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The "global pariah", the Defamation Bill and the Human Rights Act

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1 Introduction

The campaign for reform of the law of defamation in England and Wales[1] is reaching its climax. Following the report of the Ministry of Justice's Working Group[2] and Lord Lester's 2010 Bill, the government last year produced its own Draft Defamation Bill, based largely on Lord Lester's, together with a Consultation Paper that canvassed possible options for further or alternative reforms.[3] The Bill, in accordance with best parliamentary practice, was submitted in draft for scrutiny by a Joint Committee of both Houses, which heard extensive oral and written evidence and reported in October 2011.[4] The Joint Committee broadly endorsed the government's approach but in certain respects urged it to go further, producing a number of detailed recommendations. As this article went to press, the government produced its formal Response[4B] to the Report, accepting many, though not all, of its recommendations; it is expected that a revised Bill will be introduced into Parliament later this year. Meanwhile campaigners for more radical reform have vowed to keep up the fight and it is certain that attempts will be made in Parliament to amend in a pro-defendant direction whatever Bill the government finally produces.

This article will argue in favour of reform of the law of defamation, in particular to clarify the threshold of seriousness for a claim to be brought, extend qualified privilege, change to a single publication rule and restrict the rights of corporate claimants to sue. However, while supporting reform, it will also make four key arguments intended to balance some of the more exaggerated claims made by campaigners for reform. First, it will

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1 See, generally, http://libelreform.org/

2 Ministry of Justice, 23 March 2010, www.justice.gov.uk/publications/libel-working-group-report.htm; the author acted as the academic member of that group.

3 Ministry of Justice, *Draft Defamation Bill: Consultation paper* CP3/11 Cm 8020 (Norwich: TSO 2011).

4 Joint Committee on the Draft Defamation Bill, *First Report: Draft Defamation Bill* HL 203, HC 930-I (2011–2012), hereafter JC Report.

4B Government's Response to the Report of the Joint Committee on the Draft Defamation Bill' (February 2012) Cm 8295; hereafter "Response".

highlight how much of the "chilling" effect of libel law is unrelated to the substance of the law, but flows instead from fear of high legal costs. Second it will challenge the notion that the *values* underpinning speech and reputation are inevitably in conflict with each other. Third, by means of a brief comparative analysis, it will question whether English libel law really deserves its labelling by the reform campaign as a "global pariah" or "disgrace" – labels that have helped drive the perception that a *radical* rebalancing of substantive law in favour of free speech is required. Fourth, it will advance a number of arguments questioning the extent to which parliamentary reform of defamation law can achieve exactly what campaigners want: these will consider the important role in this area of both Articles 8[5] and 10[6] of the European Convention on Human Rights (ECHR), as interpreted by the Strasbourg Court, and will highlight the important obligation of courts under s. 3 of the Human Rights Act 1998 (HRA) to interpret and apply legislation compatibly with those rights "so far as is possible to do so".[7] It will contend that the constraint on one-sided reform flowing from this interpretive obligation, coupled with serious ambiguities about the role of the existing common law after reform, together mean that the relationship between the production of new statutory language and actual legal change is more complex and nuanced in this area than many reformers have appreciated.

2 The role of procedure and costs

Everyone agrees that the recent impact libel law has had on serious journalism and scientific inquiry has been problematic; the stories of Peter Wilmshurst, Simon Singh and others are too well known now to require retelling here.[8] The question is: why has this problem come about in recent years, and what should be done about it? A key aspect of the debate has concerned questions about whether it is substantive law that is mainly or partly to blame, or whether the problems flow from excessive costs and complex procedures, or both. So we must first question the extent to which reform of the substantive law of defamation can prevent harm done by threatened *misuse* of that law. Nick Clegg, when introducing the draft Bill, said: "It is simply not right when academics and journalists are effectively bullied into silence by the prospect of costly legal battles with wealthy individuals and big businesses."[9] No one surely could disagree; but it is important to be clear about the limits of what can be done to prevent such *abuses* of the law by reforming the *content* of the law. That such objectionable things can happen flows above all from two simple facts: first, that there is no legal aid for libel;[10] second, that, in private law disputes, as opposed to judicial review of a public authority, claimants can issue proceedings without the permission of a court. And issuing proceedings – or simply threatening to do so – is often enough to scare some critical voices into silence, given the huge cost of such proceedings and the absence of legal aid. Much of the evidence put forward by the Libel Reform Campaign against the current state

5 Article 8 provides: "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6 Article 10 provides in para. 1 that "Everyone has the right to freedom of expression"; the second paragraph provides a similar set of exceptions to para. 2 of Article 8.

7 HRA, s. 3. UK courts also appeared to have accepted that they are obliged to act compatibly with the Convention rights as public authorities under HRA, s. 6, in deciding domestic defamation cases: see e.g. *Re Guardian News and Media Ltd* [2010] UKSC 1.

8 See e.g. their evidence, and those of other scientists and writers to the Joint Committee, JC Report, Evidence, n. 4 above, vol. II, HL 203 & HC 930-II.

9 "Nick Clegg: 'Chilling' libel laws will be overhauled", *The Telegraph*, 7 January 2011.

10 Save in the exceptional circumstances set out in the Access to Justice Act 1999.

of the law does not concern actual court decisions; rather it tells stories of scientists and journalists being intimidated, silenced, by letters from expensive lawyers carrying frightening threats of legal action.[11] From this there is often a jump to the notion that law reform is the answer. But in many of the admittedly heinous examples used to fuel the campaign, the changes made to substantive law by the draft Bill would make no difference at all, since it is the simple *threat* of proceedings, however unlikely they are to be successful, that has caused the damage. As the Joint Committee put it: "The threat of court action, however empty, is enough for many to give way.".[12] Many others may be "chilled" by the fear of libel laws into not speaking out at all, however groundless their fears. The Publishers Association, in a survey of its members, found that "almost half of the publishers who took part" had "withdrawn publications as a result of threatened libel actions; a third have refused work from authors for fear of libel suits, a third have avoided publication on particular subjects" and "60% have avoided producing books about specific people or companies who have previously sued for libel".[13] Peter Wilmhurst, a victim of corporate libel proceedings, has related his experience of doctors being deterred by the fear of being sued for libel from giving evidence to the General Medical Council in relation to serious misconduct allegations against other doctors – this despite the fact that such statements would clearly be privileged and thus immune from liability.[14] Wealthy individuals or large corporations may issue proceedings even if their lawyer advises them that they would be highly likely to succumb to a strikeout application. Such claimants may simply calculate that the case is unlikely to get that far – that the recipient of the threatening letter will publish the desired retraction or simply desist from further criticisms, fearing that once proceedings are issued, even to have the case struck out may cost tens of thousands of pounds. Should the critic instead take a stand, refuse to withdraw their statements and defend the subsequent proceedings, they may be forced to give up in the end, or risk bankruptcy. Even if they win, they will probably not be able to recover all of their costs and thus risk being left very substantially out of pocket – over a hundred thousand pounds in Dr Singh's case.[15] As Dr Wilmhurst told the Joint Committee:

> Even though a defendant's statements are provably true . . . a wealthy claimant can use the cost of a case and amount of time wasted to drag out a case in order to force a less wealthy defendant to give up defending a good case.[16]

Equally, from a claimant perspective, the huge cost of defamation proceedings can deter or prevent many of those seriously libelled by the media from obtaining the rapid, prominent correction and withdrawal that they seek. While conditional fee arrangements (CFAs) have allowed for greater access to justice – and been used by deserving defendants as well as claimants – the current proposals radically to restrict such success fees, although aiming to bring down costs, risk rendering CFAs less available as they become less attractive to lawyers.[17]

Regrettably, however, there is very little in the Bill itself that recognises these basic points, the sole exception being the provision in cl. 8 to remove the right to trial by jury.

11 See e.g. Evan Harris's evidence in the JC Report, n. 8 above, EV 05, p. 73.

12 JC Report, n. 4 above, para. 81.

13 See n. 8 above, EV 38 at p. 300–1. It should be stressed that these figures only cover those *who responded to the survey*, around 65% of its membership; thus the figures in the text must not be read as if they were percentages of all publishers who are members of the association.

14 Ibid. Appendix 2.

15 See n. 8 above, EV 24.

16 See JC Report, n. 4 above, Written Evidence, HL 203 & HC 930-III, Dr Wilmhurst, EV 7, at [8].

17 On costs, see e.g. R Shaw and P Chamberlain, "CFAs in defamation and related claims: is the gravy train coming to an end?" (2010) 15(2) *Communications Law* 51 and Paul Tweed's paper in this volume (2012) 63(1) *NILQ* 141.

There is broad support for this move, with a strong consensus by practitioners that, when judges are freed from the worry of pre-empting matters that they must currently leave to the jury, they may become much more proactive in terms of case management, striking out bullying or trivial claims at an early stage.[18] The consultation paper includes some outline proposals for procedural reform, none of which, however, are in the Bill itself.[19] Here, the Joint Committee report has provided a much-needed corrective, arguing that:

> New mechanisms and streamlined procedures are required to enable parties to settle disputes more quickly and therefore cheaply. *Without procedural reforms, any changes made by the Bill will have little impact on the problems that have been identified with defamation law.* There was widespread agreement too that a rapid public correction, explanation or apology is often the remedy most valued by the claimant, and generally preferable to a lengthy legal case and consequent financial compensation, which too frequently would not meet the total costs of legal action.[20]

It is to be hoped that the latter point – making judge-ordered corrections or retractions much more quickly and cheaply available – will be picked up by the government, which, disappointingly, included no reforms to remedies in the Bill itself.[21] While the Committee's greater focus on this point is to be welcomed, it is notable that, save for a concrete proposal to require the permission of a court for a corporate claimant to issue proceedings,[22] most of its suggestions are in outline only and would require further detailed work by both the Ministry of Justice and the judiciary before they could be brought forward as concrete reforms. Moreover, neither the government, nor the Joint Committee has engaged in really radical thinking about defamation law, of a kind that might result in ground-breaking procedural and remedial reform.[23] At the outset therefore, it must be recognised that the draft Bill misses some of the most important targets for libel reform. Thus, for change that will make a real difference on the ground, we must hope that the Joint Committee's proposals in this area are picked up by the government when it brings forward a revised Bill, or during the Bill's passage through Parliament.

3 Libel reform: background and context

Speech and reputation: an incommensurable clash of values?

Many advancing the "free speech" side of the argument in this area would appear to agree with Iago that "Reputation is an idle and most false imposition; oft got without merit and lost without deserving."[24] Many commentators have noted how little attention has been paid in the libel reform debate to the importance of reputation and both Mullis and Scott in this volume[25] and David Howarth elsewhere[26] have recently sought to correct this tendency. It

18 See e.g. the comments of Adrienne Page QC, Paul Tweed, Hugh Tomlinson and Desmond Browne QC, n. 8 above (22 June 2011) especially Q566 and 567.

