. Some of those concerns relate to jurisdiction and whether the person or the website operator is outside the jurisdiction, but I will leave them until the next set of amendments, because both my hon. Friend for Newcastle-under-Lyme and my hon. Friend the Member for Stoke-on-Trent South, in new clause 2, are trying to find a remedy and a way of clearing up the mess that the Government are making. The Minister will need to address in some detail all the points being made, otherwise we will end up with a wild west situation, where there is little protection from the increasingly hostile atmosphere that exists out there on the web.

I will confine myself to one area—identification. Some points have been made well in relation to amendments 42 and 18. There is a great gulf between simple anonymity, which is addressed in the exceptions to the defence set out in clause 5, and clear and full disclosure of identity to allow service in the jurisdiction. Given the way the web develops, that gulf could increase.

Let us take the example of pseudonyms, nicknames, aliases, and so on. People often adopt multiple identities on the web, on Twitter or wherever else, perhaps not for insidious reasons, but, nevertheless, they do. What amounts to identification? Does an internet protocol address qualify? An IP address allows tracing in some circumstances but not always. A certain degree of sophistication and skill is required to do that. I can give an example from my own experience.

Just before the last election, I noticed that my Wikipedia entry was changing every day in a way that was somewhat untrue and largely defamatory. We popped back and changed the entry every day, but it was getting a bit tedious—I do not understand any of the process, but fortunately I had some people under 25 helping out—so I said, "Is there nothing we can do to find out who these people are?" Cleverly, using the available information, such as the IP addresses that have to be supplied by contributors to Wikipedia, they managed to trace the address around the net. They found out other things that the same person had been doing—on the whole, it was the same person making the alterations every day—and, eventually, they found somewhere that gave their name and address. To my shock, horror and amazement, the person turned out to be quite a prominent member of the local Conservative Association. When the national press reported the story shortly afterwards, the changes quickly stopped.

My point is that when I had other things to do in the couple of weeks before the general election, I should not have had to spend my time on that, although perhaps that was part of the objective. I was fortunate to have technical assistance that went beyond my own abilities, but I am not sure that would have been the case for everyone in that position.

There are grey areas where there is a possibility of identification, but how far is the wronged person to go in seeking that information? How far should it be the responsibility of the website operator to provide it? The clause does not go far enough. Indeed, anything short of providing the real-life identity details that would allow proceedings to be served does not amount to identity in this case. The amendments would address that, so accepting them would correct the defect. I am afraid that other defects cannot be corrected even by amendments.

Helen Goodman: If my hon. Friend's approach was adopted, that, too, would produce useful behaviour change. If authors did not wish to play the game—as it were—and the web operator was clearly liable, the web operator would be incentivised to take down defamatory posts. We would then have a much better atmosphere on the net, and we would know that wild posts would not languish there as long as they do now. Does my hon. Friend agree?

Mr Slaughter: I agree, but although I think the solution I am suggesting is right and the only one that gives practical effect to what the Government say they are trying to achieve, which is to prevent anonymity standing in the way of redress, it will itself create a whole series of extra burdens, rules and regulations for website operators. The conclusion that we will probably reach at the end of this morning's debate is that the clause is not fit for purpose and needs to be reconsidered. We cannot have the Government shrugging their shoulders and saying—

Helen Goodman: It is too difficult.

Mr Slaughter: Either that it is too difficult, or "We said what we would like to happen and if it is not happening, well, that's tough."

10.15 am

The Chair: I call the Minister.

Robert Flello: Déjà vu.

Mr Djanogly: Yes, indeed, a slight sense of déjà vu. We have had a substantial and, from my point of view, helpful debate on clause 5. We have covered a lot of ground and have gone into significant detail. I made my preliminary remarks an hour and 15 minutes ago, so I will head straight into the amendments.

Amendments 9 and 10 would place in the Bill the process that website operators would have to follow should they wish to avail themselves of the defence. An operator would be required to publish a notice of complaint alongside the material complained of within seven days of receipt of the complaint. Failure to do so would mean that he could rely only on the standard defences available to a primary publisher. The amendments appear to be based on a Joint Committee recommendation, but there are a number of difficulties with the approach.

Following the publication of the Joint Committee's report, my officials met internet organisations, and those organisations identified significant practical and technical difficulties with posting a notice of complaint alongside defamatory material. For example, the content complained about might be embedded within a number of different sites, meaning that it would be unclear who was responsible for attaching the notice and where exactly it should be placed. There might also be difficulties in ensuring that the notice was transferred across to sites on which the material subsequently appeared.

In addition, the amendments would provide that where website operators failed to meet the requirements of the new provision they would not only be unable to rely on the new clause 5 defence, but would be prevented from relying on any other defence that existed in relation to secondary publishers, for example under the e-commerce regulations and section 1 of the Defamation Act 1996. If website operators did not comply with what was intended to be a voluntary process, the protection available to them would be significantly reduced, and we do not believe that that is what the hon. Member for Stoke-on-Trent South intended, or that it is right.

Amendment 42 would replace the requirement in subsection (3)(a) for the claimant to show that it was not possible for him or her to identify the person—I think that the hon. Member for Newcastle-under-Lyme, who tabled the amendment, referred to a Mr John Smith—who posted the statement, with the requirement for the claimant to show that it was not possible to obtain sufficient identifying details relating to the person who posted the statement, so as to be able to serve that person with legal process. The intention would seem to be to ensure that unless the complainant was in a position to be able to bring proceedings against the author, the website operator could not argue that the complainant had failed to satisfy subsection (3)(a).

The aim of the clause is to ensure that complaints concerning a statement on a website are directed to the author, and that may happen in two ways. When the author can be approached directly, through either contact details on the website or a mechanism provided by the site, the complainant should do so. Where that is not possible, it is proposed that there should be a simple system for allowing the claimant to approach a website operator who, to benefit from the defence, will need to take steps to facilitate contact with the author. I have already provided the Committee with a note on the principles that we intend to follow, and in light of the fact that a number of Members have commented on it, I should say that it is provisional, and was circulated to help the Committee's considerations. We will seek, in due course, the views of stakeholders—internet organisations, claimant lawyers and the libel reform campaigners—on the terms of draft regulations. We believe that the approach ensures that statements do not have to be taken down unnecessarily and that disputes are kept out of the courts in the first instance.

I want to make it clear that the word "identify" in subsection (3)(a) is intended to mean that the claimant has sufficient information to make contact directly with the individual who posted the material. What constitutes "sufficient" will obviously depend on the facts of the particular case. On a local discussion forum, where all users are known to one another, a name might in some cases be sufficient form of identification, but on a much larger forum, it is likely that some additional information, such as an e-mail address, might be required.

Where an author refuses to engage with the claimant, either when direct contact is made, or by refusing to give consent to the website operator to pass his contact details on to the claimant, a claimant may apply to the court for a Norwich Pharmacal order to obtain the information necessary to bring legal proceedings against the author of the defamatory statement.

Helen Goodman: The Minister is assuming more legal knowledge than some of us have. I did not quite catch what a claimant may apply to the court for.

Mr Djanogly: A Norwich Pharmacal order is a way of enabling someone who wants to make a claim to go around the immediate person with whom they have contact to see what the third party's details are. It is an existing procedure.

The amendment would effectively require the website operator to provide the claimant with information that they are unlikely to hold, and that they would, in many cases, find difficult to obtain. The amendment would defeat the simple system that the Government intend to establish, with the likely result that website operators continue to simply take down statements that are the subject of complaint in order to avoid potential liability.

In light of the helpful comments made by the hon. Member for Stoke-on-Trent South and by the hon. Member for Newcastle-under-Lyme, who tabled the amendment, there is some scope for reconsideration of subsection (3)(a). In particular, I can see that the simple fact that a claimant can identify the person who posted the defamatory statement does not mean that they will be able to do anything about it, but at the same time, the operator, under subsection (3)(a), will not be responsible for the libel. Perhaps we should not try to legislate for every eventuality. I will consider the matter further, so we will return to that at a later point.

Amendment 43 would amend one of the provisions in subsection (4), concerning the information to be included in a notice of complaint. It would replace subsection (4)(b), which is a requirement that the complainant explain why the statement is defamatory, with a requirement to give details as to why its publication is unlawful, including information as to why it is untrue or why other potential defences do not apply.

The Government believe that the amendment is wrong in what it seeks to achieve. Our intention in clause 5 is to put in place a system that will increase freedom of speech by superseding the current practice where complained-of material is often simply taken down by website operators who are fearful of being sued. At the same time, the clause will protect the rights of claimants by providing them with an easy and straightforward way of getting in touch with authors.

