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GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

WRITTEN EVIDENCE

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Memorandum submitted by the Pirate Party UK (D 01)

SUMMARY

The Pirate Party UK¹ welcomes reform of the law on defamation but has concerns about the economic impact of the narrow wording of the draft Bill, the chilling effects on free speech of not having a broader and clearer exemption for user comments, and potential loopholes and drafting mistakes in the current text. Several weaknesses and limitations have been identified within Clause 5 of the current Bill, and alternative clauses, aimed at fixing these are suggested. These clauses expand Clause 5 to cover all platform-providers, remove the restriction on anonymous comments and associated notice provisions, but adds a power by which a court can order the removal or modification of defamatory content.

1. Introduction

1.1 The Pirate Party UK is a political organisation registered with the Electoral Commission. It campaigns for significant reform to copyright and patent law, protection for personal privacy and Government transparency, and greater freedoms of speech and communication. It was formed in 2009 and has fielded candidates in elections for local Government and the Scottish and UK Parliaments. The Party has links (through the umbrella organisation Pirate Parties International) with similar organisations in nearly fifty countries worldwide, and “Pirate” politicians have been elected to local, state and international Parliaments.

1.2 Government attempts to regulate the Internet are often highly unpopular with voters, and lead to a reinforcement of the view that politicians do not “get” the Internet. The Party feels the issues with the current draft of the Bill would tend to reinforce that view. While this may prove advantageous to the Pirate Party at the ballot box, it would prefer it to be fixed sooner rather than later. While the case for dealing separately with online defamation is clear—online forums are often non-commercial, and run by individuals who cannot reasonably be expected to have the same legal or fact checking resources as commercial publishers. The Party feels it is inappropriate to single out a specific technology when creating defences. Such an approach could lead to an over-complication of the law, with defences required for each new technology as it develops. The natural delay between new technologies and amendments to the law that take account of these technologies will inevitably lead to problems and stagnation.

1.3 In debates on this Bill, particularly in its second reading in the House of Commons, the broader issue of bullying or “trolling” was discussed. While bullying is a serious issue, whether online or offline, the Party feels this is not an appropriate place for a discussion on it. There are already a raft of criminal measures designed to tackle abusive, harassing or malicious behaviour, which are being successfully applied in the online world (although this should not be taken as an indication of support, by the Party, of these powers, many of which are too broad). It is unlikely that a situation would arise where those measures would not apply, but defamation would, particularly considering the requirement of “serious harm”, or the application of the defences of truth or honest opinion (or their existing equivalents). Additionally, it is likely that many statements falling outside the scope of criminal measures would be dismissed as “mere vulgar abuse”, and even in cases of defamatory bullying online, a claim under defamation is unlikely to be the most appropriate course of action. The Party feels that, while issues of bullying do need to be discussed, this Bill and the debates surrounding it should focus on reputation and defamation alone.

1.4 The Party broadly supports the Defamation Bill, and welcomes the commitment of all major political parties to reforming English defamation law and protecting freedom of expression. However, the Party has strong concerns over Clause 5 (“Operators of websites”) of the current Bill, which are listed below, along with suggestions for improving the law. The Party notes the lack of a clause imposing limitations on the ability of non-natural persons to bring actions for defamation, and would support the amendment in the name of Robert Ffello MP marked as NC4.

2. Specific Concerns

2.1 The Party is concerned that, as it stands, Clause 5 only applies to “websites”, and that no definition of a website has been given. Unless the authors of the text specifically intended to exclude Newsgroups, Internet Relay Chat Rooms, and mobile phone apps etc., then this defence, protecting providers of publishing platforms, should not be protocol-specific, or even technology-specific. It should cover any similar publishing platform, whether on the Internet or using another technology.

2.2 The Party notes that the defence under Clause 5 appears to have significant overlaps with existing limitations to defamation claims. Following the recent case of *Tamiz v Google Inc.*,² in many situations where this defence could apply, the website operator would not be liable due to not being a publisher at common law. If the author of the statement is identifiable, there may be a defence under the proposed Clause 10, and if insufficient notice has been given to the operator there may be a defence under reg. 19 Electronic Commerce

¹ For more information on the Party, contact the press office on press@pirateparty.org.uk or visit www.pirateparty.org.uk

² *Tamiz v Google Inc & Google UK Ltd* [2012] EWHC 449 (QB), at paragraph 39.

