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Select Committee on the Constitution

9th Report of Session 2012–13

Defamation Bill

Report

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Defamation Bill

1. The Defamation Bill had its second reading in the House of Lords on 9 October 2012,[1] having been passed by the House of Commons in September. The bill has been committed to Grand Committee. The first day of its committee stage is scheduled for 17 December. Meanwhile, on 29 November the report of the Leveson Inquiry into the culture, practices and ethics of the press was published in four volumes.[2]

2. The bill reflects the commitment made in *The Coalition: our programme for Government* "to review libel laws to protect freedom of speech". The existing law on defamation[3] is largely a product of common law development, supplemented from time to time by statute. It is often criticised for being overly complex and uncertain and, through the prospect of expensive legal proceedings,[4] for promoting a "chilling effect" on free speech. Another major concern is that the current law does scant justice to the developments in information and communications technology; indeed, the most recent statute, the Defamation Act 1996, effectively predates the internet age.

3. The bill is a mix of reforming and codifying provisions designed to modernise and clarify the law. Clause 1 raises the threshold for bringing a claim by adopting the test of "serious harm" to a claimant's reputation. Clauses 2 to 7 rework the defences to an action for defamation, including by a new defence of "responsible publication on matter of public interest" (clause 4), a new defence for operators of websites (clause 5), and through extended applications of absolute and qualified privilege[5] (clause 7). The remainder of the bill deals with a range of connected matters, including a single publication rule effectively to create a one-year limitation period, the restriction of court jurisdiction so as to limit so-called "libel tourism", and the removal of the presumption in favour of jury trials in defamation cases.[6]

4. The bill has major constitutional implications. At third reading in the Commons, the Lord Chancellor and Secretary of State for Justice, Chris Grayling MP, described the issues it addresses as going "to the core of what it means to live in a free and open society".[7] Striking the right balance between the protection of freedom of expression on the one hand, and the protection of reputation on the other, is of the essence of this. The recent public controversies over child abuse allegations concerning Jimmy Savile

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1 HL Deb, 9 October 2012, cols 932–986.

2 HC 780. The report is available at: http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp

3 Defamation in English law encompasses the two separate civil actions of libel and slander, which relate to the written word and to word of mouth respectively. Appendix 4 of the Leveson report gives a succinct account of the substantive law of defamation.

4 The Minister, Lord McNally, has recognised that the question of substantive reform is closely bound up with concerns about costs and funding: see HL Deb, 9 October 2012, cols 935–936.

5 So as to cover, for example, proceedings in any legally established court outside the United Kingdom, and proceedings at a press conference held anywhere in the world concerning a matter of public interest, respectively.

6 Clauses 8, 9 and 11, respectively.

7 HC Deb, 12 September 2012, col 366.

and care homes in north Wales[8] highlight both the importance and the topicality of the subject.

5. The Leveson report further underscores the centrality of constitutional principle in this general area:[9]

> "a free press serves democracy by enabling public deliberation [and] through its public watchdog role, acting as a check on political and other holders of power ... The unique power wielded by the press … must also be used consistently with other democratic values … Chief amongst these is the requirement that press freedom promotes, and operates within, the rule of law."

6. The Defamation Bill is the product of a lengthy gestation process. Originally the subject of a private member's bill introduced by Lord Lester of Herne Hill,[10] the bill was preceded by draft legislation, which was subject to public consultation and to pre-legislative scrutiny by a joint committee.[11] The Government's response to the public consultation and to the joint committee's report was published in February 2012.[12] **We welcome this careful and inclusive process of bill development in the constitutional sphere.** That said, a chief theme in the Commons debate on third reading was the pressing need for close scrutiny of the bill by the Lords. The Lord Chancellor stated that the Government "are open to continued debate and dialogue in the other place to ensure that we get the Bill right".[13] As explained below, the Leveson report further underscores the need for full and careful deliberation.

7. Constitutionally speaking, clause 4 of the bill, in creating a defence of responsible publication on matter of public interest, is of particular significance. However, concern has been expressed in the House of Lords as to whether, as currently drafted, it will give publishers a clear, effective and proper measure of protection. The Minister, Lord McNally, conceded that "the clause that we have put forward will need further work".[14]

8. Clause 4 is intended to replace the so-called "Reynolds privilege". A defence of publication in the public interest established by the judicial House of Lords in 1999[15] and elaborated in subsequent case law,[16] the "Reynolds privilege" focuses attention on the need to investigate and verify allegations prior to publication. According to the explanatory notes on the bill, the aim is "to reflect the principles" established by the case law. In particular, clause 4(2), in providing a list of factors possibly relevant to the issue of

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8 See HC Deb, 6 November 2012, cols 733–749.

9 *op cit.*, pp 64–65.