The amendment would tilt the balance against the complainant. It would require them to consider the defences available to the defendant and indicate why those would not apply. It is difficult to see how the claimant would be in a position, particularly at such an early stage, to know whether a defence applies. For example, how could a complainant know that the statement was based on a privileged statement; what information

[Mr Djanogly]

the author had before publishing the statement; what he knew about its reliability; and what steps he had taken to verify it? That information would simply not be available to the complainant. In any event, unless the complainant were a lawyer or took legal advice, it is difficult to see how they would be in a position to do that. In order to protect their rights and ensure that the notice of complaint fully complied with the requirements of the amendment, the complainant would inevitably be driven to additional cost and delay. Rather than making life simpler for the layman, it could increase the role of lawyers.

The simpler and more straightforward system that we propose is preferable. We envisage that the complainant will be able to give a notice of complaint to the website operator that sets out the name of the complainant; where on the website the statement is posted; what the statement is and why it is defamatory of the complainant, including sufficient explanation to enable the author to appreciate why the words complained of are inaccurate, insupportable or damaging; and whether the complainant has attempted to contact the author directly and whether they succeeded in doing so.

That will enable the website operator to locate the material in question and contact authors to seek their views on whether they agree to remove it. We consider that the information provided by the complainant will be sufficient to enable the author to reach a view on whether he wishes to agree to the removal, although we will of course seek views on the point in the course of drafting regulations. In the event that the author does agree to removal, the material will be removed. In the event that he does not, the complainant will be able to take further action to resolve matters, including through legal proceedings if the issue cannot be resolved by other means.

The procedure, as set out in clause 5, would enable matters to be resolved promptly and without the need for legal advice or legal proceedings unless that proves necessary. Amendment 33, which was tabled by the hon. Member for Bishop Auckland, would add to the list of matters that may be included in regulations under subsection (5). It proposes that regulations may require website operators to set up and publicise a designated e-mail address to receive notices of complaint, and may require authors to release their identities to website operators and complainants without exception. As the question of who is a website operator will be covered under amendment 46, I will not address that now.

In relation to the first part of this amendment, the note we circulated to the Committee indicated that website operators will be encouraged to set up and publicise a designated e-mail address for this purpose as a matter of good practice. It will be in website operators' interests to do that. If they choose not to use the process or do not respond to the notice, they will not benefit from the defence. Having a designated e-mail address will assist in ensuring that notices of complaint are readily identifiable, and will help to minimise delay. It is our view that website operators will act responsibly and adopt designated e-mail addresses as good practice, which is preferable to forcing them to do so.

In relation to the second part of the amendment, our note indicated that in responding to a notice of complaint, where the author of the material refuses to agree to the removal of the material complained of, it would be open to him to indicate that he did not wish his identity and contact details to be released. The amendment would require the author to release the details to both the complainant and the website operator. It is not clear what penalty would follow failure to do so. That would enable the complainant to pursue proceedings against the author without the need to seek a court order for the identity and contact details to be released.

It would no doubt be welcomed by many claimants, but I totally reject the hon. Lady's suggestion that this is a trolls' charter. We hope and expect, as she admitted, that it will induce behavioural change for the better. However, she will appreciate that her amendment would remove protection from authors who have a valid reason for wishing to remain anonymous, such as whistleblowers. It would not be welcomed by the Libel Reform Campaign, often quoted by the hon. Member for Stoke-on-Trent South, nor do the Government consider that it would be appropriate. While we agree that anonymity should not be used as a cloak for making abusive or untrue statements, there are sometimes legitimate reasons for someone posting material anonymously or under a pseudonym, and for not wanting their identity to be disclosed. It would go against the general intentions of the Bill that whistleblowers and others with valid reasons for not disclosing their identity should be forced to do so.

Under the system that we are proposing, if the author indicates to the website operator that he does not wish his name and contact details to be released to the complainant, the website operator must inform the complainant. If the complainant wishes to take further action he will then be able to seek a court order for the website operator to release the name and contact details that it has in relation to the author. We consider that that strikes the right balance: it provides a quick and easy way for the claimant to obtain the necessary details where the author has no objection to providing them, but then places the responsibility back on the claimant to secure a court order where the author is unwilling.

Helen Goodman: Will the Minister explain, to those of us who are not lawyers, how to obtain a court order. I would have to see a solicitor even to find out how to do that. I am sure most British citizens would be in the same position. What does it cost to get a court order?

10.30 am

Mr Djanogly: The hon. Lady would have to go to a solicitor to find out the cost, which would probably depend on the complexity of the case.

Turning to other amendments in the group, the combined effect of amendments 18, 19, 20, 22 and 23 would create a requirement in all cases for court authorisation before a notice of complaint could be given to the website operator. Under amendment 22, the court would assess various issues relevant to the likely success of a potential claim before giving authorisation. Once the notice was served, if a time limit were specified, the operator would have to remove the statement within that period to be able to avail himself or herself of the defence. The supplementary amendments 19 and 23 would support that new system.

Amendment 18 is an addition to the conditions that must be established by the claimant in order to defeat a website operator's defence under clause 5. At present, a claimant must show that it was not possible to identify the person who posted the statement, that they have given the operator a notice of complaint, and that the operator has failed to respond to the complaint in accordance with the regulations.

The amendment would add an additional requirement—that the claimant should show not only that they were unable to identify the person who posted the statement, but that they were unable to contact them. As I have already mentioned, the word "identify" is intended to mean that the claimant has sufficient information to make contact directly with the poster, and my initial view is that the requirement is unnecessary. However, as I said in relation to amendment 42, we shall review the issue.

Mr Slaughter: I am grateful for that information, which is important. Can the Minister give the Committee any idea of the stage in our proceedings when that is likely to happen? In the meantime, will he accept representations from the Opposition or indeed from practitioners about how the provisions might be amended to effect what we all want?

Mr Djanogly: I am always happy to take representations from the Opposition or, indeed, practitioners, and I look forward to receiving those. As for timing, I cannot tell the hon. Gentleman whether it will be while the Bill is in the Commons or in the other place.

Amendment 20 would provide for the condition to be met if the claimant notified the website operator and the website operator did not elicit a reply from the author within a time scale provided for in regulations. The Government do not consider that the process set out in the group of amendments is appropriate. The aim of clause 5 is to remove the threat of liability from website operators provided that they assist claimants to identify an author of allegedly defamatory material. That process, which will be set out in regulations, will be quick, clear and practical.

Introducing a requirement that the claimant should obtain court authorisation before a notice of complaint could be served on a website operator would create significant additional delay and expense for the claimant, both of which are unnecessary if the author is content for the statement to be removed. That potential delay is compounded by amendment 22, under which the court would assess various issues relating to whether a claim—if one were ultimately brought—would be likely to succeed. The court cannot realistically be expected to do that at the stage in question, in the absence of detailed evidence from the complainant, and from the potential defendant, particularly as the issues to be addressed include whether a defence is likely to be available.

The purpose of providing a notice of complaint is to help the complainant to identify the potential defendant. However, under the process established by the amendments, the court could potentially authorise the taking down of material without the defendant being informed or given an opportunity to make representations. That would work against our aim of trying to encourage freedom of expression. The Government consider that the system proposed in clause 5 strikes the right balance between the various interests involved, and will provide a far more effective means of resolving the issues.

Amendment 21 replaces the word "was" in clause 5(4) with "is". The existing wording focuses on the fact that the statement was posted on the site and is not intended to suggest that it must no longer be there for a complaint to be valid. On that basis the amendment does not appear necessary.

My hon. Friend the Member for Morecambe and Lunesdale asked whether images can be defamatory. The case law uses the phrase "defamatory statement" in a general sense. It does not mean written words alone. There is no legal doubt about that. In fact, it helps explain why the word "imputation", which the Committee will recall we discussed on Tuesday, is important. The issue is not necessarily what particular words say, but what the meaning of the statement, including an image, imputes.

The hon. Member for Stoke-on-Trent South queried whether there is a need for reference in clause 5 to the e-commerce directive not applying. The clause does not affect the defences available under the e-commerce directive. It deals with a separate issue related to website operators that host user-generated content. In the event that a website operator also falls within the types of internet service covered by the directive, both defences will potentially be available.

The hon. Member for Hammersmith asked about issues where the defendant or website operator is outside the jurisdiction. We recognise that once the new system we are proposing is introduced, difficulties may still arise in relation to taking action outside this jurisdiction. That is not a reason for not taking action to provide a fairer and more balanced system for resolving complaints about online material generally. There are detailed rules governing jurisdictional issues, which will apply in all cases where difficulties arise.

Simon Hughes: I have waiting for an appropriate moment to intervene and I think this may be it. Obviously, these issues are technical, and the Government and experts have given them lots of thought. Can the Minister tell us whether some of the learning that he is using to argue the case for the present drafting comes from comparable common law jurisdictions, for instance, such as Canada, Australia or New Zealand? The issue is the same, in essence, in other parts of the world, and the technology is in the same place, so it seems sensible to make sure we learn and benefit from work others have done in the last few years in legislating on these issues.