19 Ministry of Justice, n. 2 above, Annex D, and see the government Response, at paras 65–76.

20 JC Report, n. 4 above, para. 10 (emphasis added).

21 Another significant omission is any reform to the current "single meaning" rule (the legal fiction whereby a defamatory article is taken for legal purposes to have only one meaning: see e.g. *Slim* v *Daily Telegraph Ltd* [1968] 2 QB 157, especially at 171 and *Charleston* v *News Group Newspapers* [1995] 2 AC 65. It is condemned by many as both artificial and responsible for lengthy and complex procedural wrangling.

22 See p. 185–6 below.

23 See A Mullis and A Scott, "Reframing libel: taking (all) rights seriously and where it leads" (2012) 63(1) *NILQ* 3.

24 *Othello*, Act II, Scene 3, 259–64.

25 See A Mullis and A Scott, "Swing of the pendulum: reputation, expression and the re-centring of English libel law" (2012) 63(1) *NILQ* 25.

26 D Howarth, "Libel: its purpose and reform" (2011) 74 *MLR* 845–77.

is also frequently asserted that freedom of expression is the primary right in a democracy and that the crucial values underlying it do not also underpin the right to reputation. Hence the submission of the Libel Reform Campaign to the Joint Committee argued:

> Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: "I may not agree with [your reputation], but I will defend to the death your right to [protect] it." It seems unlikely . . . Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression.[27]

In order to contest the notion that reputation and speech are simply opposing principles, with free speech having inevitable categorical priority, a very brief survey of the key free speech rationales[28] will be undertaken, with the aim of showing that there is in fact a strong congruence between the values underpinning both rights.

The argument from truth, one of the classical free speech justifications,[29] has evident affinity with the basic existence of defamation law and the public interest it serves in providing a public remedy in respect of false and damaging accusations that may distort public discourse, as well as defaming the individual concerned. Of course, libel law can be misused to silence truthful criticism, but the point is that the basic principle underlying the law is one that, like free speech, aims to *promote* truth. Similarly, the self-development rationale for free speech evidently does *not* support a right to publish stories that wrongly damage or destroy another's reputation: both the "looking glass"[30] rationale for defamation law and that deriving from the vital human interest in forming social bonds and relationships[31] explain how gravely harmed an individual's ability to flourish may be when either they are shunned by society or their own self-esteem is badly damaged by seeing the poor image reflected back at them by the world.[32] Thus, while free speech *in general* is undoubtedly a vital condition for human development, its use to damage or destroy reputations may severely injure the development of those defamed; hence providing remedies for such misuse is in harmony with this rationale for free speech itself. The argument from moral autonomy[33] is also engaged by both free speech *and* reputation. While the moral autonomy of citizens is a powerful argument in favour of free speech in general, it is hard to see how such arguments, which are essentially dignitarian, can justify the kind of utilitarian calculus by which it is considered that allowing for the damaging of the dignity of certain individuals will be likely to produce better public discourse overall.[34] To treat the

27 See JC Report, n.4 above, Supplementary Written Evidence, Libel Reform Campaign (EV 13).

28 For an excellent discussion, see E Barendt, *Freedom of Speech* 2nd edn (Oxford: OUP 2005), ch. 1; for detailed analysis in the context of defamation law, see D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008).

29 Set out originally by J S Mill, "On liberty", in M Cowling (ed.), *Selected Writings of John Stuart Mill* (London: Everyman 1972).

30 That is, the social-psychology argument that how others see us has a critical impact on our self-image and thus self-esteem. See Mullis and Scott, "Swing of the pendulum", n. 25 above.

31 Advanced by Howarth, "Libel", n. 26 above.

32 As Howarth notes, ibid. p. 854, Rawls considered self-esteem so important that he afforded it the status of a primary good in his hugely influential account of justice: J Rawls, *A Theory of Justice* (Cambridge MA: Belknap Press 2005), especially at 440.

33 See e.g. R Dworkin, "Rights as trumps" in J Waldron (ed.), *Theories of Rights* (Oxford: OUP 1984); "Do we have a right to pornography?" in *A Matter of Principle* (Cambridge MA: Harvard UP 1985). For another defence of free speech based on autonomy see T M Scanlon, "A theory of freedom of expression" (1972) 1 *Philosophy and Public Affairs* 204.

34 I have made a similar argument elsewhere about the free speech rationales and privacy-invading speech: see G Phillipson and H Fenwick, *Media Freedom under the UK Human Rights Act* (Oxford: OUP 2006), pp. 683-90.

individual's reputation as "regrettable but unavoidable road kill on the highway of public controversy"[35] is plainly to use that person as a means to an end, failing thereby to recognise their inherent worth and dignity as an individual, which gives rise to the autonomy argument in the first place.

By far the most important contemporary free speech justification is the argument from democracy, in which freedom of speech is viewed as a primarily *instrumental* good in enabling and sustaining democratic self-government.[36] Barendt has rightly termed the democracy rationale, "much the most influential theory in the development of 20th century free speech law",[37] something that is clearly true in terms of both UK and Strasbourg jurisprudence.[38] While the importance of free speech to a democracy is self-evident, it should also be noted that a convincing argument can be made that the legal freedom carelessly to damage the reputation of others with false accusations does *not* well serve either public debate or the democratic process. As Barendt has put it:

> The public has a free speech interest in the publication of fair, well-researched stories, not in those which are poorly put together and which gratuitously destroy the standing of people in public life. The House of Lords was, therefore, surely right to insist [in *Reynolds*] that the press and other media should be required to observe the standards of responsible journalism . . .[39]

As Lord Nicholls put it in *Reynolds*, when reputations are wrongly damaged by the media:

> society as well as the individual is the loser . . . Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad.[40]

Barendt's paper in this volume illustrates this point tellingly by reference to a case in the US in which a newspaper "made a shocking mistake" in reporting that a candidate for a local office had been charged with perjury, when in fact the accused was his brother.[41] Thus "its coverage may have ruined the life of the claimant",[42] while the democratic process would clearly have been distorted had the plaintiff lost the election on the basis of a straight falsehood. The *Reynolds* approach of course also recognises that it may be in the public interest to publish stories the truth of which cannot in the end be proven in court, provided that reasonable attempts were made to verify the facts. Hence, the media should be free from the chilling effect of libel damages in relation to such stories, although, as many have pointed out, the value in truth *and* in informed public discourse surely require that, where it becomes clear in court that a given accusation was *not* true, the court should have power to order the newspaper to publish a correction, even though it is protected from liability in *damages* by the *Reynolds* defence.[43]

35 *WIC Radio Ltd* v *Simpson* [2008] 2 SCR 420, at para. 2, per Binnie J.

36 Advanced originally by A Meiklejohn, e.g. "The First Amendment is an absolute" (1961) *Supreme Court Review* 245.

37 Barendt, *Freedom of Speech*, n. 28 above, pp. 18 and 20 respectively.

38 See e.g. Phillipson and Fenwick, *Media Freedom*, n. 34 above, pp. 16–18, 37–79, 689–90.

39 See Barendt, *Freedom of Speech*, n. 28 above, p. 222.

40 *Reynolds* v *Times Newspapers* [2001] 2AC127, 201 (hereafter, *Reynolds*).

41 See *Ocala Star Banner Co.* v *Damron* 401 US 295 (1971).

42 See E Barendt, 'Balancing freedom of expression and the right to reputation: reflections on *Reynolds* and reportage' (2011) 63(1) *NILQ* 59, p. 66.

43 See further below, p. 172.

In short then, even a brief consideration of the key rationale for free speech shows considerable congruence with the values underpinning the right to reputation. This should encourage us to search for principled resolution of more practical and limited legal points of conflict between the two, rather than making the crude assumption of an inherent normative conflict with free speech figuring as the invariably superior value. It also helps to explain why both Strasbourg and a number of Commonwealth jurisdictions have concluded that a proper accommodation between defamation law and free speech is fully consonant with human rights values. It is to the comparative issue that we now turn.

Comparative perspectives: myth and reality

If the inevitability of a clash of values between reputation and speech at the theoretical level has been too readily assumed, the use of comparative analysis in the reform campaign has been obviously flawed and misleading. This issue is important, because it is only when we have a realistic view of the alleged problems of English libel law in comparative perspective that we will be in a position properly to evaluate the case for reform. Conversely, it has been a grossly *distorted* comparative perspective that has been used as one of the major arguments for radical reform: the perception has been put about that English law is some kind of "global pariah" as John Kampfner of Index on Censorship has repeatedly put it.[44] Far from being able to show anything close to a global consensus against English law, however, the usual comparison cites only the opposition of a single country, the United States.[45] The US example has been convenient for reformers because the USA recently passed an Act to protect US citizens from the enforcement of foreign libel judgments not compatible with the US First Amendment protection for free speech.[46] This has had a profound effect upon perceptions in this country. The Commons Select Committee on Media, Culture and Sport concluded that it was "a humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts",[47] while the Deputy Prime Minister has claimed that reforms are necessary to stop English libel law being an international "laughing stock" and make it instead a "model" for the world to follow.[48] It may be noted in passing that, if the premise of this argument were correct, it would leave the government with some difficulty. Since (as discussed below) the Bill makes only very modest changes to substantive defamation law, if English law really were a laughing stock before the Bill, it would certainly still be so after it. Fortunately, however, the premise of the argument is plainly false: English law has if anything already been something of a model to Commonwealth countries, which have adopted variants of its nuanced *Reynolds* approach – that broadly protects *responsible* journalism on public interest topics even where defamatory allegations turn out to be false – and clearly *rejected* the blanket US *Sullivan* doctrine, which effectively denies the protection of defamation law to all "public figures".[49] As a leading comparative scholar of defamation law points out:

> Changes have been seen in countries including Australia, Canada, Hong Kong, India, Malaysia, New Zealand, South Africa, and the UK itself. Generally *the developments outside the US* mean that, where material is published to a wide

44 See e.g. "Libel reform: a final push", *The Guardian*, 18 October 2011.

45 Reliance has also been placed on criticisms made by the UN Human Rights Committee – see below p. 157.

46 The so-called SPEECH Act (Seeking the Protection of our Enduring and Established Constitutional Heritage) 2010.

47 *Press Standards, Privacy and Libel*, House of Commons Culture, Media and Sport Committee, 9 February 2010, HC 362-I, 6.

48 "'Laughing stock' libel laws to be reformed, says Nick Clegg", *The Guardian*, 6 January 2011.

49 Subject to them proving malice – generally an impossible burden: see *Sullivan* v *New York Times* (1964) 376 US 254. For a comprehensive comparative study, see D Milo, *Defamation and Freedom of Speech* (Oxford: OUP 2008).

> audience, defamation defendants can establish a form of qualified privilege if they show that the publication concerned a matter of public or political interest and *was made responsibly or reasonably*.[50]

As Mullender puts it:[51]

> In . . . Commonwealth jurisdictions . . .. judges have pursued a common theme. Where journalists go about their business responsibly and in ways that serve the public interest,[52] they should not run afoul of defamation law – even if they are unable to prove the truth of the statements they make.

He notes that, while there are differences of "nomenclature and points of doctrinal detail", judges in Canada,[53] Australia,[54] New Zealand,[55] South Africa[56] and the United Kingdom have all agreed on this basic approach.