Regulations.³ If the purpose of this Bill is to make things clearer for internet users, then it should cut through this tangle of case law and EC Directives, and spell out the legal position in plain English.

2.3 Rather than clarifying this complex area of law, the current clause seems only to add to the confusion, potentially giving website operators who are not experts in the law a false impression that, unless they comply with this defence or if they allow anonymous postings, they will be liable for defamatory comments. The addition of the defence could have a chilling effect on anonymous or pseudo-anonymous speech online, and a corresponding adverse economic effect as website operators choose to locate offshore, despite its aim of reducing the possible liability of website operators. Any new defence in this area should be as clear and unconditional as possible, ideally also covering the above defences.

2.4 The existing clause fails to specify who the “operator” of a website is; it could be the hosting company, a person financing a website, a company running a blogging or commenting service used on a website, or any person with administrator access to the website. A narrow interpretation of this definition could dramatically limit the effectiveness of the defence (particularly for websites where a third-party comment system is used), and without clarification, the uncertainty (only to be settled by long and costly litigation) could add to the confusion surrounding and ineffectiveness of the defence. This term should be clearly defined in the Bill.

2.5 The Party is concerned by the lack of justification for withholding this defence from website operators who allow anonymous comments. If the purpose of this clause is to promote a free and open Internet by limiting the liability of website operators for statements they are not directly responsible for, it seems illogical to remove this protection for the website operator merely because the author of the statement cannot be identified. As the long gestation period of Ofcom’s “code” portion of the Digital Economy Act has shown, identifying the exact person behind a keyboard is far from a trivial task and may not be possible at all, rendering the whole clause worthless. This withholding also raises issues of proportionality. If this defence strikes the correct balance between freedom of expression and the right to respect for private life (extending to the protection of reputation) when applied to posts of identified authors, it seems unlikely that it will do so with regard to anonymous authors where the interference with private life is less (due to anonymous speech generally carrying less weight), but where the interference with freedom of expression is greater, as the website operator has fewer protections. This defence should apply regardless of whether it is possible to identify the author.

2.6 If this limitation to the defence is to remain, it is crucial that the Bill (rather than regulations) should define what is needed to “identify” the author of a statement. The current clause could be interpreted as covering situations varying from where the claimant can identify the poster through any means (including through obtaining court orders against the website operator and ISPs requiring the disclosure of evidence) to where the full name of the poster is publicly visible next to the post. The clause does not specify what information is sufficient to “identify” a poster; whether it is their real name or IP address (rarely unique or sufficient to narrow down to a single person alone), or nickname or email address (leading to the problems linking that persona to an individual). The clause could be interpreted as placing an impossible burden on website operators to verify any identification information provided by their users. If this qualification is to remain in the defence, it should state precisely what degree of certainty is needed to satisfy or fail the condition currently in subsection (5)(a). If this is not made clear, there will be significant pressure on UK website operators to move offshore, leading inevitably to economic damage. The Pirate Party feels this new defamation legislation should aim to make the UK a jurisdiction that attracts, not repels Internet companies.

2.7 While not specified in the Bill, it seems that the regulations created under Clause 5 are intended to create an extra-judicial “notice and takedown” procedure for defamatory posts on websites. Such a system may informally exist under the EC Regulations but Parliament should be wary about creating a formal system without a thorough consultation on the merits and dangers of such a system. The Pirate Party notes that similar systems implemented elsewhere, particularly the “DMCA takedown” system in the United States of America for copyright infringement, have come under intense criticism due to being open to significant abuse. Parliament should not create, or authorise the creation, of such a system, especially without a more detailed examination.