Mr Djanogly: The best way I can answer my right hon. Friend's point is to recount a conversation I had with Lord Lester just before Second Reading, when he said that all the world's eyes are on us, and that we are leading the way in this area.

I finish by making the general point that the intention of clause 5 is to deal with the particular problem that exists in defamation law whereby website operators currently seek to remove any risk of liability by immediately removing material on receipt of a complaint. It is not the intention of the Bill to regulate the internet more

[Mr Djanogly]

widely. That is a much broader issue for colleagues in the Government, particularly the Department for Culture, Media and Sport.

Robert Flello: I am grateful to the Minister for taking the time to go through the various amendments and to put on record his observations. One of his last comments, that the eyes of the world are on us, is quite a telling one. It puts even more pressure on the Committee to get the Bill right.

On amendments 9 and 10, the Minister said that website operators said it was all too difficult—but they would say that, wouldn't they? It is too difficult for me to service my own car, so I get somebody in to do it. Talking generally on amendments 18 and—I think—amendment 42, the Minister spoke about local discussion forums. There are still secret authors on local discussion forums, but I am grateful that he will reconsider 5(3)(a).

I shall not press my amendments in this group. The intention was to probe and push the Minister to see that clause 5 is very weak in the areas we have discussed so far this morning. I want to move on to new clause 2 and amendment 24, and indeed the stand part debate, so I shall not press my amendments.

Paul Farrelly: Regarding amendment 42, the Minister has indicated such willingness to move that I feel the Committee has experienced its first tectonic moment.

Simon Hughes: It was not that exciting.

Paul Farrelly: It certainly was on this side. On amendment 43, the Minister gave a full response, and I am sure that as members of the Committee we will be lobbied intensively by the website operators, the legal profession and the libel reform campaigners once they have considered his remarks. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Paul Farrelly: I beg to move amendment 44, in clause 5, page 3, line 36, at end insert—

'(4A) If, after service of a notice of complaint, an operator continues to publish the statement complained of, the court may, on an application by the claimant, make such order requiring the operator to take down the statement as the court considers just.'.

The Chair: With this it will be convenient to discuss the following:

Amendment 45, in clause 5, page 3, line 44, at end insert—

'(ca) make provisions as to the procedure to be followed on the making of an application for a take down order under subsection (4A).'.

New clause 2—*Operators of websites: order for removal of defamatory statement*—

'(1) This section applies where an action for defamation may be brought in respect of a statement posted on a website, whether or not such an action is actually brought and regardless of whether the action lies against the operator of the website, the author of the statement or both.

(2) A claimant may apply to the court for an order that the operator remove the relevant statement from the website.

(3) Where an application for an order under this section is made—

(a) the operator shall inform the author, if identifiable, of the relevant statement about the application;

(b) both the operator and the author, if known, may make written submissions to the court in relation to the application, such written submissions to be made available to the claimant, the operator and the author, if known; and

(c) the judge shall take into account any such written submissions before coming to a decision in relation to whether or not to grant the order.

(4) Any order under this section must be implemented by the operator no later than seven days following notice of the order; and failure to comply with this time limit will render the operator liable in an action for defamation as if the operator were the author of the relevant statement.'.

Paul Farrelly: The purpose of amendment 44—amendment 45 is consequential—is to ensure that a court has jurisdiction to enforce a takedown procedure. It is intended to cover the position of a website operator who posts a defamatory comment and willingly gives up the identity of the person who has posted it, but then, if that person is sued successfully, the website operator—for whatever reason—decides not to take the defamatory comment down. The whole clause as drafted assumes the website operator will be responsible. The amendment and new clause 2 seek to move in the same direction, but do not make that assumption. They cover the position if a website operator—for whatever reason—is irresponsible.

My amendment 41, which was not selected, was intended to cover that point as well, and make an amendment to clause 5 that also aligns it with e-commerce regulations. One of the problems in the clause is that so far it gives website operators a complete defence and does not give complainants the opportunity to go to court to enforce a takedown order. I will draw my comments to a close, but I wish briefly to make further comments about the whole clause when we debate stand part.

Robert Flello: New clause 2 is an attempt to improve dramatically what is currently in clause 5. Subsection (1) sets the scene. It is deliberately designed to be a catch-all provision covering postings on websites. Subsection (2) makes it clear that a claimant has a definite course of action that they can pursue. Subsection (3) says:

"Where an application for an order under this section is made…the operator shall inform the author, if identifiable"—

I take on board the Minister's comments about believing the word "identify" covers contactable—

"of the relevant statement about the application…both the operator and the author, if known, may make written submissions to the court in relation to the application, such written submissions to be made available to the claimant, the operator and the author, if known; and…the judge shall take into account any such written submissions before coming to a decision."

The subsection is designed to give a straightforward process for quickly and simply addressing a complaint. Both parties—the claimant and the author—have the chance to set out their case before a judge makes a ruling. That should be a quicker and cheaper means of resolution.

10.45 am

Subsection (4) says:

"Any order under this section must be implemented by the operator no later than seven days following notice of the order; and failure to comply with this time limit will render the operator liable in an action for defamation as if the operator were the author".

The last part is intended to ensure a speedy approach to compliance with the lack of defence severely focusing the operator's mind. The purpose of the new clause is to ensure that a website operator cannot claim the defence of providing details, then leave the offending article on the website until a court orders them to take it down, given that there will be cases where cases against the author cannot proceed because the author is impecunious or out of jurisdiction.

For balance, I am aware that there are concerns that the new clause appears to allow the court to censor a website—obviously that would not apply to a book or other publication—without there being an action for libel. For example, perhaps a wealthy claimant might use this to chill. However, it was tabled in the spirit of wishing to improve the Bill. I look forward to hearing what the Minister has to say. The intention is to achieve a quick resolution: written submissions can be made to a court, a judge can hopefully make a speedy decision and rule accordingly. I will not detain the Committee by commenting further on what my hon. Friend the Member for Newcastle-under-Lyme said a moment ago.

Mr Slaughter: If the Minister thought that I had said all I wanted to say about offenders out of the jurisdiction, I have not. I want to say a little bit more about that. I would welcome his response in the same spirit as he responded to the issues on identity, as these are related points. I raise the matter because the amendments tabled by my hon. Friends the Members for Newcastle-under-Lyme and for Stoke-on-Trent South would act as a safety net in cases where it is simply impossible, despite the identity of the malefactor being known, for the abused party to obtain redress. There are already some cases of that.

New clause 2 would deal with the situation where the author of the defamatory comment is domiciled outside the jurisdiction, a claim is issued, and there is a judgment that the matter should be taken down by the website operator. A problem continually arises that is connected to the points that my hon. Friend the Member for Bishop Auckland made earlier. We live in a different world from a hundred years ago. It is perfectly possible for people to take out particular vendettas or to pursue grudges from the other side of the world, sometimes in jurisdictions where it is impossible for action to be taken. I shall give three examples.

In the first case, the prospective claimant's children were accused online of being paedophiles by a fugitive from justice who had fled to Mexico. Every time the children applied for a job in the UK, their Google entries revealed the wholly untrue allegations of paedophilia. Checking job applicants on Google is quite normal practice now; it is a new form of taking up references, and I am sure that members of the Committee have done that. It took months for the material to be removed by Google only for it to return continually because the person in Mexico was keen for that to happen. It was catastrophic for the children, who could not get jobs in the UK because at every interview they attended the articles were raised.

In the second case, an individual was libelled on the internet by someone based in Panama, and the libel was spread online between websites in Spain, the USA and other jurisdictions. The individual had to step down as director of his company because the investors were concerned about the allegations. He cannot get the allegations removed from the various websites because, as the courts in every other jurisdiction inform me, he must bring the claim in Panama. However, the person spreading the libel is well connected in that country, so the individual is unable to obtain redress through the Panamanian legal system.

The third case involves someone living in England who was libelled by someone in Iran. He tried to bring a claim in England, but his lawyers advised him that he would not be able to obtain redress because there was not substantial enough publication here to satisfy the Jameel test. He brought a claim in Iran, but the judge was threatened by people connected to the publisher. That claim also failed.

Those are all cases that leading libel lawyers—perhaps the first port of call in such circumstances—have discussed with me. I suspect that such examples will become increasingly common. In the first case, some redress could eventually be secured by bringing an action against Google.

Robert Flello: As the Bill stands, subsection (2) would get Google off the hook.

Mr Slaughter: That is right. If the matter does not receive far more scrutiny from the Minister and his civil servants, there could be a lot of unintended consequences.