To this may be added the fact that English libel law is also broadly consonant with the approach of the European Court of Human Rights to freedom of expression.[57] The Court draws on the common traditions of the European democracies and is in turn responsible for setting standards across the whole of the Council of Europe. In comparative terms, the European Court has clearly pursued the Commonwealth rather than the US approach, holding that even major public figures are entitled to reasonable protection for their reputations.[58] Hence, in Strasbourg's view, the mere fact that the subject matter of a publication relates to a politician, or other topic of legitimate public interest, can never per se justifiably afford it blanket protection from defamation law if it makes false and damaging allegations. Instead, the European Court has repeatedly held that journalists benefit from protection under Article 10 only where defamatory allegations are supported by an adequate factual matrix, based upon reasonable attempts to investigate their reliability.[59] In *Bladet Tromsø*, for example, the court, in an oft-repeated phrase, said that the press should be protected, providing "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism".[60] Part of this ethic means that the "ordinary obligation" on the media is "to verify factual statements that [are] defamatory".[61] Moreover, it is now clear that, where a state fails to provide a remedy when serious defamatory allegations are published without due care, Article 8 may be breached, due to the adverse impact on personal integrity that seriously defamatory allegations may have.[62] Moreover, this applies even where the allegations relate to "public

50 A Kenyon, "What conversation? Free speech and defamation law" (2010) 73 *MLR* 697, p. 711 (emphasis added).

51 R Mullender, "Defamation and responsible communication" (2012) 126 (July) *LQR* 368, pp. 370–1.

52 Strictly speaking, under *Reynolds*, it is only required that the subject matter of the publication be on a matter of public interest.

53 *Grant* v *Torstar* (2009) 2009 SCC 61.

54 *Lange* v *Australian Broadcasting Corp*. (1997) 189 CLR 520 HC (Aus).

55 *Lange* v *Atkinson* [2003] 3 NZLR 385 CA (NZ).

56 *National Media Ltd* v *Bogoshi* 1998 (4) SA 1196 SCA.

57 See e.g. Milo, *Defamation*, n. 49 above; G Phillipson (with C O'Brien), "Defamation and political speech" (ch. 21), Fenwick and Phillipson, *Media Freedom*, n. 34 above.

58 See e.g. *Lingens* v *Austria* (1986) 8 EHRR 407, at [42].

59 See, amongst numerous authorities, *Pedersen & Baadsgaard* v *Denmark*, Application No 49017/99 (17 December 2004); *Radio France* v *France*, Application No 53984/00 (30 March 2004).

60 (1999) 29 EHRR 125, at [65]

61 Ibid. at [66].

62 See e.g. *Pfeifer* v *Austria* (2009) 48 EHRR 8; *Chauvy* v *France* (2005) 40 EHRR 706, at [31]; *Lindon, Otchakovsky-Laurens and July* v *France* (2008) 46 EHRR 35; *Petrenco* v *Moldova* [2011] EMLR 5; *Petrina* v *Romania* 78060/01 [2009] ECHR 2252. See, generally, below, pp. 159–60.

figures", including politicians,[63] an approach that implicitly but necessarily rejects the US *Sullivan* approach as incompatible with the ECHR.

It is in light of the above that we must consider the now notorious criticisms of English libel law made in the 2008 report of the UN Human Rights Committee,[64] also much cited by campaigners for reform as evidence of pariah status. First of all, it should be noted that it was primarily "the practical application" of the law of libel that was criticised; its adverse international impact was said to flow from the "advent of the internet and the international distribution of foreign media", while one of the Committee's main recommendations concerned curbing excessive costs.[65] It is true that the Committee also referred to the law itself as being "unduly restrictive" and suggested that the UK should consider introducing a US-style *Sullivan* "public interest" defence – but this was a baffling suggestion, since not only would this imply a need to change the law in all the Commonwealth countries noted above, but it would also almost certainly place the UK in breach of its international obligations under Article 8 of the ECHR – presumably not a desirable outcome in human rights terms. The conclusion must be, therefore, that, despite this apparent singling out of the UK by the UN Committee, English libel law is very much not out of step with most other Western countries. It is important to emphasise this because the libel campaign has said so many times that English libel law is the most draconian or claimant-friendly in the Western world that it seems to have become a kind of accepted truth just through repetition. But, as the evidence above confirms, the English *Reynolds* approach is, if anything, something close to an international standard-setter – already in this respect the model that Nick Clegg imagines only reform can make it. Moreover, in the light of the recent revelations of gross press misconduct by the Leveson Inquiry and the phone-hacking scandal, it would seem a bad time to argue that the current standards of responsible journalism that the law imposes on the media should be relaxed. The idea of removing from British newspapers a requirement that, before defaming public figures, they should check their facts, would strike many as a decidedly unappealing prospect.

Why then the violent criticism from US commentators? The simple answer is that US free speech doctrine under the First Amendment is very much an example of what human rights lawyers know as "American exceptionalism". It undoubtedly forms a strong contrast to English law in this area – but in most other areas of free speech law is out on a limb compared to the Strasbourg–Commonwealth consensus. The most dramatic example is probably in the area of hate speech, in which the US stands alone in holding that intentional incitement to racial hatred is constitutionally protected speech.[66] But other examples of US free speech exceptionalism are easy to find and include its stance on whether the state may punish, prevent or remedy by individual suit prejudicial media reportage of criminal trials

63 See e.g. *Lindon* v *France* (2008) 46 EHRR 35 concerning the notorious political figure Le Pen; *Europapress Holding DOO* v *Croatia*, Application No 25333/06 (2009) concerning a government minister. In that case, the court remarked that "the more serious the allegation is, the more solid the factual basis should be".

64 30 July 2008, CCPR/C/GBR/CO/6 at [25].

65 The Joint Committee recommended that the UK consider "limiting the requirement that defendants reimburse a plaintiff's lawyers fees and costs regardless of scale, including Conditional Fee Agreements and so-called 'success fees', especially insofar as these may have forced defendant publications to settle without airing valid defences." It also said tentatively that the UK "might consider" requiring claimants to show some "preliminary evidence" of falsity and absence of ordinary journalist standards. However, these aspects of English law are again commonly found in other countries and are also in accordance with the Strasbourg jurisprudence: see e.g. text to n. 183 below.

66 *RAV* v *St Paul*, 505 US 377 (1992); *Virginia* v *Black*, 538 US 343 (2003). This stance is also probably contrary to Article 19 of the International Covenant on Civil and Political Rights.

in the interests of fair trial rights and the presumption of innocence;[67] how far the state may regulate campaign financing;[68] and the extent to which there should be a remedy for the publication of private facts by the media.[69] The often unique stance of the US in these areas is well known to comparative free speech lawyers, and it is no surprise, therefore, to find US law in an oppositional stance to English law in relation to defamation also. What *is* startling is the frequency with which media and libel campaigners routinely hold up US libel law as somehow being "the standard" by which English law should be judged, without any acknowledgment that the US approach to the defamation of public figures has been rejected by virtually every major Western democracy. Our consideration of libel reform must then start with the clear acknowledgment that English law in this area is firmly in the moderate mainstream of comparative free speech law. That does not mean that it could not benefit from reform: but it does mean that such reforms must be assessed on their merits, not be propelled by the Libel Reform Campaign's baseless assertion that "English libel law is becoming a global disgrace."[70]

Since it is *not* then the case that English law falls outside some international consensus, what else may have fuelled the recent campaign for reform? Has English law perhaps been moving in a more claimant-friendly direction in recent times? Once again, unequivocally not. As Mullis and Scott point out in their paper in this volume, all the major changes in recent years have been in favour of the media: these include the development of *Reynolds* privilege from 1999 and its strengthening recently in *Jameel*;[71] the introduction of the offer of amends procedure in the 1996 Defamation Act; the ability of the Court of Appeal to control the award of damages by juries;[72] the introduction of a *reportage* defence for the media;[73] and the significant widening in recent years of the defence of "fair comment".[74] So it seems plausible to assert that what led to the recent campaign were developments elsewhere: the introduction of CFAs, which allowed more people to sue but, when coupled with the recent use of 100 per cent success fees, can hugely increase the costs that the losing side must pay; the massive rise in internet usage, which has vastly increased the scope for defamatory allegations to be read across the world, thus increasing the choice of possible fora for legal action; and the practice of newspapers and non-governmental organisations (NGOs) of maintaining vast online archives, which, combined with the effect of English law's admittedly archaic multiple publication rule, has meant that such bodies faced liability

67 US Supreme Court: *Nebraska Press Association* v *Stuart* 427 US 539, 549 (1976); cf. the Strasbourg decision in *Worm* v *Austria* (1997) 25 EHRR 557 and the laws governing contempt of court in most Commonwealth countries, on which see: I Cram (ed.), *Borrie and Lowe on the Law of Contempt* 4th edn (London: LexisNexis 2010). On the US stance, see G Phillipson, "Trial by media: the betrayal of the First Amendment's purpose" (2008) 71 *Law and Contemporary Problems* (Duke Law School, USA) 15–30 and other papers in that volume.

68 Modern doctrine stems from the Supreme Court decision in *Buckley* v *Valeo*, 424 US 1 (1976), which ruled that spending money to influence elections is a form of constitutionally protected free speech. For the most recent Supreme Court decision, see *Citizens United* v *Federal Election Commission*, 558US 08-205 (2010).

69 For a particularly striking example of US law's weak protection for privacy in the face of press freedom claims, see *Florida Star* v *BJF* 491 US524 (1989), in which the US Supreme Court held that the revelation in newspaper's report of a rape victim's name and address, resulting in her further terrorisation by her assailant, was protected against a civil action by the First Amendment. See, generally, D Anderson, "The failure of American privacy law" in B Markesenis (ed.), *Protecting Privacy* (Oxford: Clarendon 1999).

70 See http://libelreform.org/

71 *Jameel* v *Wall Street Journal* [2006] UKHL 44.

72 By virtue of s. 8(2) of the Courts and Legal Services Act 1990.

73 *Al-Fagih* [2001] All ER (D) 48. This allows the media to report the facts of an ongoing dispute involving defamatory allegations without incurring liability.

74 Said to have "widened enormously" in recent years by Lord Walker in *Spiller* v *Joseph* [2010] UKSC 53 at [131].

for defamation that was essentially indefinite in time.[75] English law has not recently become more claimant-friendly, rather the reverse; but the rise of the internet and the globalisation of legal services has recently extended the *practical effect* of English libel law as a potential restriction on free speech.

Article 8 ECHR: gone missing from the debate?