2.8 As noted in the second reading of the Bill, this clause could lead to situations where a defamed individual is left without a remedy. In situations where a defamatory statement is posted on a website, the operator is not the poster and the author can be identified, but where the author is outside the reach of the courts, a claimant would be powerless to recover any damages or force the removal of the statement. This may be appropriate in the circumstances, having regard to the importance of freedom of expression, however, if something is to be done to fix this, the Party suggests a process whereby a defamed party could apply to a court for an order remedying the situation (discussed in more detail below).

2.9 A final concern is that this clause may create problems in situations where an author may be unable to remove or alter their statements. Many websites have comment sections where, once posted, an author has no control over their comments. If the author is identifiable, this defence would grant immunity to the website operator, while not protecting the author. As such, even if a successful action were to be brought against the author, they would be unable to remove their statement and could be liable for subsequent damage done to reputation, while the website remains protected. Even if the website is interpreted as becoming the “poster” at this point, they could still be practically immune if outside the jurisdiction of the courts. The Bill should provide for such circumstances by ensuring that the liability of an author in such circumstances is limited.

³ The Electronic Commerce (EC Directive) Regulations 2002/2013, as applied in Tamiz.

3. Proposals

3.1 The Pirate Party recommends an amendment to the Defamation Bill replacing the current Clause 5 with the following:

Clause [A]: Operators of public publishing platforms

- (1) This section applies where an action for defamation is brought against the operator of a public publishing platform in respect of a statement posted through that platform.
- (2) It is a defence for the operator to show that the operator was not the author of the statement.
- (3) In this section—
 - (a) “author” has the same meaning as in section 1 of the Defamation Act 1996,
 - (b) “public publishing platform” includes any system whereby the public, or any section of the public may post statements for publication, and
 - (c) “operator” means anyone with control over a platform or part of a platform.

3.2 Subsection (1) of this clause mirrors that of the existing clause, but extends it to any “public publishing platform”—see paragraphs 2.1–2.3. Subsection (2) creates the defence, but restricts it in cases where the operator is the author. Subsection (3) defines the various terms.

3.3 As discussed in paragraphs 2.8–2.9, it may be necessary to include some form of judicial “takedown” system. If that is the case, the Pirate Party recommends an amendment to the Defamation Bill, adding the following clause:

Clause [B]: Order for removal or modification of defamatory statements

- (1) The High Court shall have the power to grant an order against the operator of public publishing platform requiring the removal or modification of an unlawfully defamatory statement.
- (2) An order under this section may only be made on the application of an individual defamed by the relevant statement.
- (3) In determining whether to grant an order under this section a court shall take into account—
 - (a) any applicable defences or limitations to a claim for defamation, and
 - (b) any other matters which appear to it in the particular circumstances to be relevant.
- (4) In any action for defamation regarding a statement subject to an order under this section, no account shall be made of any publication or damage caused after the granting of the order.
- (5) In this section “public publishing platform” and “operator” have the same meaning as in section [A].

3.4 This clause covers similar material to the amendment in the name of Robert Flello MP marked as NC2, but contains significant differences. Subsection (1) creates the power, but extends this power to the removal or modification of a statement. This would allow the court to require that the statement be altered to include a correction, to have the offending part removed, or to include a reply (in circumstances where removal would not be in the public interest). Subsection (2) limits the application to the defamed party. While this clause does not require that the website or author be notified, the Party understands that the court has the power to notify or join then if appropriate.

3.5 Subsection (3)(a) specifies that the court must consider any applicable defences or limitations to the claim. This is to remove the practical bias in favour of claimants in situations where the defendant (the website operator) may not have an interest in arguing the case, challenging evidence or raising defences.⁴ Subsection (3)(b) gives the court the power to consider anything else it feels relevant. Subsection (4) provides the limitation discussed above in paragraph 2.9, making an author immune to an action in defamation for any subsequent damage.

3.6 Unlike the amendment NC2, this clause would not make the website operator liable under defamation for not complying, but such failure would still be breach of a court order, potentially falling under contempt of court. This clause contains no explicit time limit for complying, as such a limit would seem arbitrary. Instead, the imposition of a time limit would be left to the discretion of the court, considering all relevant circumstances. In some cases this could be a matter of hours, in others longer may be needed.