On the definition of "website operator", if there is a broad definition, which includes internet service providers and organisations such as Google, and if those are "responsible" organisations and can be proceeded against, there might be the possibility of redress. It needs to be made clear in the Bill, however, that such redress is available, which is what the amendments are designed to achieve.

Helen Goodman: Picking up on the intervention by my hon. Friend the Member for Stoke-on-Trent South about Google, people who appear to be responsible might, in practice, not always behave responsibly. I am sure that my hon. Friend the Member for Hammersmith is aware of the cases that our hon. Friend the Member for Walthamstow (Stella Creasy) brought against Google when postings were made as part of gang warfare on YouTube. She contacted Google and asked it to take the postings down. It took her nine months. When we had a meeting with Google, it said, "We are located in the United States, so we don't have to abide by English law." So, even apparently respectable organisations can behave irresponsibly.

Mr Slaughter: Absolutely. There have been a number of similar cases, involving Google and other such web engines. To use one of the Minister's favourite phrases, it might be that they do not have sufficient skin in the game. Such examples are of huge concern, and can

[Mr Slaughter]

destroy the lives of individuals who are defamed. Actions can be carried out entirely with malice, by individuals who are unreachable, and therefore the only redress is through the hosts, but they are unconcerned—to put it mildly—and effective and speedy remedy must be provided. This is one of the most serious aspects of the Bill, because if such remedy is not provided, it will be open season. I think the Minister is wrong to say that this is not a trolls' charter. It is a trolls' charter and, in particular, a world trolls' charter. There is something else that our amendments, good as they are, might not address, although they try to do so. What happens when the organisation is not as responsible as Google, with a host based out of jurisdiction? Where is the remedy?

Helen Goodman: My hon. Friend makes another good point. I understand that there are people who deliberately put their sites offshore in order to evade constraints. The claimants and the authors could all be in the UK and the website hosted in another jurisdiction. It is not clear if the Minister believes that the Bill deals with that dog-legging system.

Mr Slaughter: That is not a new problem. It has been encountered in areas such as child pornography on a website. Steps have been taken to block websites and hosts that have pernicious material of that kind. That is obviously a serious step to take, and there has to be a balance. If there is free rein because not just the perpetrator of the libel but the host—the engine that enables it to be disseminated—is untouchable, because it is not just out of jurisdiction but is based where the rule of law effectively does not run, at the moment nothing can be done.

If the objective of clause 5 and the Bill is to look in the round at defamation and the internet, that matter should be addressed. What steps do the Government intend to take to deal with such situations? It is not good enough to say, as the Minister did earlier, something on the lines of "Let us do what we are doing here and then we will see what happens later." It sounds to me as if the point about being out of jurisdiction has been put in the "too difficult" tray again. I do not think that should be possible, as we might otherwise end up creating more problems than we solve when the Bill is enacted.

Mr Djanogly: New clause 2 and amendments 44 and 45 seek to create mechanisms whereby a claimant could apply to the court for an order to remove allegedly defamatory material posted on a website, without actually requiring the claimant to bring defamation proceedings in relation to that material. The Joint Committee recommended the inclusion of such a mechanism in the Bill. It envisaged a process whereby, after an application to the court by the complainant, a website operator would inform the author about the application and both sides would then be able to submit brief paper-based submissions for the judge to consider before making a prompt decision on whether the material should be removed.

The Joint Committee also raised the possibility that where website operators did not comply with a removal order within a set time scale they could be held liable for the material as a primary publisher. In the Government's response to the Joint Committee we expressed concern that that approach would be likely to have significant resource implications for the courts. It has proved difficult to obtain information on the likely number of cases. Indications are that complaints are received by website operators on a regular basis. Even if only a proportion of complainants chose to pursue a court order for takedown, the number of cases is likely to be substantial, which would represent an entirely new task for the courts and would add to the substantial burden they are already under.

There are also questions about the extent of the evidence the court would require to reach a decision on whether material should be taken down. The Joint Committee proposal and the approach in new clause 2 envisage a paper-based system, whereby the court is asked to make a quick decision on the basis of written submissions from the parties involved. However, it is difficult to see that system providing the court with adequate information to come to a full, considered decision. The risk is that the court would be encouraged to take a cautious approach and to order removal in a majority of cases, which would not provide any further protection to freedom of expression than the current situation, whereby websites remove material to avoid potential liability.

11 am

Alternatively, some have suggested that the court should determine issues, such as whether there is serious harm and whether defences may be available, before reaching a decision on takedown. There would clearly be difficulties in such a mini-trial approach, not least in the time that that would require, leading to possible delay in the removal of the material, and the costs that would be incurred to produce evidence on substantive matters at such an early stage.

There is also a risk that bringing cases within the aegis of the court for a decision on takedown could encourage claimants, where takedown is ordered, to pursue further litigation against the material's author for other remedies, such as damages, because they already have a judgment in their favour. By contrast, under clause 5, complainants will often be able to get the material removed without going near the court. The amendments could therefore add significantly to overall levels of litigation.

Our approach in clause 5, and in the procedure that will be set out in regulations, seeks to provide a mechanism that allows parties to resolve matters without the need for court proceedings. The process will be quick, clear and practical. Where the complainant and the author are in contact but cannot agree a way forward, material would be left up on the website, but we believe that is right until the court has established whether a statement is in fact defamatory.

The Government consider that the system proposed in clause 5 strikes the right balance between the various interests and will provide a far more effective means of resolving such issues. With amendments 44 and 45, the hon. Member for Newcastle-under-Lyme may be suggesting an additional system that would ensure that website operators have to abide by a successful claim. We will consider whether anything further is necessary to address such situations. On that basis, I hope that the hon. Gentleman will agree to withdraw his amendment.

Robert Flello: The Minister is correct that new clause 2 seeks to reflect the Joint Committee's views. He says that he is concerned about overburdening the courts, but we are seeking justice for ordinary people who are defamed. Currently, people have to put up with being defamed because they cannot afford to pursue a full defamation case. The new clause would introduce a cheaper way to resolve such matters quickly. If the new clause is not accepted, such people would have to pursue a full defamation case at even greater cost, taking up more court time. As my hon. Friend the Member for Hammersmith pointed out, there are many jurisdictions where people, including large organisations, cannot be pursued. That said, a little more work is needed to tighten up some of the provisions of new clause 2, so I do not propose to press it to a vote. I will rework the new clause and bring it back in a tighter form.

Paul Farrelly: I welcome the Minister's concluding comments—I feel that was a second tectonic moment—in which he recognised that there may be irresponsible website operators who continue to post defamatory material, having fulfilled all the requirements of clause 5, which is well intentioned but not perfect. On the basis of the Minister's comments, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Paul Farrelly: I beg to move amendment 46, in clause 5, page 3, line 45, at end insert—

'(5A) For the purposes of this section—

(a) the term "operator of a website" includes a web host, an operator of a social media site, an operator of a search engine or any other information society service provider;

(b) an operator of a website which has an automated or manual moderation policy through which it removes or edits content posted by third parties will not be treated as the poster of a statement for the purposes of this section unless the claimant can demonstrate that—

(i) the website operator knew or ought to have known that it was facilitating the publication of unlawfully defamatory material; or

(ii) the removal or editing of the material by the website operator rendered the statement defamatory.'.

Given the time, I do not want to delay the Committee with a lengthy speech. The intention of the amendment, as the Minister and his advisers will have established, is that the clause should define a website operator and make it clear who a poster is. In that sense, it travels in the same direction as amendment 17, tabled by my hon. Friend the Member for Stoke-on-Trent South. One of the purposes is to make it clear that a website operator cannot be considered a poster simply because it has moderated content.

Mr Djanogly: Amendment 46 defines the term "operator of a website" for the purposes of clause 5. It also provides that an operator of a website that removes or edits content posted by third parties will not be treated as having posted a statement and can still benefit from the new defence, unless the claimant can show that the operator knew or ought to have known that it was facilitating the publication of unlawfully defamatory material, or that removal or editing of the material by the web operator rendered the statement defamatory.

The Government take the view that including a definition of a website operator on the face of the Bill is unnecessary and potentially unhelpful. We think the courts will readily understand the term "operator of a website". In addition, given the pace at which the internet and technology are developing, to attempt to formulate a precise definition that provides a comprehensive list of the areas covered would run the risk of focusing on technology-specific detail, which could quickly become out of date.

Mr Slaughter: I take the Minister's point, although the definition is not a closed one in my hon. Friend's amendment. Would the Minister say, for the avoidance of doubt, that currently the instances given under proposed new subsection (5A)(a), which refers to

"an operator of a social media site, an operator of a search engine"

and so on, would all qualify as operators of a website?