Having disposed now of two myths – relating to value-incommensurability and comparative law – we may move to consider briefly a third and more specific contextual factor, namely the growing importance of Article 8 in this area. This complex issue is comprehensively considered by Mullis and Scott in this volume,[76] so it is necessary to make only a simple point here. It is notable, reading the Joint Committee report and some of the evidence submitted to it, that there is a strong general tendency to ignore Article 8, minimise its importance, or imagine, wrongly, that it can somehow be shunted out of the way into privacy law, where it belongs. Thus the report discusses Article 8 in relation to defamation just once – and then briefly,[77] otherwise mentioning it only in relation to the right to privacy and then to support a pro-defendant reform to the fair comment defence that is in fact dubious from an Article 8 perspective.[78] Similarly, JUSTICE's determinedly one-sided submission all but ignores Article 8 (save for one dismissive point)[79] and appears to be either unaware of, or unconcerned about the possibility that some of the changes it advocates could place the UK in breach of its obligations under Article 8.

A look at the legal realties, in contrast, makes clear that the wistful hope of reformers that Article 8's role in defamation law can be minimised is misplaced. Whatever the rights and wrongs of the relevance of Article 8 to defamation law,[80] it now seems firmly established that it is here to stay, particularly in domestic law. The European Court does not at present *consistently* consider Article 8 in defamation cases: in fact, a 2010 study of 90 decisions since *Chauvy* v *France* in 2004[81] found that Article 8 figured in only 24 of them.[82] Rather, it seems to be in the process of deciding *when* Article 8 should apply.[83] In contrast, the decision of the Supreme Court in *Re Guardian News and Media Ltd*[84] on its face accepted that Article 8 is *always* engaged in defamation cases, thus seemingly going further than Strasbourg itself requires. Similarly, Lord Neuberger MR recently found in *Times* v *Flood*[85] that "Articles 8 and 10 of the Convention . . . are, of course, of critical importance in this area."[86] It is to be hoped that Strasbourg and the domestic courts together can clear up the

75 This is because English law treats each time an article is downloaded and read as a fresh publication, giving rise to fresh liability, meaning that in effect, there is no limitation period for libel.

76 Mullis and Scott, "Swing of the pendulum", n. 25 above.

77 JC Report, para. 18.

78 Ibid. para. 69(a); see discussion below at 176–7.

79 Considered below at ibid.

80 Some opposition to this development, including the author's, has proceeded from the lack of a properly reasoned account by the Strasbourg court of its relatively abrupt introduction into defamation cases; the "Swing of the pendulum" piece by Mullis and Scott in this volume is the best defence to date of the engagement of Article 8 in defamation, see n. 25 above; see also Howarth, "Libel", n. 26 above.

81 (2005) 40 EHRR 706.

82 S Smet, "'Freedom of expression and the right to reputation': human rights in conflict" (2010) 26(1) *American University International Law Review* 184, p. 195.

83 See *Karako* v *Hungary* (2011) 52 EHRR 36, discussed in detail by Mullis and Scott, "Swing of the pendulum", n. 25 above.

84 [2010] UKSC 1, at [37]–[42].

85 [2010] EWCA Civ 804, [2011] 1 WLR 153, para. 20.

86 Citing *Cumpana* v *Romania* (2005) 41 EHRR 14 (GC), para. 91, and *Pfeifer* v *Austria* (2009) EHRR 8, paras 33 and 35 as "authoritative" findings that "reputation [is] within the ambit of article 8" (ibid.).

confusion created by the former's somewhat enigmatic *Karako* judgment and its apparent misinterpretation in *Guardian News*. Courts need a clear and principled basis for deciding when Article 8 is applicable in defamation cases.[87]

But even assuming that this results in the finding that Article 8 does *not* always apply to defamation, in cases that, for example, concern corporate claimants[88] or strictly financial loss caused by "business libels",[89] its applicability even in some cases is of potentially great significance. Hugh Tomlinson QC has recently highlighted up to four ways in which English defamation law, under the influence of Article 8, may be driven in a more "*pro-claimant*" direction:[90] these include questions over the continued viability of the complete defence of truth, the rule against injunctions,[91] the existing categories of qualified privilege and the notion of resolving doubt in favour of Article 10 in *Reynolds* cases: the latter has already gone, deemed incompatible with Article 8.[92] Similarly, Mullis and Scott suggest that the Article 8-driven denial of qualified privilege to a local authority in *Clift* v *Slough*[93] might be taken further in cases where private bodies are concerned, with courts having to reassess established heads of privilege by asking whether they properly balance the competing Article 8 and 10 rights.[94] Howarth has also recently suggested that the defence of truth should arguably not apply where the harm caused is disproportionate to the benefit of revealing the truth in all the circumstances[95] – an issue also raised recently by Eady J.[96] In short, then, this might have been a good time for some serious reflection on when Article 8 should apply in defamation cases and what reforms it may require of the law. Instead, the approach of many reformers seems to amount to little more than the vain hope that it will somehow just go away.

Having disposed of these preliminary points, we may now turn to consideration of some general issues raised by legislative intervention into the common law, and the constraints on that intervention represented by the courts' obligations under the HRA.

4 Codifying and reforming the common law under the HRA: general considerations

Codification and reform: advantages and disadvantages

Given that in many areas the Bill makes only modest changes to the law and in some none at all, one of its chief benefits has been argued to be that it codifies an often very complex caselaw in relatively simple language. This may have two possible benefits. First, it may produce a more *accessible* version of the law, by placing in statute simpler and clearer

87 For full analysis, see Mullis and Scott, "Swing of the pendulum", n. 25 above.

88 On which, see *Hays* v *Hartley* [2010] EWHC 1068.

89 See Tugenhadt J in *Thornton* v *Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), at [39]: "What is at stake in a defamation reflecting on a person's character is now likely to be recognised as engaging that person's rights under article 8. On the other hand, if an alleged defamation engages only a person's *professional* attributes, then what is at stake is less likely to engage their rights under article 8, but may engage only their commercial or property rights (which are Convention rights, if at all, under article 1 of the First Protocol" (emphasis added).

90 "Strasbourg on privacy and reputation Pt 3: 'A balance between reputation and expression?'", *Inforrm*, 23 June 2010, available at http://inforrm.wordpress.com/2010/06/23/revisited-and-updated-strasbourg-on-privacy-and-reputation-part-3-%E2%80%9Ca-balance-between-reputation-and-expression%E2%80%9D/.

91 Affirmed recently in *Greene* v *Associated Newspapers* [2005] QB 972.

92 *Times* v *Flood* [2010] EWCA Civ 804, [2011] 1 WLR 153, at [21].

93 [2010] EWCA Civ 1484.

94 Mullis and Scott, "Swing of the pendulum", n. 25 above.

95 Howarth, "Libel", n. 26 above, pp. 867–8.

96 Speaking extra-judicially in a speech delivered at City University, London, 11 March 2010, available at www.judiciary.gov.uk.

formulations of the fair comment, "truth" and *Reynolds* defences that will be much more readily available and comprehensible to the layperson than the current, highly complex caselaw. This may particularly benefit two groups, who generally cannot afford routine – or indeed any – access to libel lawyers: "citizen journalist" bloggers and small NGOs, both of whom have increasingly important roles to play in public discourse. From a rule of law perspective, therefore, in which the clarity and accessibility of legal rules are cardinal virtues, the Bill can be argued to have significant merit. Second, if it can set out the best understanding of the common law in clear and emphatic terms, the Bill *may* ensure that more judges actually apply the law, rather than the more speech-restrictive version of it that many of them have evidently historically preferred.[97]

On the other hand, a number of commentators have pointed out the danger that the Bill's new provisions will simply lead to more uncertainty and hence more (expensive) litigation, defeating the clarificatory purposes of the Bill and adding to legal costs. Mullis and Scott have previously argued that, particularly where legislation mainly codifies the law with only minor changes, the reforms may simply not be worth the trouble. They place the "new" public interest and truth defences in this category, together with the "substantial harm to reputation" requirement in cl. 2, arguing:

> It is inconceivable that there will not be litigation while the precise ambit of the new law is explored. Given that the gains will be negligible, it must be doubtful whether statutory restatement in [these] . . . [areas] would be worth the candle . . .[98]

Similar arguments – that the new cl. 2 test is unnecessary and will merely increase costs – have been made by leading practitioners.[99]

It is tempting to respond by arguing that such additional litigation may simply be the short-term price to be paid for the longer-term goal of better and clearer libel law. However, this is subject to three major provisos. First, the legislation must clearly distinguish between pure codification on the one hand and reform on the other; in places the two appear to be mixed up together, as in relation to cl. 4 on "honest comment", where elements of codification and minor reform appear together in an uneasy jumble.[100] Second, in relation to *both* codifying *and* reforming provisions, the statute must make clear what role the existing common law will play. The rule of law benefits of clarity and accessibility posited above will not accrue – indeed the position could become worse than the present – if judges in practice simply keep applying the common law (on the basis that the statute is merely declaratory of it). Nor will the law become any more clear or accessible if judges purportedly apply the new statutory provisions, but so heavily glossed by the common law that, to discover the "real" meaning of the new provisions, one must, after all, read the previous caselaw.

There are in fact a number of possible approaches that courts may take to the interrelationship between the new statute and the existing caselaw; moreover, given the

97 It is generally acknowledged, for example, that High Court judges applied the new *Reynolds* defence somewhat restrictively, resulting in the eventual rebuke and clarification of *Jameel*. *Jameel* v *Wall Street Journal* [2006] UKHL 44, especially paras [33] (Lord Bingham), [56] (Lord Hoffmann). As Boland puts it, "the lower courts . . . initially thwarted the intention behind '*Reynolds* privilege' by applying it restrictively, with the consequence that it succeeded in very few cases": J Boland, "Republication of defamation under the doctrine of reportage – the evolution of common law qualified privilege in England and Wales" (2011) *OJLS* 89, p. 90.

98 A Mullis and A Scott, "Worth the candle? The government's Draft Defamation Bill" (2011) 3(1) *JML* 1, pp. 2–3 (hereafter *JML*).

99 See e.g. the comments of Adrienne Page QC, Paul Tweed, Hugh Tomlinson and Desmond Browne QC in evidence to the Joint Committee, JC Report, n. 19 above, Q564.

100 See further below, pp. 173–80. The JC Report, n. 4 above, notes this problem, at para. 21.

mixture of codification and reform in the Bill, it seems likely that different approaches will have to be taken, depending upon which part of it is being applied. Possible approaches include the following.

(a) First, judges could treat certain provisions as setting out a new and separate defence from those established under common law. This is a possible reading of cl. 2, which does not abolish the common law *Reynolds* defence. Under this approach, the common law would remain, running alongside the new law, so that defendants could argue *either Reynolds* privilege *or* cl. 2 "responsible publication". Quite plainly this would achieve nothing other than more litigation. Recognising this, the government has now indicated that it will amend the Bill to explicitly abolish *Reynolds* (Response at para. 13).

(b) A second possibility would be for courts to treat the new law purely as declaratory of the old; in such a case, judges would presumably recite the statutory formulation, but use established caselaw to determine all the detailed meanings of the law. This would be another possible approach to cl. 2, and a likely approach to cl. 1 (substantial harm) and cl. 3 (truth). As discussed above, this would provide little, if any, additional clarity, but it would improve accessibility, provided that the wording of the statute at least broadly captured the law actually applied by the courts.

