DEFAMATION BILL 2011

Consultation by the Joint Parliamentary Committee

Response from the Campaign for Press and Broadcasting Freedom (June 2011)

INTRODUCTION

The Campaign for Press and Broadcasting Freedom (CPBF) welcomes the opportunity to respond to the consultation on the Defamation Bill. The CPBF, established in 1979, is an independent organisation dealing with questions of freedom, diversity and accountability in the UK media. It is membership based, drawing its support from individuals, trade unions and community organisations. It has consistently developed policies designed to promote accountability, diversity and plurality in mass communications.

The CPBF welcomes the draft Bill as a positive and much-needed move towards reforming not just defamation law but the practices of the libel courts as well. In general we support the approach of PEN and Index on Censorship and applaud the work they have done in this field. For the sake of concision we are not answering all the committee's questions where we are in agreement with others but are concentrating on areas in which we have distinct points to make.

SUMMARY

The CPBF is recommending:

* Definitions of defamation and substantial harm

* Reversal of the burden of proof and the assumption of harm

* Responsible publication defence, codifying the Reynolds tests and statutory definition of the public interest

* Honest opinion defence unless factual assertions proved to be false

* Single publication rule with "materially different " qualification

* Actions by overseas citizens ("libel tourism") subject to very strict tests for admissibility

* Establishment of Libel Tribunals, covering all media, for quicker, cheaper actions.

* Tribunals to have power to require publication of corrections/apologies as "right of reply" as well as or instead of damages

* If no tribunal, then eligibility for legal aid for private plaintiffs

* Restrictions on CFA fees

* No actions against individual defendants if material has been published in a commercial publication, with the publication automatically joined in the action

* Automatic protection for ISPs over material on their networks

* Defence for internet forums and other online media if material is removed on notification of potential action, whether pre-moderated or not.

* Courts required to consider public interest consideration in judging privacy actions or applications for injunctions.

RESPONSES IN FULL

CLAUSE 1: DEFINITION OF DEFAMATION; A "SUBSTANTIAL HARM" TEST

** Should there be a statutory definition of "defamation"? If so, what should it be?*

Yes. It should state that a person's reputation has been tarnished by the publication of allegations that are not

true and must be proved not to be true. The substantial harm test is a good one; the new element should be that the onus is on the complainant to prove both the falsity of the allegation and the degree of harm. This relates also to the burden of proof, the reversal of which the CPBF wholeheartedly supports (Clause 3).

CLAUSE 2: RESPONSIBLE PUBLICATION IN THE PUBLIC INTEREST

** Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not, what changes should be made?*

We take it that the "concerns" relate to the uncertainty of the standing of the Reynolds tests and the inconsistency of their application by the judges. To codify these into the responsible publication defence would be a positive step. We believe the tests should be set out in a schedule to the Bill. This would be fair to litigants on both sides; journalists will know what steps they will have to take, which will enhance not just their ability to defend their work but also the standards of reporting in contentious areas. The original judgement set out in the House of Lords by Lord Nicholls in 1999 set 10 tests. There will need to be discussion as to their appropriateness and the form in which they should be stated. For example, a requirement that the subjects of investigations must have been given the opportunity to respond before publication should carry a condition that the opportunity must be reasonable and not offered immediately before publication. (This is not at all to argue that such a requirement should be statutorily imposed, particularly in the light of the Mosley judgement in Europe; it is only relevant as a defence to libel.)

** Should the meaning of "public interest" be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?*

The public interest should be defined to establish the distinction between that and the "interest to the public" justification sometime advanced by the press: it is not a defence. It is sometimes said that the public interest is difficult to define and a matter of interpretation that depends on circumstances, but we do not accept that. There are perfectly serviceable definitions in existence, such as that used by the Press Complaints Commission. (It is at http://www.pcc.org.uk/cop/practice.html)

CLAUSE 4: HONEST OPINION

** What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened? Is its relationship to the responsible publication defence both clear and appropriate?*

Traditionally there has been a tolerance of comment and few actions over comment columns, arts reviews, cartoons and so on. There is however a risk that the expansion of irresponsible and ill-informed comment on the internet could change that. At present there are also relatively few actions against internet comment largely because people do not yet take it seriously but this might well change, and there needs to be stronger protection. The honest comment defence should be valid as long as any factual assertions on which comment is based are correct. To overcome the defence the plaintiff would be required to prove that they are not.