Mr Djanogly: That may be the case, but we are talking about what the future will hold, rather than the current position. For example, if a definition had been attempted a few years ago, there would have been no such thing as a social networking site. We think that attempting a definition would cause more problems than it would solve.

The clause is intended to recognise the fact that users may post on websites material for which the individuals or companies that host the site cannot reasonably be held responsible. Those would include website operators such as Facebook or Mumsnet, and online newspapers and bulletin boards that enable users to post and read messages. The clause aims to make sure that there is responsibility, and that any appropriate redress is directed at the right party—namely the author of the allegedly defamatory material. To that end, to the extent that a website operator, such as the BBC, posted its own material, it would not be covered. In that situation, the operator would clearly be a primary publisher. However, if users post material on a discussion forum hosted by the BBC, the BBC should not reasonably be held liable for that content—the author should.

The clause is not intended to deal with other internet services such as services that simply transmit information or provide access to a communications network—for example, broadband and telecoms providers. We would not wish to suggest, as the amendment would do by including a definition, that they might otherwise be liable in an action for defamation, nor would we want to cast doubt on the protection available under the e-commerce regulations.

The amendment also suggests that website operators who moderate should lose the defence where they knew or ought to have known that they were facilitating the publication of unlawfully defamatory material. That would put the onus on the claimant to prove that the website operator knew that the publication was unlawfully defamatory. It would be unfair to shift the burden of proof to the claimant to prove that, particularly as it would appear to require him to show that the operator knew or ought to have known not only that the material was defamatory but that it was unlawful. That could mean his having to prove that the operator had or ought

[Mr Djanogly]

to have had knowledge that there were no defences available. Again, that is a recipe for getting lawyers involved, rather than for transparent and quick resolutions.

As for provisions on moderation in the amendment, as I explained in speaking to amendment 17, under the Bill, an operator of a website will be able to rely on the clause 5 defence, provided that if it is served with a notice of complaint it follows the prescribed process, regardless of whether it moderates the site. The Government have no intention of penalising operators who seek to moderate websites in a responsible manner—I wish to make that perfectly clear—but we expect the courts to take a common-sense approach to subsection (2) and to the issue of whether or not the operator had posted the material.

That would be a matter for the court to determine taking into account all circumstances of the case. However, if the operator moderates content on the website so much so that it changes the meaning of what the author had posted, in a way that made it defamatory or increased the seriousness of the defamation, that would clearly weigh heavily in the balance. We do not think the courts need to be told that. On that basis, I hope that the hon. Member for Newcastle-under-Lyme will withdraw his amendment.

Paul Farrelly: The language of the amendment regarding the definition seeks to be inclusive. The use of the term "other information society service provider" seeks to mirror the sometimes arcane language of the e-commerce directive. I am sure that on the basis of the Minister's remarks, further representations will be made by interested parties. Pending those, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Robert Flello: I beg to move amendment 24, in clause 5, page 4, line 4, leave out from 'section' to end of line 5 and insert 'shall not come into force without the affirmative resolution of both Houses of Parliament.'.

Amendment 24 would remove of subsection (7) from the word "section" onwards and replace it with fresh wording. It is a matter of principle for the Opposition. As I will outline in the stand part debate, I fear that introducing regulations in any other way and relying on the Minister's officials to get them right is not the best way forward with something so important. I hope that the Minister will appreciate that the regulations will raise important issues and require full and proper scrutiny before they are put in place, so I hope that he supports the amendment, given that it aims simply to ensure that scrutiny will take place in both Houses. As I said, the matter is one of principle, so I will push it to a vote if necessary.

Helen Goodman: I rise to support an important amendment. I return to the little paper that the Minister gave members of the Committee, to illustrate some of the questions he has raised, which we need to resolve and look at in more detail.

In the provisional contents of a notice of complaint, the Minister has introduced a completely new concept. He says that the notice must include:

"The statement concerned and why it is defamatory of the complainant (including…why the words are inaccurate, insupportable or damaging)".

The word "insupportable" has a common meaning in the English language, but I think this is the first time that the term has been used in any of the documents. It seems to import a completely new idea. Does the Minister really mean insupportable? What does he mean by that, in the context? Will he explain what is going on?

I have another question about the Minister's note. In stage 2, he mentions:

"In the event of an action being brought against the website operator alleging that it failed to respond to the notice of complaint in accordance with the relevant time limits".

He has said nothing about relevant time limits. Given that he has proposed that we should follow the negative resolution procedure, he should give the Committee some kind of guidance. It is quite reasonable to have a time limit, so that things do not go on for months and months, but that is a significant point, and we must have some sense from the Minister about what he is doing. If he is not able to clarify those points, it will emphasise the procedural point made by my hon. Friend the Member for Stoke-on-Trent South. When we come to look at the regulations, a lot of details will be significant.

I offer the Minister a thought. He said earlier that he did not want to include the definition of "operator of a website" in primary legislation because technology is changing. May I suggest that if he wants a piece of legislation that will last for a long time, he should adopt a principle-based approach, and then define things for the technology at the moment in regulations? It will be much easier for the House to come back and change regulations—we can do that in six weeks—if there are significant technological problems. That would bring far greater clarity. If the regulations are to do something important and significant, we will need to implement them through the affirmative resolution procedure, rather than the negative.

11.15 am

Mr Djanogly: In relation to regulations per se, a regulation-making power has been used because the details of the new procedure may be lengthy and technical, and are not suitable to appear in the Bill. The provision will provide greater flexibility to adjust aspects of the new procedure, if that proves necessary in light of how it works in practice. From the comments I have heard, that is not in dispute.

We then move to the type of resolution. Amendment 24 would mean that the affirmative resolution procedure applies to regulations made under clause 5, rather than the negative resolution procedure currently provided for in the Bill. The Government consider that the detailed and technical nature of the proposed regulations, and the fact that they will govern procedural issues, means that the negative resolution procedure is more appropriate, and provides the appropriate level of parliamentary scrutiny. I can, however, reassure the Committee that we will seek the views of stakeholders on the draft regulations in due course. I hope that on that basis the hon. Member will agree to withdraw his amendment.

Robert Flello: It is precisely because the regulations will be highly technical and detailed that the House needs carefully to consider them with an affirmative resolution. I will therefore test the Committee by proposing that we accept amendment 24.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 11.

Division No. 3]

AYES

Farrelly, Paul	Goodman, Helen
Flello, Robert	Slaughter, Mr Andy
Fovargue, Yvonne	Turner, Karl

NOES

Brake, rh Tom	Kwarteng, Kwasi
Djanogly, Mr Jonathan	Morris, David
Grant, Mrs Helen	Pincher, Christopher
Gummer, Ben	Soubry, Anna
Heaton-Harris, Chris	Vara, Mr Shailesh
Hughes, rh Simon	

Question accordingly negatived.

Question proposed, That the clause stand part of the Bill.

Robert Flello: I do not need to put on record that I think clause 5 is somewhat of a disaster waiting to happen; its fundamental principle is flawed. We all feel that we know about websites, and we all think that the provision relates to websites, but what about the wider implications? What about companies such as Twitter and Facebook? Is Twitter a website operator? What about the internet service providers that host and support those platforms? What about smartphones, apps and ways of communicating that are currently secretly held under wraps by the companies we all know?

The figures are startling. I go back to a point that was made earlier by the hon. Member for Morecambe and Lunesdale. Each minute, 30 hours of video are uploaded across the network. It is estimated that by 2015 it will take five years to watch all the video crossing internet provider networks each second. I think the Committee would benefit from hearing what AOL, the Internet Service Providers' Association, Mumsnet and Yahoo! had to say in their joint response:

"We believe that a failure to provide a clear and workable regulatory framework for online content will not only have a chilling effect on freedom of speech, but will also undermine any efforts to protect robust scientific and academic debate more effectively."

They went on to talk about the traditional defamation law that differentiates between authors, primary publishers, secondary publishers and editors, but does not sufficiently take into account how content is produced, distributed and consumed online.

"Online businesses can commonly be publishers and intermediaries rather than having just a single role. Some online businesses are publishers in a traditional sense. These businesses actively commission, edit and publish content."

Other online businesses are regarded as intermediaries. Those businesses enable a third party to publish online content but do not assume an active role in the publication process and have no direct or prior control over what is published. Intermediaries connect users to the internet or store content online.

"Online hosting can include the storing of separate websites, but also the hosting of user-generated content (UGC) such as comments, photos or videos within a website. There are also businesses that fall into more than one (and sometimes all) of these categories. Such businesses publish their own content, license content from others, and allow users to upload UGC. These businesses are primary publishers in respect of their own content, secondary publishers in respect of licensed content, and an intermediary in respect of UGC. Such…businesses include, for example, AOL, Mumsnet, Yahoo! and online newspaper sites. This is where the uncertainty of the current legal framework is felt most acutely."