(c) A third possibility would be for judges to treat at least some of the new provisions as representing a modest change in the law, but then to use established caselaw and principles as the key to *interpreting* the new provisions. Parts of cl. 4 on honest opinion seem ripe for this kind of treatment.

(d) Fourth, judges might apply the new law as it stands, using the caselaw only to help resolve ambiguities. This could apply to any provisions in the Bill that codify or change the law.

(e) Fifth, and finally, judges could take the new law as an entirely fresh start, rendering the old law wholly inapplicable. This seems likely at least in relation to cl. 6 (single publication) but could be applied elsewhere.

In practice, different judges will probably employ different combinations of the above approaches, disagreeing amongst themselves at to which approach should apply to which provisions. Under the worst case scenario, a great deal of litigation, possibly involving numerous appellate decisions, would be required to lay down an authoritative approach. The government seems to envisage approach (d) in relation to both the new truth and fair comment defences. In each case, the Explanatory Notes state that, where a defendant wishes to rely on the new statutory defence, the court would be required to apply the words used in the statute and not the current caselaw. However, the notes go on to say that: "in cases where uncertainty arises the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied".[101] Mullis has aptly described this as "an invitation to litigation",[102] while Mark Warby, in his evidence to the Joint Committee, similarly commented in relation to the new defence of truth:

> If the intention is that the courts would take account of the common law case law (as stated in para 24 of the Consultation Paper) then why abolish it? The justification offered in the Consultation Paper is that otherwise the common law

101 See n. 3 above, Explanatory Notes, para. 19 (Truth) and para. 30 (Honest Comment).

102 "The government's Defamation Bill – insufficiently radical?" Pt 2; *Inforrm*, 19 March 2011, available at http://inforrm.wordpress.com/2011/03/19/opinion-the-government%E2%80%99s-defamation-bill-%E2%80%93-insufficiently-radical-part-1-alastair-mullis-2/.

> defence would continue to exist alongside the statutory one, leading to confusion. But . . . I find it hard to think of anything more likely to confuse a client or non-specialist lawyer than advice to the effect that "Yes, I know that section 3(4) says the common law of justification is abolished, but that was not really the intention; the government expects Judges to refer to the common law nonetheless . . ."[103]

An additional problem here is that the same language is used in the Explanatory Notes about both the truth and honest comment defences. However, in the former case, it appears that the Act *only* codifies the existing law; in the latter, as currently drafted, it appears to both codify *and* modify it.[104] Further uncertainty could arise over how far courts will use references to the consultation paper or Explanatory Notes as evidence of the intention of *Parliament*. Although *Pepper* v *Hart* allows for reference to Ministerial Statements in order to resolve legislative ambiguities,[105] there are constitutional difficulties inherent in allowing government statements, whether forming part of Hansard or not, to determine the intention of the legislature.[106]

These problems, many of which are inherent in any statutory reform of rules of common law, will be aggravated in this particular instance by the fact that, assuming the Bill is enacted in some form, there will in future be not two but *four* sources of law for the courts to integrate, viz:

1. the new Defamation Act;
2. the existing caselaw, which will have some role – presumably a varying one depending upon the wording of particular provisions – in determining the meaning of the new provisions;
3. Articles and 10 and 8 as interpreted and applied by the Strasbourg court in its very extensive jurisprudence in this area;
4. The HRA, which tells the courts (in provisions themselves open to interpretation)[107] how to apply the Convention and its caselaw in domestic law.

While domestic courts have made a start in reshaping libel law to take account of factor 3, this will be an ongoing task, as the Strasbourg court's jurisprudence continues to develop and refine. Moreover, as noted above, the UK Supreme Court has recently held that Article 8 is *always* engaged in defamation cases.[108] If, at some future point, the Strasbourg court clarifies unequivocally its apparent stance in *Karako* v *Hungary*[109] that this is sometimes, but not always the case,[110] then domestic courts will have to reconsider this point, at the same time as seeking to apply the new legislation. Either way, assuming that the HRA remains on the statute book, courts will remain bound to ensure under s. 3 that any new Defamation Act is interpreted and applied compatibly with the Convention rights

103 See JC Report, n. 16 above, EV 55, at para. 20.

104 By removing the common law's current insistence that, to benefit from the defence, the publication must explicitly or implicitly refer to the facts that justify the opinion offered: see below, pp. 174–5.

105 *Pepper (Inspector of Taxes)* v *Hart* [1993] AC 593 (HL).

106 See A Kavanagh, "*Pepper* v *Hart* and matters of constitutional principle" (2005) 121 *LQR* 98, 100.

107 For example, there is a lively debate around how far s. 3 legitimately allows courts to go (discussed in Kavanagh, *Constitutional Review*, n. 125 below), while the interpretation of the HRA's provisions in relation to "horizontal effect" continues to be of notorious difficulty. See, most recently, G Phillipson and A Williams, "Horizontal effect and 'the Constitutional Constraint'" (2011) 74 *MLR* 878–910.

108 *Guardian News*, n. 84 above.

109 See n. 83 above.

110 As Mullis and Scott argue is the best interpretation of its *Karako* decision ("Swing of the pendulum", n. 25 above).

under the HRA and, in doing so, take account of the Strasbourg jurisprudence on those rights (under s. 2). As is well known, under the so-called "mirror principle", domestic courts have interpreted the HRA as meaning that they should generally follow the clear requirements of the Strasbourg caselaw.[111] It is to the HRA's importance to the interpretation of any new statute that we now turn.

The HRA constraint on reform

One matter that seems to have been notably neglected in the libel reform debate to date is the constraints represented by the courts' above-noted duties under the HRA. Indeed the HRA has generally been given pretty scant consideration: the Joint Committee report, for example, mentions it just once, and then only (with unconscious irony) to cite s. 12(4) – the provision requiring courts to "have particular regard to the importance of the Convention right to freedom of expression" – which has certainly *not* had the effect of causing domestic courts to favour that right over competing ones such as Article 8.[112] This example notwithstanding, the common assumption by reformers seems to have been that, if only just the right statutory language can be found, it will be like pulling a legal lever: the new formulation will be automatically implemented, just as intended, by the courts. The naivety of this stance will be immediately apparent to human rights lawyers familiar with some of the HRA caselaw on s. 3. The Defamation Bill will doubtless be accompanied by a statement of compatibility with the Convention rights when presented to Parliament.[113] Hence the courts will be likely to assume Parliament's intention to have been that any apparent incompatibilities should be dealt with using s. 3. Indeed, the Explanatory Notes, when dealing with the issue of compatibility with the Convention rights, state:

> It is considered that this Bill allows due flexibility for courts, when considering cases, to ensure that Convention rights are respected according to the extent to which the relevant rights are in play.[114]

The caselaw on s. 3 demonstrates that, whatever language Parliament uses, judges are capable of subjecting it to some pretty drastic re-interpretation in order to bring it into line with the Convention rights. As Lord Nicholls put it in the leading case: "Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear."[115] It is worth rehearsing briefly a few of the leading cases on s. 3, in order to correct the tendency, evident in so much of the discussion of this subject, to ignore its potential to change the meaning and effect of whatever provisions end up in the new Defamation Act.

The leading case, *Ghaidan* v *Godin-Mendoza*,[116] concerned a provision in a statute giving the right to inherit tenancies to married couples and couples "living together as husband and wife". In order to "read out" the sexual orientation discrimination entailed by this provision,[117] the House of Lord reinterpreted it so as to cover two gay men who had lived

111 See *R (on the application of Ullah)* v *Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26; [2004] 2 AC 323, at [20] (Lord Bingham); J Lewis, "The European ceiling on rights" (2007) *Public Law* 720. See also R Masterman, "Aspiration or foundation? The status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law" in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge: CUP 2007).

112 As affirmed, e.g. in *Guardian News*, n. 84 above. Similarly, the JUSTICE submission mentions the HRA only once, in its final paragraph, and only then in relation to an ancillary point on the ability of "public authorities" to bring defamation actions: JC Report, n. 16 above, EV 20, para. 59.

113 Such a statement accompanies the draft Bill, n. 3 above.

114 See n. 3 above, Explanatory Notes, para. 66.

115 *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, 571.

116 Ibid.

117 Which violated Article 8 read with Article 14 – the non-discrimination provision.

together in a stable relationship. Lord Millet's dissent complained that the terms "husband" and "wife" were surely gender-specific terms, intended to limit the benefit of the legislation to opposite-sex couples.[118] In an earlier decision, a provision in the recently passed Youth Justice and Criminal Evidence Act 1999, providing that evidence of the victim's sexual history with the defendant in rape trials could only be admitted in very narrowly defined circumstances,[119] was interpreted by the House of Lords to mean that it could be admitted whenever the interests of a fair trial under Article 6 required it.[120] No real attempt was made to explain how the actual words of the statute could bear the new meaning imposed upon it (as Lord Hope in dissent complained); rather, an effective amendment to the statute was inserted in the form of a proviso that evidence must be admitted where Article 6 ECHR so required. A similarly dramatic re-reading of legislation occurred when their Lordships found in *Lambert*[121] that a provision in the Misuse of Drugs Act that plainly placed an adverse *legal* burden on the accused[122] could be read down using s. 3 into merely an *evidential* burden. Their Lordships thus read the words, "proves that he neither believed or suspected that the substance in question was a controlled drug" as meaning, "*leads evidence such as to raise an issue as to whether* he neither believed or suspected . . .". The most recent example concerned provisions in the Prevention of Terrorism Act 2005 dealing with control orders: the provisions stated that evidence *must not* be disclosed to a suspect where it was contrary to the public interest; they were reinterpreted by the House of Lords to mean that the gist of such evidence must be disclosed even if that was contrary to the public interest,[123] again by the insertion of an Article 6-protecting proviso. As a result of these and other decisions,[124] the leading commentator in this area, Aileen Kavanagh, is very clear that courts have reached outcomes plainly contrary to Parliament's intention as expressed in the relevant legislation,[125] occasional pious denials by Law Lords notwithstanding.

Of course, there are some quite well-established limits to interpretation under s. 3 deriving from the caselaw. Most importantly – if rather vaguely – acts of interpretation must be recognisable as such and not cross into the "forbidden" area of "legislation".[126] However – and this is a key point – *reinterpretation of statutory provisions is easy to achieve when those provisions use broad and general terms, which are inherently open and flexible in meaning.* Applying this point to the Defamation Bill, it is immediately evident that it is heavily reliant on such terms – and thus inherently flexible in its meaning and effect. Consider for example the repeated use of the term "substantial" in the Bill's clauses: only statements causing or likely to cause "substantial harm" to reputation are defamatory (cl. 2); "substantially true" allegations are protected by the defence of truth (cl. 3(1));[127] the new single publication rule

118 *Ghaidan* v *Godin-Mendoza*, n. 115 above, at 582ff; his Lordship complained by way of analogy that the word "black" cannot be interpreted to mean "white" (at [70]).

119 S. 41.

120 *R* v *A (Complainant's Sexual History)* [2002] 1 AC 45 (HL).

121 *R* v *Lambert* [2001] 3 All ER 577.

122 If he could not prove that he was ignorant of the fact that the substance he had in his possession was a controlled drug, he would be convicted.