June 2012

Memorandum submitted by the Booksellers Association (D 02)

May we start off by saying that we are absolutely delighted that the earlier Joint Committee and the Ministry of Justice have listened to our previous representations and that a new Clause 10 has been introduced in an effort to give us better protection. We are extremely grateful. However, in spite of secondary publishers like

⁴ See recent cases under s 97A Copyright, Designs and Patents Act 1988, such as *Dramatico Entertainment Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2012] EWHC 268 (Ch) & [2012] EWHC 1152 (Ch), where a claim concerning a website was brought against ISPs, who did not appear in court or raise any defence.

booksellers now being in an improved position, we are still concerned that the proposals don't give us the appropriate protection that we really need.

WHEN DOES A "CLOGGING LETTER" HAVE AUTHORITY?

This is a key point. Will the Courts require the Clause 10 issue to be adjudicated before a claimant (or his/her lawyers) can rely upon a so-called "clogging letter" demanding that the bookseller remove the book from sale? (As a secondary publisher, the bookseller wouldn't have a clue as to whether a particular passage in a book was on-side or off-side.)

To rectify this, could it be built into the new Bill that a "clogging letter" can only have authority after the date at which a Court has ruled on the preliminary Clause 10 issue? And that, moreover, the claimant would be required to ask the Court to decide on this preliminary issue... and then it would be up to the Court to decide whether the bookseller should be joined at these preliminary proceedings?

This would seem to us to make a great deal of sense, as otherwise a cautious bookseller—uncertain in difficult cases as to the outcome under Clause 10—might well want in any event to consider whether the secondary publisher can rely on the Section 1 1996 Act defence. (If the "clogging letter" has authority before a Court was able to review the situation under Clause 10, then it would seem to us that much of what Clause 10 was meant to achieve would be substantially undermined.)

SECTION 1 1996 ACT

If the claimant manages to find a way past the Clause 10 defence, then the bookseller will in practice have to rely on the defence in section 1 of the 1996 Act with all the inherent problems that we have on numerous occasions described (please see section 2 of the *attached [not printed]*). In the past, we have engaged the services of specialist Counsel [Edward Garnier and Gordon Bishop] to look at the problems of section 1 for us, and we have put forward specific revised wording for section 1 (please see section 6 of the *attached [not printed]*). Could this suggested new text that we have proposed—or Lord Lester's suggestions on a new section 1—be taken into consideration?

THE PHRASE "REASONABLE PRACTICABLE" IN CLAUSE 10

If Clause 10 of the Bill is passed into law, then a Court asked to adjudicate on any proceedings brought against a bookseller (or any other secondary publisher) will have to consider as a preliminary issue whether or not "*it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher*". There is at present no guidance given in Clause 10 or elsewhere in the Act as to how the judges should construe the term "reasonably practicable" and whether issues raised extend beyond identification of the alleged defamer to, for example, the complications of litigating in a foreign jurisdiction or the fact that the prospective defendant does not have assets sufficient to meet a judgement. Some guidance in the Bill would assist greatly in bringing a degree of certainty—so important in business—as to the extent of availability of the defence.

June 2012

Memorandum submitted by Celia M Bibby (D 03)

Clause 7: Reports etc covered by Privilege: whether the proposals to extend its defences is appropriate and sufficient.

1. This memorandum is taking a radical approach to Clause 7 Privilege and arguing that this Defence in Defamation Law removes the basic right of an individual to have redress for any proven defamation they have suffered.

2. The right to defend one's professional and private reputation has been accepted in other aspects of the Defamation Bill so the exceptions specified under Clause 7 Privilege are promoting a two-tier justice system, which is contrary to equality under the law.

3. This memorandum is focussing on the Defence of Privilege in the way it affects UK patients. Patients are already at a legal disadvantage under the law, since the 1990 Access to Medical Records Act S 5.1 removes any right of access given by the Act by allowing the holder of the records (usually a GP) to prevent access.

4. If, following application to the High Court, a Claimant's medical records (or part of them) are seen by them, or the records are made available by other means, and they are found to contain proven defamatory statements, there is no legal redress under the law because of the Defence of Privilege.