The organisations go on to identify the three principal regulatory frameworks and three different types of online intermediaries: access providers, cachers and hosting providers. I will not detain the Committee by going into too much detail, but it is important to have a wide understanding of these points. Access providers are commonly referred to as ISPs—internet service providers—but are more accurately described as internet access providers. They connect customers to the internet, either through fixed or wireless connectivity. Hosting providers store others' content online, from the websites of large corporations to individuals' personal websites or UGC posted on websites.

The organisations go on to point out that, under e-commerce regulation 19, hosting providers are not liable for the content they host as long as they do not have actual knowledge of unlawful activity. That was a point I dwelt on earlier. They also note that the different liability provisions for access and hosting providers are often overlooked. That may explain why the internet has been described as the wild west. I will come back to that point in a short while.

The organisations also point out that under the e-commerce regulations and the Defamation Acts, hosting providers can be held liable for not removing allegedly defamatory content on notice that that may give knowledge. That has led to a situation in which intermediaries, instead of actual publishers or authors, are being asked to decide what content should be taken down, and are being threatened with legal action. They believe that that has a chilling effect on freedom of speech and they then refer to the Booksellers' Association:

"UK law does not require internet service providers to monitor the information which they transmit or store."

They also refer to the e-commerce directive regulations. They note:

"Some observers suggest that proactively monitoring content for defamatory comment is an option hosting providers should consider. A system in which companies are forced to monitor UGC is extremely resource-intensive, and…not feasible for many online businesses."

They cite the example of Mumsnet, which receives around 30,000 new posts a day.

AOL and various organisations have set out their case. They say there is a mismatch in the current legal framework:

"A detailed analysis of the Defamation Act and the e-commerce regulations reveals that the two pieces of legislation do not offer the same levels of protection to online intermediaries and, when taken together, fail to provide clarity on how a claim of defamation should be properly made; whether claims should be directed at publishers or intermediaries; and what action should be taken by whom in response to a claim of defamation…What is clear, and what has resulted, is that online intermediaries have become police, judge and jury in a system without legal due process to safeguard free expression."

The submission is certainly something that Committee members should look at if they have a moment. It says that there needs to be a proper framework. Clause 5 does not provide that.

What do the explanatory notes say about clause 5?

[Robert Flello]

"This clause creates a new defence for the operators of websites"—

with no particular definition of "websites."

"Subsection (2) provides for the defence to apply if the operator can show that they did not post the statement on the website."

The notes explain that subsection (3) refers to "provisions contained in regulations," that subsection (4) says that "regulations may specify" and subsection (5)

"provides details in general terms…including in regulations… Subsections (5) and (6) enable, respectively, the making of other provision".

All the way through there are references to regulations, other provisions and general terms. It all comes down to the regulations, which the Committee has not seen and will not get a chance to scrutinise. Moreover as amendment 24 has been rejected, they will not even be subject to an affirmative resolution when they eventually come before the House.

What clues do we have in the absence of the draft regulations? I turn now to the Minister's letter. He is an honourable man and I know it was designed to help the Committee. I will extract a couple of points from it. In the letter to the joint Chairs, the Minister notes that he aims to give further details relating to the new procedure under clause 5:

"Full details of the proposed regulations are still to be worked up. However, I attach a note setting out the main aspects of the new procedure and how we see it working."

One clue is that the Minister feels that the attached notes give the main aspects of how he sees the provision working. That sets off even more alarm bells. If that is the meat to be fleshed out, it is extremely worrying.

My hon. Friend the Member for Bishop Auckland has already gone through some of these points so I will not repeat them. In stage 1 there is the "encouraged" versus "required" point in the second paragraph; what is meant by "insupportable" in the third bullet point; and in the fourth bullet point confirmation of whether the complainant has attempted to contact the author. I think we dealt with that on amendment 18. In stage 2 there is reference to a fixed period:

"On receipt of the notice the website operator has a fixed period".

Again, is that a day, a week, a month or a year? We need a lot more clarity than those main principles give us. Certainly we will not be able to test those technical regulations in any depth.

Finally there are three possible outcomes. In the first, the author does not reply. I assume that means the author does not reply to the website operator. On the face of it the onus will be on the website operator to monitor and comply with the response deadline, so it seems as though there will be a fairly straightforward process if the author does not reply. But as we have already heard, there could be a whole host of reasons why the author does not reply. They may have used a computer that has not captured their IP address.

In the second situation the author replies to the web operator and agrees to the removal of the material. One thing I would be keen to ensure is that—coming back to the point made by the right hon. Member for Bermondsey and Old Southwark—if the claimant feels that they have been defamed, there is provision for them to sue for defamation. That is not particularly clear in the note. We want to see a lot more substance about the recourse for someone who has been defamed. The item may subsequently be removed, but the damage has been done in the interim. Again there is scant information about that. What if a person feels that they are justified, but they are now feeling the chilling effects and do not want to be hauled through the courts, so they agree to remove the material even though they want to stand by it? The note does not cover the various situations that apply.

11.30 am

In situation c the author replies—to the website operator I presume—and refuses to agree to the removal of the material. The penultimate paragraph states:

"If the complainant wishes to take further action he will need to seek a court order for the website operator to release the identity and contact details that it has in relation to the author."

That will involve more costs and delays just to get to the point when we start to deal with the defamation. Those are all things that new clause 2 seeks to address in a speedier way.

My hon. Friend the Member for Hammersmith asked what happens when the person who posts something on a website is Iranian. As I understand it, under clause 5 as currently drafted the website operator has done everything that they need to do. They have contacted the author, the author has refused the request, so what is the claimant to do? They are stuffed; they are stymied and cannot do anything. They cannot act against the website operator, so at that point there is little they can do.

When I was looking at what other people think about the Bill, I came across a comment—ironically, it was posted on a website—that I believe provides a good explanation of the problem. It comes from the English PEN website and captures the issue well. It is comment No. 365.

Helen Goodman: I wonder who that was.

Robert Flello: The person does give a name, but there is no e-mail address and it is not obvious whether "Smith" is the person's actual name or a name that has been made up. We will never know, and that is part of the problem. He—or she—says:

"The internet allows just about anyone to easily publish defamatory statements about others, and to do so behind the anonymity of a pseudoname or a nickname. The new defamation bill seeks to prevent anonymous defamation, by allowing the websites to hand over the contact details of the 3rd party, so that the victim can then request that the defamatory material is removed.

There are several problems which the Bill does not address: a) the contact details held by the website may not be correct. Many websites do not verify the names and addresses of their users. So the victim could end up receiving an address such as Mickey Mouse, 1 High Street, London, NWIA lAA, which is totally useless;

b) even if the website verifies the email address (by sending an acknowledgement e-mail), this address could be to a web e-mail host such as Hotmail or Yahoo, which can be created by anyone and has no connection to the true identity of the 3rd party;

c) even if the e-mail address is correct, the 3rd party may not respond to the victim's correspondence (by e-mail or letter) whilst the damaging and untrue defamation remains on the website, visible to all and continuing to injure the victim's reputation. There needs to be a definitive time limit by which the 3rd party must respond, otherwise the defamatory post is removed;

d) if the real address or e-mail addresses are fake, then the only means of finding the 3rd party are through the IP address. Not all websites capture the IP address. If the website does not capture it, they cannot then rely on the defence under clause 5 that they supplied all the details necessary to contact the 3rd party;

e) even if the website captures the IP address (and it is possible to use an IP proxy which masks the true IP address of the 3rd party) then—"

I feel a drum roll—

"the victim would have to obtain a Norwich Pharmacal disclosure order from the High Court to force the internet service provider (such as BT or Virgin etc) to disclose the identity of the IP user. The problem is that some ISPs only retain the IP data for six months and use dynamic IPs—IP numbers that change daily or even every time the user logs onto the internet, or switches their computer on. So the IP that a person uses to create a user identity on a website, could be different to the IP used to publish the defamatory remark. Worse than that, if the 3rd party creates their user name at an internet cafe and then uses the cafe (or another) to publish the defamatory material, then even the IP number would not help the victim, as it would resolve back to the internet cafe, not the person responsible for the defamatory post;

f) another problem—"

this may go some way to answering my hon. Friend's question—

"is that the Norwich Pharmacal disclosure order could cost the victim as much as £5,000 or more in legal fees—even if they do all the legal work themselves. Under the Totalise *v.* Motley Fool authority, the ISP supplying the identity of the 3rd party is entitled to their legal costs, as well as the costs of extracting the data about the 3rd party. The problem is—"

The Chair: Order. Is the hon. Gentleman going to be quoting from the website for much longer? I do not think it is in order to quote at enormous length from one particular document.