123 *Secretary of State for the Home Department* v *AF (No 3)* [2009] 3 WLR 74.

124 See also *R* v *Offen* [2001] 1 WLR 253.

125 A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP 2009), pp. 80–1 and see, generally, chs 2–4 on the s. 3 caselaw.

126 See e.g. Lord Millett in *Mendoza*, n. 115 above, at 584: "the exercise which the court is called on to perform is still one of interpretation, not legislation".

127 And see also re multiple imputations in cl. 3(3), the repeated use of "substantially true" and a similarly open-textured term, "materially injure".

uses the test of whether a later publication was "substantially the same" (cl. 6(1(b)) as an earlier one, while denying it protection under the rule if the manner of its publication was "materially different"(cl. 6(4)). Another example is the notoriously vague term, "the public interest", used both in relation to the codification of *Reynolds* in cl. 2[128] and as part of the definition of honest comment in cl. 4(3). The comment defence also hangs upon the key distinction between statements of fact and expressions of "opinion" – a famously slippery distinction that sharply divided the High Court from the Court of Appeal on the facts of the notorious *Simon Singh* case.[129] Similarly general terms include the test of whether "an honest person could have held the opinion" in relation to the honest comment defence in cl. 4(4), "responsible"[130] in relation to cl. 2, "impartial" in relation to "reportage",[131] and so on. Moreover, even when introducing a seemingly hard and fast change like the single publication rule in cl. 6, an escape route is left via the very general proviso in the Limitation Act 1980, allowing an action to be brought out of time where "it appears to the court that it would be equitable" to allow it.[132] Clearly then, the Defamation Act will be *linguistically* wide open to interpretation and reinterpretation.

There are other limits to the use of s. 3 HRA deriving from the caselaw; however, none would appear to apply to the Bill. The first of these, deriving from *Anderson*,[133] is that a proposed re-interpretation must not go against the basic thrust or "grain" of the legislative scheme. Thus, in *Anderson*, the incompatibility with the Convention lay in the involvement of the Secretary of State in sentencing adult life prisoners (which violated Article 6(1)). Whilst it might conceivably have been *linguistically* possible to have read the Secretary of State's role out of the legislation, his role was a feature that was pervasive: unlike in cases in which the compatibility problem lay only in a particular sub-section of the statute, his role was embedded in the statute as a whole. In contrast, the Defamation Bill sets out a series of piecemeal, distinct reforms; presumably therefore, if one is found, on its ordinary construction, to violate Article 8 (or 10), courts will view it as easily remedied by interpretation without this gainsaying a "fundamental feature" of the legislation.

Another limitation derives from *Bellinger*,[134] and may be termed the implied "constitutional constraint" on the use of the court's s. 3 powers, deriving from the separation of powers. It applies when courts, although *able* to achieve re-interpretation as a matter of linguistic possibility, consider that the proposed change would have widespread implications in a complex area of social policy[135] that are "felt to be beyond the constitutional competence of the court".[136] The result is that a Declaration of Incompatibility (under s. 4 HRA), allowing *Parliament* to devise a comprehensive legislative solution, is seen as the more appropriate remedy. Again, however, this constraint would not appear applicable to the Defamation Bill: since the law of libel was originally judge-made, courts will doubtless feel themselves to be constitutionally competent to deal with legislation in the area as necessary; moreover, it is hard to see how judicial reinterpretation of the Defamation Act could have major knock-on effects in other areas of law, save

128 Cl. 2(1), 2(2).

129 *British Chiropractic Association* v *Singh* [2010] EWCA Civ 350, CA.

130 In relation to cl. 2 (responsible publication on matter of public interest).

131 Used in cl. 2(3) "an accurate and impartial account of a dispute" attracts cl. 2 protection.

132 S. 32(A). And see below, at pp. 171–2.

133 *R (on the application of Anderson)* v *Secretary of State for the Home Department* [2003] 1 AC 837. The House of Lords instead issued a declaration of incompatibility.

134 *Bellinger* v *Bellinger* [2003] 2 AC 467. See A Kavanagh, "The elusive divide between interpretation and legislation under the Human Rights Act 1998" (2004) *OJLS* 259, p. 272.

135 In *Bellinger* itself, how to recognise new gender status in the law.

136 R Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge: CUP 2011), p. 165.

possibly the new privacy "tort"[137] – which is also judge-made and therefore may be appropriately adjusted by judges, as necessary. The final key constraint arises in instances where the compatibility problem follows from the *absence* of provisions in a statute, so that "re-interpretation" would in reality mean the *implication* by a court of wholly new, detailed provisions into the statute (the issue in *Re S and Re W*).[138] Once again, this seems unlikely to apply in relation to the Defamation Bill, in which any compatibility problems will presumably arise from specific provisions, not their absence. In short, therefore, none of the major constraints on the use of s. 3 identified in the caselaw appear likely to apply to the new defamation legislation, while its repeated use of open-textured language leaves it extremely susceptible to (re)interpretation by courts armed with s. 3.

Thus the fact that, under the HRA, the courts will be not only free, but *required* to ensure that English defamation law remains compliant with Strasbourg principles, greatly limits the practical capacity of legislation to make radical changes to the law, even if its sponsors had wanted it to. An exception, ironically, is one change that the Bill does *not* make: were corporate claimants to be simply disabled from suing in defamation in clear language, this could presumably not be re-interpreted under s. 3. Given the modesty of the current Bill's proposed reforms, it is in fact hard to see major Article 8 or 10 issues arising from it, unless the courts were to take the view that some of the extensions to privilege (discussed below) under-protect Article 8. However, three other possibilities remain. First, were the Bill to be amended in Parliament so as to introduce more radical pro-defendant reforms, clear areas of incompatibility could well arise, requiring interpretive action to remedy them. Second, new Strasbourg developments, or domestic reassessment of the existing European caselaw, could require interpretation of the Act to change over time. This leads onto the third point, which is that the availability of s. 3 provides an answer to concern expressed by some practitioners that the codification undertaken in the Bill will "ossify" the law, preventing future dynamic developments.[139] In the light of the discussion above, this concern appears overstated:[140] the key provisions in the Bill may be interpreted and re-interpreted by courts using s. 3, allowing for a broad range of future developments related to Articles 8 and 10 to be accommodated within the existing wording. As seen above, such re-interpretations may even depart from the clear meaning of statutory words: the new Act should not in practice therefore prove to be a legal straightjacket.

5 The specific provisions and proposals to go further

Having now made the four key points highlighted in the introduction, we may turn to consider the particular proposals for reform contained in the draft Bill, taking them in order. In places, proposals to go further, from the Joint Committee and others, are also considered.

Requirement of substantial/serious harm: clause 1

Clause 1 of the draft Bill provides that: "A statement is not defamatory unless its publication has caused, or is likely to cause, substantial harm to the reputation of the claimant." A number of points may be made about this simple provision. First of all, as a

137 Otherwise known as the extended action in confidence: see, generally, *Campbell* v *MGN Ltd* [2004] 2 AC 157 (HL), especially at [11]–[22] (Lord Nicholls).

138 [2002] 2 AC 291.

139 See in particular Hugh Tomlinson's oral evidence to the Joint Committee, JC Report, n. 19 above, Q569.

140 This seems particularly so in relation the "new" public interest defence, in which the factors to which the court is instructed to have regard are neither weighted in any way nor stated to be exhaustive: plainly this clause therefore allows for developments in future.

number of commentators have pointed out, such a notion, rather than "raising the bar" for libel claimants, may go no further than the existing law, given the recent finding by Tugendadt J in *Thornton* v *Telegraph Group* that libel law "must include a qualification or threshold of seriousness, so as to exclude trivial claims".[141] Despite some confusion,[142] it now appears that the government's intention is that, while the new test was intended only to "reflect" not change the common law, putting it in the statute will give it "new prominence".[143]

Opposition to this provision, and suggestions for it to go further, have therefore both focused on the question of whether it will serve any real purpose as it stands. Two key points may be made here. First, in asserting that the common law already sets this threshold, most reliance has been placed on the *Thornton* decision, which after all, is only one, very recent decision, and not by an appellate court.[144] Second, there are undoubtedly older cases in which courts have set the bar too low for defamation: the best recent example is probably *Berkoff* v *Burchill*:[145] the Court of Appeal held that statements in film reviews by Julie Burchill that the claimant, like most film directors, was "hideously ugly" and – in a review of *Frankenstein* – that "the Creature" looked "a lot like Steven Berkoff, only marginally better-looking", were *capable* of being defamatory, in the sense of being likely to bring Berkoff into ridicule.[146] While the bar may well have been raised anyway since that decision,[147] the provision is a potentially useful reminder to the courts that, in order to restrict free speech, there should be some likely *serious* harm to reputation. This requirement is fully congruent with the view of the Strasbourg court that:

> In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life.[148]

This is not to imply that only those defamation actions that engage Article 8[149] should be permitted to proceed, but rather simply that some reasonable threshold of seriousness is fully consonant with Convention principles.

Two further points may briefly be made. First, this is an excellent example of a provision that, due to its general wording, will be read by the courts under the HRA – and by reference to the common law – to mean whatever they think the Convention and common law principle requires. Media lawyers will recall that the word "substantial" in the Contempt of Court Act 1981 was read down by the courts, so as to mean, in effect, "non-

141 [2011] 1 WLR 1985 at [100]. *Ecclestone* v *Telegraph Media Group Ltd* [2009] EWHC 2779 (QB) has been cited as an example of the law already disallowing trivial claims.

142 When the Lord Chancellor and the minister responsible for the Bill, Lord McNally, gave oral evidence to the Joint Committee, they gave the impression that the provision was intended to "raise the bar" from that set by the existing law: JC Report, n. 18 above, Q574.

143 See JC Report, n. 11 above: Kenneth Clarke MP, Lord McNally and Jeremy Hunt MP, Written Evidence, Lord McNally (EV 47).

144 *Sim* v *Stretch* [1936] 2 All ER 1237 may also be interpreted as requiring the same threshold.

145 [1996] 4 All ER 1008.

146 Another probably borderline case was *Dee* v *Telegraph Media Group* [2010] EWHC 924 (QB) (accusation that the claimant was the world's worst professional tennis player – summary judgment for defendant on justification and fair comment).

147 See e.g. *John* v *Guardian Newspapers* [2008] EWHC 3066, in which a satirical article about Elton John was found not to bear the seriously pejorative meaning contended for by the claimant; I am indebted to Alastair Mullis for this point.

148 *A* v *Norway*, Judgment of 9 April 2009, at [64].

149 See discussion above, pp. 159–60.

negligible".[150] Thus arguments about the precise wording to be used may in practice be of little consequence. The Joint Committee, echoing the view of the Libel Reform Campaign in this respect, suggested that the test be modified to "substantial and serious", and the government now proposes to use "serious harm" as the test.[151] While the current author would support this, as giving the judges a nudge in the right direction, it must be doubted whether it will make any real difference in practice.