CLAUSE 6: SINGLE PUBLICATION RULE

** Do you agree with replacing the multiple publication rule with a single publication rule, including the "materially different" test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired?*

Bringing online publications into line with print, with the deadline of 12 months for initiating an action, is obviously just and sensible. Indeed the CPBF would happily see the timescale reduced further, perhaps to six months, for cases to the proposed new Libel Tribunal (see below).

The "materially different test" is reasonable since web pages can easily be altered. But the argument that unaltered material remains accessible and should therefore remain actionable after 12 months does not hold water. The same could have been argued over newspaper and library archives and more relevantly for books, whose shelf life is much longer than that of the press.

CLAUSE 7: JURISDICTION - "LIBEL TOURISM"

** Is "Libel tourism" a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach?*

Libel tourism is acknowledged as a problem by everybody expect those with a vested interest in it. The Bill's solution of leaving the decision to allow such a speculative action to the discretion of the judge is not enough. Until recently when the issue became too hot the judges showed themselves perfectly happy to wave them on. There need to be defined criteria for actions that the English courts will entertain. A plaintiff should have to show that there is no legal route to redress in his or her resident country or the country of publication, that the circulation of the publication concerned in the UK is significant, and that he or she has a significant reputation here that has been substantially harmed.

CONSULTATION ISSUES:

** What are your views on the proposals that aim to support early-resolution of defamation proceedings? Do you favour any specific types of formal court-based powers, informal resolution procedures or the creation of a libel tribunal?*

The establishment of a process to facilitate the early resolution of defamation cases is a much-needed initiative. Although it is often said that English defamation law is faulty, most of the abuses have in fact arisen from current practice rather than the development of the common law. Costs and delays are the major problems. A process that could provide faster and cheaper redress would be highly beneficial. Of the suggested alternatives, a Libel Tribunal is the best option.

Individuals who consider they have been maligned in the media do not want cases to drag on for years. They are generally less interested in money awarded by the courts than in the righting of a wrong and the restitution of their good names. The High Court is not the ideal place to settle such disputes. The alternative currently offered, as far as the press is concerned at least, is the Press Complaints Commission, but the PCC cannot offer any effective remedy. It is a creature of the owners of the national press whose fundamental remit is to minimise

the damage caused by their excesses; its refusal to take action over the News of the World phone-hacking scandal is timely evidence of that.

From time to time the PCC tinkers with its procedures but there is no prospect of significant reform as long as it is financed and controlled by the publishers. This rules out a self-regulatory "informal resolution procedures" option, which would leave the courts as the alternative, so a new approach is badly needed.

A new tribunal system, modelled on the Employment Tribunal, could provide the solution. Deadlines would be tighter, costs would be limited, and most importantly the Tribunal should have the power to order publications to print corrections or apologies, the texts to be negotiated between the parties for endorsement by the Tribunal. They would have the power to suspend proceedings and direct the parties to reach a settlement. (One of the problems with the PCC system is that the parties or their representatives do not get face-to-face discussions.) The Tribunal chair would be a judge or senior lawyer, with lay representatives appointed from the publishers and civil society, including the media unions, as with ETs.

The CPBF has long supported the idea of a statutory Right of Reply, under which publications would be required to correct factual inaccuracies. Successive attempts to introduce this in Parliament have failed in the face of the difficulty of defining a fact, which can be more contentious than it seems. A Libel Tribunal, however, could enforce the Right of Reply by ordering the publication of a correction or apology. It would not happen as quickly as the CPBF might like to see, but it would be better than the libel courts that can only award monetary damages.