5. The wording of the Defence of Privilege is to protect the medical profession and the insurance companies, which act for them. No UK patient would ever have voted for such a Defence and many voters today are not aware of the existence of the S 5.1 of the Access to Medical Records Act or the Defence of Privilege and their effect to patients' rights under the law.

6. The law usually allows for the matter in a dispute to be heard in Court with both sides having the opportunity to put their argument and with an impartial judge and/or jury to decide the outcome. Defence of Privilege removes this fundamental tenet of the British Common Law by refusing the citizen the right to seek redress under the law.

7. Evidence is given in *Factual Information Nos 47–104* and the book “*Expert Witness*” and the oral evidence synopsis held in the Scrutiny Unit of the House of Commons. This evidence shows that the present Defence of Privilege acts against the exposure of crime, promotes the “bullying” of those who are vulnerable due to ill health and shields the truth from public scrutiny. Although thankfully rare the crimes of people such as former GP Harold Shipman remind us that no-one citizen’s rights should be considered greater than another.

8. *The Factual Information* illustrates how a defamation, concealed for some 25 years and then revealed during an unrelated civil legal action, despite all the attempts by the legal and medical professions to keep it hidden, prevented an unprejudiced consideration of the medical evidence and legal issues in the civil case referred to.

9. In addition the motivation for the defamation was malicious in that the defamation was not true, either at the time it was made nor subsequently over the following 25 years. The intent was to shield the perpetrator from prosecution by the Police for a potential crime under the Mis-Use of Drugs Act 1971 by discrediting a witness.

10. The recipients of the defamatory material (legal professionals in the civil legal case) were able to pass such defamatory material relating to their client between them without the client having sight or knowledge, initially of the defamation. A confidentiality undertaking, by the Defendant’s insurers (MDU) in the civil case, was used to prevent the solicitors in the civil case communicating freely with their client. This was also used to restrict certain issues in the Expert Reports, commissioned in the case, becoming known to the Claimant.

11. The Defamation was finally revealed when the Claimant took the case over and submitted a Writ against the Defendant, the papers were released by the Law Society, and the Claimant continued acting as a Litigant in Person, including conducting her own case at a Judicial Review in the High Court

12. The domino-like effect of the defamation gave rise to legal investigation beyond the original case as each interested party attempts to have the truth suppressed. The costs in legal terms are increased with each attempt to silence the Claimant, costs which are eventually borne by the taxpayer.

June 2012

Memorandum submitted by Hardeep Singh (Sahota) (D 04)

SUMMARY

As a libel-survivor, having defended a case for more than three years, I welcome the reforms proposed by the Government in updating Britain’s outdated defamation laws. I have been both a supporter and an active participant in the Libel Reform Campaign since 2008. An area that has yet to be addressed in the Defamation Bill is the issue of “non-justiciability”; the submission follows a previous one to the Joint Committee on the Draft Defamation Bill in July 2011.⁵ It is trite law that certain matters ie doctrinal disputes, which would otherwise be litigated within defamation proceedings, fall within a territory the courts will not enter. They are deemed “non-justiciable.” This forbidden territory in defamation law urgently needs a statutory footing.

1. Introduction

1.1 On 17 May 2010, Mr Justice Eady permanently stayed my libel case *His Holiness v Singh*,⁶ based on the self-denying ordinance of “non-justiciability”.

What is clear is that secular courts will not adjudicate matters of religious dispute.

The most recent case to be dragged through the courts decided on the same principle is *Shergill v Purewal*⁷ (2010). The presiding judge used the decision by Mr Justice Eady in my case as a legal authority. There are several other legal authorities here, which look at the same principle in cases involving all five major faith groups.

Since my case, there have been others involving legal threats to writers from New Religious Movements or NRMs.⁸

1.2 A court simply cannot trespass into the Church/State divide, so even if the imputation is alleged to be libelous; if it scrutinises doctrinal difference or the fitness of someone to hold a “religious” position of authority—the serious harm test does not apply.