The second point, put forward by a number of media practitioners, and by Mullis and Scott, is that the provision may be an excellent example of the kind of clause that will add nothing to the law but more litigation. Mullis and Scott contend that it is likely that "in practice, defendants will seek to challenge every libel claim on a 'clause 1 basis' with mini-trials taking place on the issue of 'substantial harm' at the outset of every action", something that would "increase the complexity and cost of litigation, not reduce it".[152] However, this objection appears overstated. While there may be a risk of this occurring in some early cases, or later marginal ones, there will still surely be a large number of cases in which the allegation is plainly serious enough to cross the threshold. Moreover, its chief value may lie in helping to deter frivolous claims.

Responsible publication on a matter of public interest: clause 2

Here again, the approach of the Bill is basically to capture the existing common law but in simpler, more straightforward language. Clause 2 provides as follows (note that changes the government has agreed to make in its recent Response are indicated by square brackets showing words to be deleted):

2 Responsible publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that:

(a) the statement complained of is, or forms part of, a statement on a matter of public interest; and

(b) the defendant acted responsibly in publishing the statement complained of.

(2) In determining whether a defendant acted responsibly 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 any imputation about the claimant that is conveyed by the statement;

(c) the extent to which the subject matter of the statement is of public interest;

(d) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;

(e) whether the defendant sought the claimant's views on the statement before publishing it and whether the publication included an account of any views the claimant expressed;

(f) whether the defendant took any other steps to verify the accuracy of the statement;

150 See the interpretation given to s. 2(4) of the Contempt of Court Act 1981 in *AG* v *English* [1982] 75 Cr App R 302.

151 JC Report, n. 4 above, para. 28. Response, at paras 9 and 10.

152 *JML*, n. 98 above, p. 4.

(g) the timing of the publication [and whether there was reason to think it was in the public interest for the statement to be published urgently];

(h) the tone of the statement [including whether it draws appropriate distinctions between suspicions, opinions, allegations and proven facts].

(3) A defendant is to be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person.

These provisions are similar to those in the Lester Bill and, as it did, treat reportage as an instance of responsible journalism (cl. 2(3).[153] They have the virtue of making clear that the protection affords to everyone, not just professional journalists.[154] As noted above, there is some modest merit in seeking to put *Reynolds* in simpler and more accessible language,[155] and particularly to emphasise the lesson of *Jameel* that lower courts had been applying the criteria too strictly and thus robbing journalists of much of the protection the House of Lords had intended to give them by that decision.[156] Thus, the clause may help make clear to judges that the required standard of responsible journalism is to be applied in a "practical and flexible manner"[157] and that the factors in cl. 2(2), taken from *Reynolds*, are not 10 hurdles every defendant must cross. It is notable that the factors to which the court is to have regard are deliberately presented as non-exhaustive and non-mandatory: thus, the court "may" have regard to the listed matters but only "amongst other [non-specified] matters". This is doubtless intended to stress that all the factors will not always be relevant, thus discouraging a rigid check-box tendency in applying them. However, there is the danger that this very flexibility may encourage courts simply to do whatever they were doing before, with the unfortunate result, discussed above, that the Bill's attempted clarification could be rendered nugatory. In relation to the reportage defence in particular, the consultation states openly that the Bill's provisions attempt only to capture the core of the emerging principles[158] and to leave the door open for further development. As discussed above, the Bill should formally abolish the common law here; moreover, as elsewhere, a coherent and consistent formula is needed by the draftsmen as to the role of existing authorities in interpreting the new law.

The consensus in terms of substance is that cl. 2 does not add anything new. Mullis and Scott see it as having rowed back from the more defendant-friendly Lester version, such that it essentially restates *Reynolds*,[159] while two leading practitioners agree.[160] Recognising this, the Joint Committee made a number of proposals to beef up the defence.[161] The most contentious of these is perhaps their suggestion that: "A new factor should be added that refers to the 'resources of the publisher'". The justification for this is that:

> it is not appropriate to expect the same level of pre-publication investigation from a local newspaper, non-governmental organisation or ordinary person as

153 Boland, "Republication", n. 97 above.

154 As already provided for by *Seaga* v *Harper* [2009] AC 1, see, especially, para. 11.

155 pp. 160–1.

156 Boland, "Republication", n. 97 above, p. 90.

157 *Jameel*, n. 71 above, at [56]

158 Based primarily on *Al-Fagih* [2001] All ER (D) 48 and *Roberts* v *Gable* [2008] QB 502, CA.

159 *JML*, n. 98 above, p. 6.

160 E Craven and A White, "Draft Defamation Bill – proposals, problems and practicalities: Pt 1", *Inforrm*, 3 April 2011, http://inforrm.wordpress.com/2011/04/03/opinion-draft-defamation-bill-proposals-problems-and-practicalities-part-1-anthony-white-qc-and-eddie-craven/.

161 JC Report, n. 4 above, para. 65.

> we should expect from a major national newspaper. [Instead] "responsibility" [should be treated as] a flexible standard that considers resources alongside other important issues such as the seriousness, nature and timing of the publication.[162]

JUSTICE similarly makes the argument that an unpaid blogger should not be expected to make the same checks before publishing a story as a professional journalist.[163] While it is of the essence of the *Reynolds* test that it should be applied with due flexibility, a note of caution should be added here. It could well be argued that if a blogger is considering publishing a seriously defamatory allegation, but knows that he or she does not have the resources to check its truth properly, the responsible course of action may not be to go ahead and publish anyway, knowing that the facts are largely unchecked, but rather to make further enquiries, or alert a professional journalist, with the resources of a newspaper behind them, to the possibility of the story's truth. Taken too far, the argument as JUSTICE puts it is a charter for irresponsible blogging, and it is welcome therefore, that the Government has rejected the proposal to add "resources" as a specific factor.[164]

As noted above, sub-cl. 3 attempts to reproduce the current defence of "reportage". It is important to recognise that such a defence has solid foundations in the Strasbourg caselaw in this area. The reportage defence recognises that, in Strasbourg terms, it is a key part of the media's "watchdog" role for it to report upon the *fact* that allegations have been made where that legitimately concerns the public. Thus, liability in defamation for such reportage will tend to violate Article 10. In particular, Strasbourg has found that journalists are entitled to repeat allegations made in official reports without attempts to verify them.[165]

However, in one respect subs. (3) may go too far. As the Joint Committee put it:

> the Reportage defence at clause 2(3) of the draft Bill . . . would appear to allow publishers to repeat almost any defamatory remark made by a third party in a context of a current controversy that relates to a matter of public interest . . . A limit is required. Our preferred option is to permit publication only when the reporting of the dispute is in the public interest (and not merely when the dispute concerns a matter of public interest). We also believe that the neutral reporting of a dispute should form one of the factors for determining responsibility, rather than automatically being viewed as responsible. Therefore, we recommend that the "reportage" defence at clause 2(3) is reformulated as a new matter to which the court may have regard under clause 2(2) namely "whether it was *in the public interest* to publish the statement as part of an accurate and impartial account of a dispute between the claimant and another person".[166]

This would appear to be in line with the most recent authority on this issue: the Court of Appeal's decision in *Times* v *Flood* makes clear that, to benefit from *Reynolds* privilege, not only must the general subject matter be one of legitimate public concern, but the particular

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162 JC Report, n. 4 above, para. 65(a).

163 JC Report, n. 16 above, Ev 20, p. 8.

164 Response, at para. 15. The Joint Committee goes on to make a number of suggestions for minor drafting changes relating to timing, "Draft Defamation Bill", n. 160 above, (65(c)) taking the statement in context (65(b)), tone (65(d)) and editorial discretion (65(e)).

165 *Bladet Tromsó and Stensaas* v *Norway* 29 EHRR 125 at [68]: "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public watchdog role of the press may be undermined."

166 JC Report, n. 4 above, para. 66.

publication must be "in the public interest".[167] The government did not accept the JC's suggestion here, saying only that it would seek to find a provision that best reflected the caselaw (Response at paras 21–3).

One problem with the current law in this area is not addressed by the legislation: that by focusing on whether the conduct of the journalist was *responsible*, it neglects the value to the public in knowing (if possible) whether the original allegations made were true or false. If the publication in question is found to pass the test of responsible journalism, the defendant will win, if not the claimant. However, in neither case will the public be any the wiser as to whether the accusation was true or not. This seems out of line with the underlying rationales for free speech, amongst them particularly, the argument from truth.[168] One way round this, as a number of commentators have suggested, would be for a newspaper that wins a case on *Reynolds* only to be required to publish a retraction or correction, at least where it has become obvious that the original allegation was false. The Libel Reform Campaign indeed has suggested that "claimants should be able to obtain a declaration of falsity from the court in *all* cases where they can prove a defamatory allegation of fact to be false".[169] However, on this matter – as on the subject of discursive remedies generally – the Bill is disappointingly silent.[170] Further, the Joint Committee comes out against any such proposal,[171] on the curious basis that: "It is not the function of the courts to determine categorically that something is false." The public might be surprised to hear this, given that criminal and civil trials are often welcomed by those accused as a chance precisely to establish the truth and thus clear their names. The Joint Committee added that "such a remedy could lead to a declaration of falsity being made in relation to a statement which is later proved to be true". One might point out that – certainly in terms of public perception – courts routinely find allegations to be false in libel trials[172] – and award large damages – so this "problem" would scarcely be a new one. The Joint Committee also does not advert to the fact that court findings of guilt of criminal trials have been known to be overturned on the basis of fresh evidence, and yet no one suggests that it is inappropriate for authoritative findings of guilt or innocence to be made by criminal courts. The committee adds, with rather more plausibility:

> There may also be legitimate reasons for a publisher being unable to prove the truth of an allegation. For instance, the publication may be based on information provided by a confidential source who cannot openly verify its truth.[173]

The *Jameel* case was precisely such an instance,[174] and such cases provide vivid demonstrations of why *Reynolds* privilege is needed. But the answer, surely, is that in such cases, the courts could do what the Joint Committee recommends and simply make a finding that the accusation was "not proven". But such instances provide no argument against the availability of declarations of falsity where it is clearly established in court that

167 [2010] EWCA Civ 804, [2011] 1 WLR 153, at [63]. See the incisive commentary by P Mitchell: "The nature of responsible journalism" (2011) 3(1) *JML* 19–28. As this paper went to press, the Supreme Court gave its judgment in the *Flood* case, in which it allowed *The Times*' appeal from the Court of Appeal judgment, but did not appear to change the law: [2012] UKSC 11.

168 See Barendt, "Balancing freedom of expression", n. 42 above.

169 JC Report, n. 11 above, pp. 64–5.

170 For more on this matter, see Mullis and Scott, "Reframing libel", n. 23 above.

171 JC Report, n. 4 above, para. 36.

172 Strictly speaking, the courts merely find the defamatory allegation not proven true; but this is not the general perception, which is surely what counts here.

173 JC Report, n. 4 above, para. 36.

174 The crucial information in that case having been provided by intelligence sources, who were, for obvious reasons, unwilling to give evidence in open court.

the accusations were indeed untrue, although responsibly made at the time. It is to be hoped that this issue will be reconsidered when the Bill is before Parliament.