10 See HL Deb, 9 July 2010, cols 423–484.

11 Ministry of Justice, *Draft Defamation Bill Consultation*, March 2011; Joint Committee on the Draft Defamation Bill Report, 2010–12, HL Paper 203.

12 Cm 8295.

13 HC Deb, 12 September 2012, col 369.

14 HL Deb, 9 October 2012, col 984.

15 *Reynolds v Times Newspapers* [2001] 2 AC 127.

16 For an explanation of the meaning of "public interest" in this context, see the speech of Baroness Hale in *Jameel v Wall Street Journal Europe* [2006] UKHL 44, para 147.

"responsible publication", is said to be "broadly based" on the jurisprudence:[17]

> (2) … in determining for the purposes of this section whether a defendant has acted responsibility in publishing a statement the matters to which the court may have regard include (amongst other matters)—
>
> (a) the nature of the publication and its context;
>
> (b) the seriousness of the imputation conveyed by the statement;
>
> (c) the relevance of the imputation conveyed by the statement to the matter of public interest concerned;
>
> (d) the importance of the matter of public interest concerned;
>
> (e) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;
>
> (f) whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement;
>
> (g) whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement;
>
> (h) the timing of the statement's publication;
>
> (i) the tone of the statement.

9. It may be questioned whether the above list, notwithstanding that it is illustrative and not exhaustive, adequately reflects the case law. The explanatory notes make no mention of the UK Supreme Court case earlier this year of *Flood v Times Newspapers*.[18] In that case, in determining whether "Reynolds privilege" attached, emphasis was placed on the journalists' reasonable belief in the truth of the supporting facts.[19] The relevance of editorial judgement was also underscored. According to Lord Mance, "the court must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgement of responsible journalists and editors merits respect".[20] Likewise, in the words of Lord Dyson, "weight should be given to a newspaper's editorial judgement as to what details are necessary to convey the essential message … The court should be slow to interfere with an exercise of editorial judgement."[21] This aspect is not highlighted in the proposed list of statutory guidelines. As such, clause 4, as currently drafted, may be said to tilt the balance against the practical exercise of press freedom.

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17 Explanatory notes, paras 29 and 31. Clause 4(5) provides that, for the avoidance of doubt, the defence covers statements both of fact and opinion. Reporting a dispute to which the claimant is a party is the subject of special provision: clause 4(3) and (4).

18 *Flood v Times Newspapers* [2012] UKSC 11, where Lord Brown (at para 113) formulated the test for "Reynolds privilege" as follows: "could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?"

19 Lord Phillips, *ibid.* at paras 79–81.

20 *ibid.*, para 137.

21 *ibid.*, para 199.

10. A different but related concern is that, over time, the multiple guidelines set out in clause 4(2) may become a "check list" or "tick-box": overly rigid and effectively constituting a series of conditions on the use of the defence. After all, this is an area with considerable potential for litigation. The *Reynolds* case established ten factors that might be considered; seven years later, in *Jameel*, Lord Hoffmann lamented their rapid mutation into a series of "hurdles at any of which the defence may fail".[22]

11. Different formulations of "a strong public interest defence" have been suggested during the course of the proceedings on the bill, either as an alternative or addition to the clause 4 codification of "Reynolds privilege". One suggestion[23] is for a complete defence if three conditions are satisfied: (a) the allegations concerned a matter of public interest; (b) the publisher honestly believed the allegations were true; and (c) there was appropriate clarification or correction. Although a showing of malice—reckless disregard for the truth—would defeat the defence, this is a high threshold for victims to meet. There is, then, limited protection for the right to reputation under this formulation.

12. A second suggestion[24] appears less sweeping in nature. There would be a complete defence if four conditions were met: (a) the statement complained of concerned a matter of public interest; the publisher (b) honestly and (c) reasonably believed that the making of the statement was in the public interest; (d) a correction was published or reasonably refused. In practice, much would depend on the judicial approach to "reasonable" belief under criterion (c). Whereas the publisher would be afforded wide discretion as to the content, form and timing of the statement, the key element under "Reynolds privilege" of steps to verify the truth of an allegation is not explicitly factored into this formulation.

13. In considering the appropriate statutory formulation of a public interest defence or defences, the House will wish to pay close regard to the constitutional principles of free speech (and circulation of ideas) and of the rule of law (as in, effective means of redress). We recognise the merits of the "Reynolds privilege" in directing attention to the need properly to investigate. However, **we are not persuaded that clause 4, as currently drafted, will provide a sufficiently robust and succinct defence of publication in the public interest.**

14. By way of response to contemporary developments in digital publication,[25] clause 5 provides a defence for the operator of a website if the operator is shown not to have posted the relevant statement. The defence is defeated if the claimant demonstrates that he or she (a) is unable to identify the poster; (b) has complained to the operator; and (c) "the operator has failed to respond to the notice of complaint in accordance with any provision contained in regulations." Clause 5(5) states that regulations may, among

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22 *op. cit.*, para 56.