⁵ <http://www.parliament.uk/documents/joint-committees/Draft%20Defamation%20Bill/Final%20Written%20Evidence%20Vol%20III.pdf>

⁶ <http://www.bailii.org/ew/cases/EWHC/QB/2010/1294.html>

⁷ <http://www.bailii.org/ew/cases/EWHC/QB/2010/3610.html>

⁸ http://en.wikipedia.org/wiki/New_religious_movement

1.3 In debates in the House of Commons, particularly during the second reading of the Defamation Bill—the litmus test for reform was highlighted. It was suggested that this should surely be whether cases like mine that of Simon Singh and Peter Wilmhurst, will be seen again. The issue of protecting Scientists and those in the Medical profession has been addressed in the Defamation Bill (Clause 6) with an extension to the defense of qualified privilege to peer-reviewed journals. This is a commendable development, however leaves those who write about or discuss religious/political disputes lagging behind in rights to free speech.

2. *Proposal*

2.1 I recommended an amendment to the Defamation Bill adding to Clause 1: The proposal is to highlight the issue of “non-justiciability” of pure doctrinal disputes, amend Clause 1, to reflect that some disputes by nature of their doctrinal constellation will simply not be adjudicated; thus no harm can be established in the first instance. Such an amendment to Clause 1, will consequently weed out both vexatious claims, whilst preventing doctrinal disputes from being dragged out unnecessarily. This will encourage early settlement of unmeritorious, “non-justiciable” claims.

June 2012

Memorandum submitted by Elaine Decoulos (D 05)

INTRODUCTION

1. My name may be familiar to those who followed the Press Standards Inquiry held by the Culture, Media and Sport Select Committee during the 2009–10 session. I very much wanted to submit evidence to the Joint Defamation Committee as well, but was too late. What happened to me and how I got defamed and then libelled in nearly every British newspaper is outlined in one of my memoranda to the Select Committee and I will not repeat it here. I believe I provide a unique insight into the problems with the libel law in England because there were several defamatory articles published about me in the British press, commencing with a court report that then became libellous. I have also represented myself in court and can assist with procedure and costs, both being huge obstacles to justice.

2. Before I comment on the individual clauses of the Bill that I believe need tidying up, I should add that I have been trying to become a Core Participant in the Leveson Inquiry from the start and have been consistently refused. I believe one of the principal reasons for this is because my libel claim against Associated Newspapers remains stayed for costs. It seems what has happened to me in the High Court in my attempt to get justice is too much for even The Leveson Inquiry to hear. It has not helped that the Counsel representing what are known as press victims in the Inquiry, David Sherborne, has been my direct opponent in court. He represented my opponents who were also defendants in the same libel claim against Associated Newspapers because of a quote provided by one of them, Bruno Schroder. A judgment from this claim can also be found as a memoranda in the Press Standards Inquiry. Certainly, no libel claim should ever be stayed or struck out because of costs, both of which have happened to me as a claimant, despite my defendants being either a corporation or a billionaire. It is beyond reason and a huge block to access to justice.

BILL CLAUSES

3. *Clause 3:* From my experience, public interest should remain a requirement for the defence of honest opinion. Otherwise, privacy law will merge even more with libel law. I recommend a definition for public interest be codified in the Civil Procedure Rules with changes proposed to the Rule Committee as necessary. This way a definition of public interest can be used for other types of litigation such as privacy.

4. *Clause 7:* There should be an amendment that there be no reporting of court proceedings or reports of court documents without both or all parties being given a right of reply.

5. *Clause 8:* The single publication should exclude newspaper websites and databases. It has been my experience that when newspapers redesign their websites, articles once removed reappear. When someone is involved with an event or court case, several articles can be published within a short period of time and it can be impossible to deal with all of them at once, unless one has a large legal team behind them. And court reports may not be libellous when they are first published, but then become so after their conclusion. Old articles can reappear on newspaper websites and databases around the world. Claimants need to have access to justice for these. This has happened to me and I am pursuing justice in the US over English newspaper articles sold to large American databases.

6. *Clause 12:* I highly recommend not giving judges discretion on this. It should be clearly defined in statute.

7. *Additional Clause:* No libel claim should ever be stayed or struck out because of unpaid costs. This is a violation of Article 6 of The European Convention.

June 2012