Robert Flello: I am grateful for that, Mr Chope, but my reason is that the document sets out succinctly the problems with clause 5. It analyses clearly from the point of view of somebody who knows what they are talking about and has a lot of experience. I have only a little more—

The Chair: Order. My point is that if the hon. Gentleman was to read out his own speech at great length, I would probably call him to order, saying that a long written speech was out of order. What he is doing is reading out somebody else's long written speech from a website. It does not seem to me that because it is on a website it is any better.

Robert Flello: I am grateful, Mr Chope. I felt that the Committee would benefit from hearing it, but I hear what you say, so I will skim through to the end of the contribution. I thought—clearly wrongly—that the Committee would benefit from that specialist knowledge, but I will move on. The bitter experience of Simon Singh and others shows that judges do not always get it right. I may refer to that on Report and Third Reading.

I have reached the point in my own speech when I say that we have had a good discussion this morning about a clause that is causing many people a great deal of concern. I conclude my remarks by once again drawing the Committee's attention to what the Joint Committee on the draft Bill said—something that I had to draw this Committee back to a number of times on Tuesday. The Joint Committee was clear about what should be in this Bill, and sadly I felt that the Minister and his team had cherry-picked the poorest fruit from that bountiful tree in drawing together the Bill. My comments are about to come to a conclusion with just a couple of final points.

Everybody should have as required reading the report of the Joint Committee on the draft Defamation Bill. Pages 12 and 13 deal with publication on the internet, introduction, social networking, online hosts and service providers. I will not incur your wrath, Mr Chope, by reading from it but I draw the Committee's attention to it, because it is extremely relevant to what is before us today.

I have two final points. There was a comment about the internet being the wild west. When we think about the wild west, one of the things that stands out is that it was not quite as lawless as everybody imagines, because the state authorities had their sheriffs and deputies to bring law and order. They did not sit back and let it all happen. They ensured that the legal authorities rode into town to clear up the mess and the problems. If the wild west is going to be used as a comparison, we should continue the analogy and make sure that it is well understood on the Government Benches that the onus is on the state authorities to saddle up and ride into the action to sort it out.

My final point relates to the comparison with pirates and piracy. The Committee will be aware that we received a written submission from the Pirate Party UK; I am sure all Members have read it. I do not intend to read from the paper, just to reference it. If we continue with the pirate analogy, one of the things that stands out is that it was not a total free-for-all because the state authorities made sure that they sailed—rather than rode—into town with all guns blazing where appropriate, to deal with the problem of pirates. To stretch that point, clause 5 is a dinghy going forth against the pirates, with a willing and able crew who do not have the resources to hand to tackle the problem. That is my conclusion.

I am very disappointed with clause 5. It is an opportunity hugely missed. I appreciate that the Minister, sitting alongside the very able Whip, will be under pressure to press on, but I urge him to take some time between now, Report and Third Reading to recast the clause. He should look again and introduce Government amendments that, in the spirit of co-operation that was discussed on Second Reading, the Opposition would be able to jump behind and embrace. Metaphorically, we would hug each other across the Chamber on the introduction of such positive proposals. I hope that I will not be disappointed after getting that image in my head, which will haunt me for the rest of the day.

The point, however, is that I hope that the Minister does not rush to Report and Third Reading. I hope that he will pause, recast clause 5, and introduce provisions to be considered at the relevant stage. Let us get the Bill right.

Paul Farrelly: You will be pleased to hear, Mr Chope, that I am not going to make a long speech. I will certainly not try to emulate a predecessor of mine, the late, great John Golding, who holds the Committee record for giving an 11 and a quarter hour speech on a

[Paul Farrelly]

single amendment to the Telecommunications Bill, thwarting the privatisation of British Telecom before the 1983 election. It would be wrong, too, not to pay tribute to some of the long and entertaining speeches that I have listened to from yourself, Mr Chope, particularly on Fridays in the Chamber.

I will be more generous to the Government than my hon. Friend the Member for Stoke-on-Trent South, given the tectonics of the debate so far. The clause is well intentioned, but like all of us, not perfect. I want to mention briefly two overarching concerns about the clause as drafted.

The first is connected to my earlier point about courts not being given jurisdiction over takedowns with respect to malicious or mischievous website operators. As drafted, the clause appears to give a complete defence to website operators if they comply with regulations to deliver up the details of authors of defamatory content, but then refuse to take it down. I draw the Minister's attention to amendment 41, which was not selected, but seeks to make it clear that the defence is one relating to an action for damages for defamation, and is not open-ended.

The point is not hypothetical. My attention has been drawn by an eminent QC to the case of a housing trust that was the subject of some pretty awful defamatory personal attacks through a website that turned out to be have been set up by a housing developer at arm's length, using other individuals—straw people—who had no assets. Those people were successfully sued. There was no possibility of any redress, but the website operator refused to take down the defamatory content, and the concern is that the clause as drafted would not allow people who had been defamed to touch the website operator.

As another example, I will use the hypothetical case of somebody mischievously putting defamatory material about an MP on my website—let us call them the hon. Member for Churchchrist. I deliver the author to the MP for Churchchrist, who successfully or unsuccessfully sues them. I am so tickled by the comments, however, that I mischievously keep them on my website. I was glad to hear the Minister say in the debate that he recognised that that may be a problem with the clause, and that he may be willing to introduce amendments to address the point.

The second overarching issue that has been drawn to my attention is that the clause may, given the Bill as drafted, be entirely redundant. The problem, as we will discuss, is that if clause 10 is enacted in its present form, website operators would simply rely on that and would not need to rely on clause 5 at all. I hope to make further remarks on that as our considerations proceed.

Clause 5, though well intentioned, is flawed. As things stand, we want to register our concern by voting against the clause.

11.45 am

Tom Brake: It is a pleasure to serve under your chairmanship this morning, Mr Chope. I will keep my remarks brief and free of analogies to the wild west, pirates or geology.

Clause 5 is a good starting point but, as the Minister has acknowledged, there is room for refinement. I welcome his indicating that he will engage in dialogue on a number of matters that have been raised this morning. I welcome, for instance, his recognition of the need for further debate on identifying the person, as set out in subsection (3)(a).

I also hope the Minister will pick up on the point that has just been raised by the hon. Member for Newcastle-under-Lyme on the potential conflict, or at least interaction, between clauses 5 and 10 and whether one will overrule the other, or whether they will clash in some way. A number of Members have referred to the need to define "website operator," as set out in amendment 46. Several organisations feel that greater clarity is required, not only to define "website operator" but to make it clear that search engines would not fall within the legislation.

The Minister will have heard many references to the e-commerce directive and whether the defamation measures should be brought into line with that directive, particularly as the Bill and the proposed regulations do not require actual knowledge of unlawful words, which is referred to in amendment 43. Some organisations are of the view that, as it stands, the Bill may offer less protection in statute than is provided by current common law. In his discussions, I am sure he will want to explain why, in his view, that is not the case or, if it proves to be so, that there is scope to amend the Bill.

The concern is that, at best, the Bill's drafting may conflict with the common law and, at worst, that the courts will interpret the failure to align the Defamation Act 1996 with the directive as providing backing to the effect of the 1996 Act. The Minister will be aware that various solutions have been proposed to address that problem.

Another matter raised by Members is moderation. The Minister has made it clear that if moderation changes the sense of something to the extent of making the defamation worse, it would have to be subject to the Bill. However, if that were not the case, moderation would clearly not be subject to the Bill.

Finally, the Libel Reform Campaign has raised the specific matter of whether there is a need to clarify the fact that a bare link to libellous material will not be sufficient to impute liability to the author. That concludes my range of points. I welcome the Minister's acknowledgment that there is still scope for discussion on clause 5, because Members on both sides of the Committee believe that there is scope for improvement.

Helen Goodman: There are serious problems with the clause. It does not reflect adequately the Joint Committee's recommendations in two respects. The Joint Committee said:

> "We recommend that any material written by an unidentified person should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves".

We have shown in our discussion of clause 5 that there are significant loopholes.

The Joint Committee continued:

> "The Government needs to frame a coherent response to the challenge of enforcing the law in an online environment…As part of doing so, the Ministry of Justice should publish easily accessible guidance dealing with complaints about online material."

To describe that as a trolls' charter is perhaps a little unfair. I think the Minister is not taking the issue of bad behaviour on the net sufficiently seriously. As I said on Second Reading, there is a strong temptation for people to feel about the net as if it is—to draw another analogy—a forest in the 13th century, when whole areas of land were outside the law. If there are significant loopholes in clause 5, we will provide a space in which people can behave in ways that they would not be able to in the real world. That might be fun for some people, but it is dangerous for others.