23 See Libel Reform Campaign, Defamation Bill—briefing for MPs; available at: http://www.senseaboutscience.org/data/files/Libel/Briefing_note_for_second_reading_debate_of_Defamation_Bill_2012.pdf

24 See HL Deb, 9 October 2012, col 954 (Lord Lester of Herne Hill).

25 Focused squarely on the press, the Leveson report has very little to say about the internet: *op. cit.*, pp 736–737.

other things, provide for action[26] the operator must take in response to a complaint and "make any other provision for the purposes of this section". The Government, in seeking to justify this heavy reliance on regulations, have emphasised the detailed nature of the likely provision.[27] In its report on the bill, the House of Lords Delegated Powers and Regulatory Reform Committee has stated that affirmative resolution procedure[28] should apply to such regulations since they could prescribe substantive elements central to the issue of whether or not the new statutory defence is defeated.[29]

15. The legal issues surrounding so-called "internet intermediaries" are novel and challenging and are of major contemporary significance for the flow of information and ideas in an open and globally connected society. **We consider that, as a matter of constitutional principle, the relevant provision should be to the greatest extent possible on the face of the bill, so allowing full legislative amendment and debate. Moreover, only by seeing the proposed obligations to be imposed on operators will Parliament be able to consider whether the regime proposed is fit for purpose.**

16. In the light of many adverse findings on the activities of the press, the Leveson report recommended replacement of the existing self-regulatory machinery and enhanced regulatory powers of standard-setting, enforcement and redress. It is proposed that what Leveson calls "a voluntary independent self-organised regulatory system"[30] would have "statutory underpinning",[31] an element which has immediately proved controversial as regards the freedom of the press.[32] This would be coupled with a statutory duty on ministers "and all with responsibility for matters relating to the media" to uphold the freedom of the press and its independence from the executive.[33]

17. The Leveson Inquiry did not embark on a detailed consideration of the substantive law of defamation.[34] Nonetheless, the four volumes of the report are replete with references to the civil law in general, and the law of defamation in particular, not least in Leveson's detailed case studies of press treatment of named individuals.[35] These materials serve, among other things, as a sober reminder of the importance of victims of defamation being able to protect their reputations quickly and cheaply.

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26 Which "may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal": clause 5(5)(a).

27 Ministry of Justice, Delegated powers memorandum on the Defamation Bill, para 6; available at: http://data.parliament.uk/DepositedPapers/Files/DEP2012–1450/DelegatedPowersMemorandumfortheDefamationBill.pdf

28 Under the bill as currently drafted, the making of the regulations is subject only to negative resolution procedure: clause 5(8).

29 Delegated Powers and Regulatory Reform Committee, 8th report (2012–13), HL Paper 50, para 4.

30 *op. cit.*, p 1781.

31 *ibid.*, p 1758.

32 As shown in the initial responses of the Prime Minister and the Deputy Prime Minister: see HC Deb, 29 November 2012, cols 446–449 and 470–472 respectively. See also HL Deb, 29 November 2012, cols 337–360.

33 At the time of writing, cross-party talks are underway on how to proceed in the light of Leveson's findings. The Government have confirmed that a draft bill will be drawn up along the lines of the recommendations; Her Majesty's Opposition intend to produce their own draft bill. See HC Deb, 3 December 2012, cols 597 and 606.

34 *op. cit.*, p 1508.

35 *ibid.*, pp 539–591.

18. The detailed recommendations[36] made by Leveson for new self-organised regulatory powers of standard-setting and sanction and of redress for those affected, including a speedy complaint-handling mechanism and inexpensive arbitration service in relation to civil legal claims, are especially pertinent. Their relationship with, and possible consequences for, the design and workings of the substantive law of defamation is a key matter for debate.[37] The assurance of a genuinely independent and effective regulatory system of standard-setting, sanction and redress would help to underwrite the case for a stronger public interest defence in defamation.

19. The House will no doubt wish to consider how the recommendations of the Leveson Inquiry as regards press regulation and redress for complainants, and the Government's considered response to them, relate to the substantive law of defamation; and the extent to which those recommendations would make recourse to the courts unnecessary.

36 *ibid.*, pp 1762–1769.

37 The Leveson report is due to be debated further in the House of Lords on 18 December.

APPENDIX 1: DECLARATIONS OF INTERESTS

The following interests were declared in respect of this report:

Lord Pannick

Practising member of the Bar.

Baroness Wheatcroft

Trustee of the Reuters Institute for the Study of Journalism, University of Oxford.