There are two further arguments for a Tribunal: one, that it would cover all media, not just the press and its websites, which is the PCC's remit. It could offer redress to those with actions against broadcasting and the internet. Second, that cutting the costs would reduce the need for a further reform that we would advocate: the provision of legal aid for individuals in libel cases.

The case for a private individual facing a libel suit from a well financed litigant, private, corporate or funded on a CFA, to receive legal aid, seems to us incontestable (see below). There is also a case, as things stand, for individuals who have been grossly

defamed by a large publisher also to be eligible for legal aid, but the accessibility of a Tribunal would supply a means to pursue the case without great cost.

** Is there a problem with inequality of arms between particular types of claimant and defendant in defamation proceedings? Should specific restrictions be introduced for corporate libel claimants?*

On inequality there are two main problems to be addressed:

1. Costs. "Rich man's justice" is a commonly used description of the libel courts but the picture is more complicated. Those with the advantage in defamation trials are not only corporations or the super-rich but those on contingency fee arrangements. They have the financial muscle to force publishers to settle cases that may not otherwise succeed. As things stand we cannot see how any reform of defamation law and practice can be meaningful until restrictions are placed on the fees that lawyers can command. We appreciate that the Secretary of State for Justice has announced he will act on the review being conducted by the Master of the Rolls, and regulations to restrict success fees will be a help, but it would be far better to institute cheaper redress through a Libel Tribunal. If no such reform is made the CPBF would argue that individual plaintiffs should be able to apply for legal aid for full trials. This would eliminate the need for such individuals to seek CFA funding, benefiting all parties.

2. Individual defendants. The inequality of powerful vested interests bringing actions against individuals is becoming a trend, as the well publicised cases of Simon Singh, Hardeep Singh and Dr Peter Wilmshurst, all of whom were virtually bankrupted by vindictive actions, have demonstrated. We have suggested in the discussion on the proposed tribunal that such individuals be eligible for legal aid. But there is a further potential solution: that plaintiffs be not permitted to bring actions against individual contributors to media alone. The responsibility for publications lies with their editors, not contributors, and they should face actions brought over material they have published. We are not suggesting that defamation actions may not be brought against individuals, but that if the material at issue has appeared in publication, then those publication must be included in the action; it was their decision to publish and they who processed the material into its final shape.

These processes commonly include taking legal advice, which they are better placed to do than contributors. Such a move would put more resources behind a defence and equalise the action.

** Does the current law provide adequate protection for internet service providers (ISPs), online forums, blogs and other forms of electronic media?*

Following on, there is a clear need for ISPs to be protected not just from such actions but from any liability for material carried unwittingly on their networks. ISPs do not have editorial control. Likewise the Bill should specifically grant the editors of online discussions the sensible protection that already exists in practice: that they will have a defence as long as they remove material as soon as practicable after being notified of a potential legal action. It would be positive to enact this in law. Present custom and practice is that this protection is greater if the forum is not pre-moderated, on the basis that the editors could not see it coming, but it seems to the CPBF that it is the post-hoc action that matters; moderated or not, the defence would stand.

** Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?*

Confusion about the relationship between privacy and reputation has been an unfortunate feature of recent debates. They are separate issues. Superinjunctions granted to protect privacy, for example, have nothing to do with reputation: the fact that they are granted to prevent the publication of information regarding the litigant is a concession that the information is true, so publication would not be actionable under libel law.

When the rights to privacy and free speech (Articles 8 and 10 of the ECHR as adopted by the Human Rights Act) come into conflict the courts will always have to decide. At present there is concern that the balance is tipping too far towards Article 8, and the Bill can remedy this by requiring the judges to take into account the public interest as newly defined in the Bill in both privacy trials and applications for privacy injunctions; it may be that if applied to some current cases the judges might

have decided there was no public interest, but that would have been no great cause for alarm.

Parties who are opposed to human rights legislation in general have seized on the privacy question, notably over the superinjunctions, to call for abolition of the Human Rights Act, on grounds the CPBF regards as spurious. Babies and bathwater come to mind. The CPBF trusts the Committee is not thinking along these lines. A straightforward affirmation of the public interest consideration would be sufficient.

ends

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