To continue with the analogy, large organisations and corporations seem to be behaving like 18th-century landowners, enclosing their space and asserting their property rights strongly. The Government's role is to stand up for the ordinary citizen, and I am disappointed with what the Minister said about costs. He referred to costs to the ISPs, for example, to explain why he does not want to tighten up the rules. I remind him that one of his colleagues, the hon. Member for Devizes (Claire Perry), has run an excellent campaign on protecting children on the net. One of the things she pointed out was that the ISPs' annual turnover is £3 billion.

Unless the Minister addresses seriously the issue about processes that are affordable for ordinary people, we will be in a situation where large organisations can assert their rights effectively but ordinary people cannot do so. I am happy to be corrected if I am wrong, but my understanding is that the Minister has not provided an impact assessment for the Bill, so we do not know what the Ministry of Justice's assessment is of the impact of the costs on the private sector. We will return to the matter in some respects when we discuss new clause 4. As I said, I see it as the Minister's responsibility to stand up for the ordinary citizen on the net.

I was completely confused by the discussion on Norwich Pharmacal. When it was first mentioned, I wrote down "Norwich farmer", which was a complete misapprehension on my part. As the Joint Committee said, we need guidance and processes that are easy for people to use. What is set out in the Bill does not seem to be consistent with other Government initiatives relating to the law about the net. At the moment, the Government—sometimes different Departments—are dealing with every problem in isolation. What the Minister seems to be allowing regarding anonymity is in total contrast to what the Home Secretary proposes in the draft Communications Data Bill, which is a system of recording the internet traffic of every citizen. The principles seem to be different, and even within the Minister's own Department there appear to be different approaches. We have one approach in the clause, and another much better one in the amendments that the Ministry of Justice secured on defamation. The Minister has been reluctant to give us a definition of "web operators", but the Attorney-General, in looking at postings on Twitter and at their relation to fair trials, has been far more specific.

When the Minister takes the clause away to redraft it, I hope that, as well as thinking through the principles, he discusses the provision with his Government colleagues. The Government need a strategy, and a coherent and principle-based approach, because none of that is evident in clause 5.

Mr Djanogly: Mr Chope, I know that we had a general agreement to finish at 12 noon, but am I right in thinking that if we want to we can run on until we have completed our deliberations on clause 5?

The Chair: The Committee sitting started at 9 am and it can continue until 2.30 pm, when the House rises, but it cannot continue indefinitely without the Chair saying that we must have a suspension for a comfort break or something to eat. By 12 noon, we will have been sitting for three hours. If there were a reasonable extension beyond that time and we were then to adjourn, that would be fine, but if you wished to extend the sitting up to something like 2 pm, I would certainly say that we must have a suspension, because we cannot carry on without a break.

Mr Djanogly: Thank you very much for that clarification, Mr Chairman. It is my intention just to finish debate on clause 5, which I hope will not take much longer than five or 10 minutes.

I concur with the hon. Member for Stoke-on-Trent South and, as suggested by my right hon. Friend the Member for Carshalton and Wallington, I think that we have had a good and full discussion on the clause, although a number of refinements have been suggested, some of which, as I have said, have more merit than others. The clause creates a new defence for the operation of websites that comply with a new procedure that will facilitate the resolution of complaints directly by complainants with the author of the allegedly defamatory material, rather than with the website intermediary. Before referring to the specific provisions, it might be helpful for the Committee if I provide some general information on our approach.

In our view, the law is unsatisfactory, as it has created a situation in which, to avoid the risk of being sued, website operators are effectively obliged to remove, on receipt of a complaint, allegedly defamatory material from sites that they host, when they are not in a position to know whether the material is defamatory. That chills free speech. At the same time, we recognise the need to help to ensure that people who have been defamed online are able to take effective action to protect their reputation.

The clause adapts an approach that aims both to support freedom of expression, by generally avoiding the need for material to be taken down without the author being given the opportunity to express his or her views, and to help to enable action to be taken against authors who are responsible for making defamatory comments online. The clause focuses on website operators, as that is the group that is primarily affected by the current uncertainties in the law. The hon. Member for Stoke-on-Trent South asked whether, if the author agrees to remove material, the claimant will still be able to sue for defamation, and I can confirm that the new procedure will not affect the claimant's right to pursue a claim for damages against the author if they choose so to do.

12 noon

In general terms, the clause is intended to cover websites that directly host user-generated content. It is not particularly intended to capture hosting service providers, but individuals or companies that run websites

and exert influence over them. That includes website operators such as Facebook and Mumsnet, and online newspapers and bulletin boards that enable users to post and read messages. Where an action is brought against the operator of a website in relation to a statement posted on the site, subsection (2) provides a defence if the operator can show that it did not post the statement. However, under subsection (3), that defence will be defeated if the claimant can show that he or she could not identify the person who posted the statement, had given the operator a notice of complaint about the statement and that the operator had failed to respond to the notice in accordance with the provisions set out in regulations to be set out by the Secretary of State.

As for the trolling points made by the hon. Member for Bishop Auckland, if the impact is very serious, it may well be the case that a criminal offence has been committed. The Government condemn trolling as abhorrent and recognise that it is often extremely offensive, particularly at traumatic times. The fundamental principle of internet-hosted material is that what is illegal offline is also illegal online. Existing legislation can be, and is being, used effectively to tackle that behaviour. I refer hon. Members—without going into detail, because of time constraints—to section 127 of the Communications Act 2003, on the improper use of a public electronic communications network; the Malicious Communications Act 1988; the Computer Misuse Act 1990; the Protection from Harassment Act 1997; the Criminal Justice and Public Order Act 1994; section 15 of the Sexual Offences Act 2003, on grooming; and, of course, general breach of the peace provisions. These may all have implications, depending on the offence.

Mr Slaughter: I am grateful for the concessions that the Minister has made in saying that he will look again at issues such as identity and process under clause 5, but will he address the point about jurisdiction? Nothing that he has said so far addresses that and I would like him to accept that it is a serious issue. Even if he cannot respond today, I hope that he will look at it as part of his reconsideration of the whole issue of web operators.

Mr Djanogly: I thought that I had addressed the issue of jurisdiction, but I will write to the hon. Gentleman further on that point. Just to confirm, the Government are committed to tackling trolling, cyber-bullying and other forms of abuse and the misuse of social networking sites. We shall work with industry, academia, charities and parenting groups to develop tools and information for users, aimed at keeping society safe online. The Government are pressing the internet industry in the UK and Europe to implement clear and simple processes for dealing with abuse online. The Government have also recently reviewed their cyber-bullying policy.

The hon. Member for Stoke-on-Trent South asked about the cost of obtaining Norwich Pharmacal orders. The need to seek a court order for the release of the identity and contact details of the author will only arise where the author wishes to stand by the material posted and is unwilling for contact details to be released. On balance, we consider that it is right for a court ruling to be obtained in these circumstances.

A regulation-making power has been used because the technical details of the procedure are not suitable for inclusion in the Bill. Regulations will also provide greater flexibility to adjust aspects of the new procedure, if that proves necessary in the light of how it works in practice. The note that I provided to the Committee provides further detail of the operation of the procedure and aspects that are likely to be covered in the regulations, and I will review the comments of hon. Members and noble Members on the note and related procedural issues such as time limits, which were mentioned today, and that will certainly help us to finalise the regulations as the Bill progresses through both Houses.

The hon. Member for Newcastle-under-Lyme and my right hon. Friend the Member for Carshalton and Wallington asked whether website operators could rely on clause 10 without the need to follow procedure under clause 5. The circumstances under clause 10 in which it is not reasonably practical for the claimant to pursue the author of the material will be a matter for the court to determine, in all the circumstances of the individual case. Failure to comply with the new process under clause 5 may be a factor which the court will wish to consider and no doubt we will return to that when we come on to clause 10.

My right hon. Friend the Member for Carshalton and Wallington asked whether there is a risk that clause 5 will affect the interpretation of other defences. The new defence in the clause does not affect any other defences that are currently available: those defences will continue to be available. The new defence addresses the specific problem in the current law relating to website operators that host user-generated content, and the fact that they are far too often put in a position where they feel they must remove statements whenever they receive a complaint.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 11, Noes 6.

Division No. 4]

AYES

Brake, rh Tom	Kwarteng, Kwasi
Djanogly, Mr Jonathan	Morris, David
Grant, Mrs Helen	Pincher, Christopher
Gummer, Ben	Soubry, Anna
Heaton-Harris, Chris	Vara, Mr Shailesh
Hughes, rh Simon	

NOES

Farrelly, Paul	Goodman, Helen
Flello, Robert	Slaughter, Mr Andy
Fovargue, Yvonne	Turner, Karl

Question accordingly agreed to.

Clause 5 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —(*Mr Vara*.)

12.6 pm

Adjourned till Tuesday 26 June at half-past Ten o'clock.