Defence of truth: clause 3

Clause 3 provides as follows:

3 Truth

1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation in relation to a statement which conveys two or more distinct imputations

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not materially injure the claimant's reputation.

Here, the Bill appears to represent a straightforward codification of existing law,[175] and it here formally abolishes the common law defence of justification.[176] However, as noted above, the government has acknowledged that the existing common law may still be referred to by judges to resolve uncertainty. The advantages and difficulties that this kind of "codification" may give rise to have already been considered.[177] In view of the discussion above on discursive remedies, it is to be welcomed that the government agrees with the Joint Committee that courts should have a wider power than at present to order a summary of their judgment to be printed by defendants (Response, para. 27). This should in some cases assist the pubic in learning the falsity of the original allegations.

Fair comment/honest opinion: clause 4

Clause 4 provides as follows (note that changes the government has agreed to make in its recent Response are indicated by square brackets showing words to be deleted):

4 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that Conditions 1, [2] and 3 are met.

(2) Condition 1 is that the statement complained of is a statement of opinion.

[(3) Condition 2 is that the opinion is on a matter of public interest.]

(4) Condition 3 is that an honest person could have held the opinion on the basis of

(a) a fact which existed at the time the statement complained of was published;

(b) a privileged statement which was published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

175 It appears to reflect the law as stated in *Chase* v *News Group Newspapers Ltd* [2002] EWCA Civ 1772.

176 Cl. 3(4).

177 See above, pp. 160–4.

(7) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

Renaming the previous fair comment defence in a way that so much better reflects its essence is clearly sensible and follows the recent suggestion to this effect by the Supreme Court in *Spiller* v *Joseph*.[178] Again, this clause more or less replicates the Lester Bill but the formulation here is simpler and clearer and has the potential to enhance considerably the accessibility of the law. It is in fact slightly more restrictive as far as defendants are concerned than the Lester formulation; under the latter, the comment could be based on allegations that can themselves be shown to have been responsibly published.[179] This does not appear to be the intention with the current Bill, although the reference to a "privileged statement" in cl. 4(4)(b) should be amended to make clear that it does *not* apply to a statement found to be protected under cl. 2, nor indeed one privileged under traditional common law "duty-interest" privilege,[180] but *only* one protected by *statutory* qualified or absolute privilege.[181]

The notion that comment on matters of public interest is free, but must be based on at least some factual matrix, is fully consonant with the Strasbourg caselaw. As Strasbourg has recently put it: "Under the Court's case law a value judgment must be based on sufficient facts in order to constitute a fair comment under art. 10."[182] Provided that this condition is satisfied, Article 10 *requires* that such comments should not attract liability: the Court has consistently held that a requirement in national law to prove the truth of value judgments will breach Article 10. The following recent exposition by Strasbourg captures its stance well:

> In assessing the proportionality of interference [with free speech], a distinction would have to be made between statements of fact and value judgments. While the existence of facts could be demonstrated, the truth of value judgments was not susceptible of proof even though there would have to be a sufficient factual basis to support it, failing which it might be excessive.[183]

Importantly, the above makes clear that upholding freedom to make so-called "bare comments" – in which the defendant has put forward a disparaging opinion without any supporting facts at all – is not required by the Convention. Indeed, in cases in which the comments were so damaging as to risk violating personal integrity, affording them protection in domestic law might well breach Article 8.

Three main issues have arisen in relation to cl. 4. The first is whether it is right to drop the common law's current insistence that the defendant must normally indicate in the defamatory publication the facts on which the opinion is based in order to benefit from the defence. The second is whether the Bill as drafted retains – or should retain – the requirement that the defendant must be *aware* of the facts on which his or her comment is based. Condition 3 merely requires that a fact or facts existed at the time of the statement that could have led the opinion to be held. The third is whether condition 2 – that the comment be on a matter of "public interest" – should be dropped.

178 [2010] UKSC 53.

179 The consultation paper says that this is because this would introduce further complexity – and that this link is not firmly established in the caselaw: see n. 3 above, para. 47.

180 See e.g. *Adam* v *Ward* [1917] AC 309 at 334, per Lord Atkinson: "a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it". A typical example is where an employer provides a defamatory reference to a potential new employer.

181 As the Joint Committee recommends, JC Report, n. 4 above, para. 69(f). The government has accepted this recommendation: Response at paras 39 and 40.

182 *Dyuldin* v *Russia* (2009) 48 EHRR 6 at [48].

183 *Europapress Holding DOO* v *Croatia* (2009) Application No 25333/06.

In relation to the first issue, the Supreme Court in *Spiller* v *Joseph* recently confirmed that:

> The comment must . . . identify at least in general terms what it is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did.[184]

In re-affirming this requirement, Lord Walker justified it explicitly by reference to the Convention, noting that:

> the Grand Chamber at Strasbourg has recently approved the general proposition that even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it. The defence of honest comment requires the commentator to identify, at least in general terms, the nature of that factual basis.[185]

The rationale for this requirement is that, whilst it is in the public interest for topics of general public concern to be robustly debated, it is very doubtful that the public interest is served by allowing people to voice opinions that are seriously defamatory without providing any of the facts that are relied on as grounding the opinion. Consider, of a senior academic: "she is the most incompetent member of her department", of a barrister, "the most dishonest member of his chambers". Allowing fact-free comment simply encourages the denigration of persons in the public eye and a poor standard of public debate. As Mullis and Scott put it:

> By requiring that the basis for the comment be made explicit, the Supreme Court imposed and encouraged a minimum standard of reasoned debate. Reasoning and analysis (albeit not of a very high standard) are required before the defence can apply. In contrast, the Government's draft Bill seems, in effect, to provide a defence for a naked opinion. This goes too far in favour of freedom of expression. Passed into legislation, it would positively invite irresponsible journalism and would permit authors to publish in the expectation that often some fact might subsequently be found upon which to hang any challenged statement.[186]

The Law Society expressed a similar concern about newspapers sued for defamatory opinions running "fact-gathering exercises all the way up to trial"[187] in order to try to find some evidence to justify the original derogatory comment.

This leads onto the second point: whether the defendant must be *aware* of the facts on which the comment is based. The draft Bill simply says that the fact must have "existed at the time the statement . . . was published". The requirement of knowledge is a common law rule and it is plausible to believe that judges would read it into the statute anyway on the basis that an "honest" person could not have held the opinion without knowing of any facts that might justify it. However, this is precisely the kind of point that would require litigation, possibly going all the way up to the Supreme Court again, to establish. Therefore, if it is intended that this rule should still apply, it should *not* be left to be implied by inference. Instead, cl. 4(a) should be amended to say that there must be "a fact or facts *of which the defendant was aware when making the comment*". On this point, the Joint Committee's reasoning is, at first sight, somewhat contradictory. On the one hand, it remarked approvingly that:

184 *Spiller*, n. 74 above, at [104].

185 Ibid, at [132]. The reference is to the decision in *Lindon* v *France* (2007) 46 EHRR 761, para. 55.

186 *JML*, n. 98 above, p. 11

187 JC Report, n. 16 above, Law Society, EV 21, p. 91.

> Neither the Government's draft Bill nor Lord Lester's Bill imposes any requirement that the commentator need know the facts relied on to support the opinion. In line with our concern to improve clarity, we welcome this change, which removes an undesirable layer of complexity.[188]

In arguing that the person making the comment need have no knowledge of any facts to support it, the Joint Committee at this point appears to be arguing for the right to wholly unsupported defamatory opinions. This appears to be implied by its comment that:

> often [the supporting] facts *will not have been evident* at the same time as the comment . . . There are also difficulties with the common situation where the media are reporting comments by others, whose knowledge of the background facts may be unknown, and where only the media are sued and the original commentator may not be prepared to assist.[189]

However, these remarks are hard to square with the Joint Committee's immediately preceding recommendation (accepted by the government) that:

> The Bill should not protect "bare opinions". It should be amended to require the subject area of the facts on which the opinion is based to be sufficiently indicated either in the statement or by context.[190]

At first sight these two statements seem contradictory: the Joint Committee seems to be demanding both that defendants should be able to publish opinions that are not based on any facts known to them, but that they must nevertheless reference those facts when writing the opinion. How, it might be asked, can a defendant refer to facts of which he or she is not aware? Presumably, however, what the Joint Committee means is that *if* a requirement is imposed that facts must be referenced in the publication in question, this will render a *separate* requirement that the defendant be aware of such facts otiose, since the reference requirement will cater for this already. However, it might equally be said that a court – or blogger – could be confused by the apparent contradiction highlighted above. Requiring the defendant to know of the facts *and* to refer to them when expressing the opinion instead puts forward a clearly consistent message; moreover the requirement of knowledge of the facts should generally be able to be satisfied by pointing to compliance with the requirement of referencing them.

The third and most difficult point is the suggestion by the Joint Committee that condition 2 – requiring the comment to be on a matter of public interest – be "dropped" as "an unnecessary complication",[191] a change strongly supported by the Libel Reform Campaign, and now accepted by the government.[192] JUSTICE also supported this proposal:

> We can see no good reason why the freedom to express one's opinions, honestly held, should be constrained by a requirement to demonstrate that the opinion relates to a matter of public interest. We note that Lord Phillips in *Spiller* v *Joseph* also doubted the need for this requirement . . . Any article 8 concerns are properly the subject of the law governing privacy, not defamation.

Similarly, the Media Law Resource Center urged the dropping of the public interest requirement, noting in relation to the Government's Article 8 concerns:

> We strongly urge that concerns for respect for private life not be imported into defamation law. Defamation law is designed to protect reputation in the

188 JC Report, n. 4 above, para. 69(c).

189 Ibid.

190 Ibid. para. 69(b). Response, at para. 32.

191 Ibid. para. 69(a).

192 See n. 27 above. Response at para 31.

> community and should not be blended haphazardly with concern for privacy rights which are subject to different legal theories and defences.

Such comments evince the desire, noted above, to keep Article 8 out of libel law. Now JUSTICE may simply have meant that if an objected-to comment on private life is made, then the remedy should appropriately be sought under the law of misuse of private information[193] not under libel law. This is what the Joint Committee seems to have had in mind in stating that: "The law's protection of the right to personal privacy and confidentiality . . . can be used to prevent people from expressing opinions on matters that ought not to enter the public domain."[194] Similarly, the Libel Reform Campaign argued on this point that "privacy law covers publication on matters of a private nature (medical records etc)". However, such comments fail to appreciate the complexity of this area. A number of different scenarios concerning comment on private matters logically arise and must be taken in turn.

The first is the scenario in which private facts about an individual have *previously* been published and given rise to liability under the new extended action in confidence/tort of misuse of private information;[195] is adverse *comment* on those facts permissible under defamation law? The Media Law Resource Center addressed this scenario, saying:

> In the Max Mosley privacy case the High Court held that reports about Mr. Mosley's German-themed S&M sessions did not involve a matter of public interest. It would be ludicrous to carry this forward and hold that opinions about his conduct are defamatory and not to be uttered because the conduct involved a private matter.[196]

However, it is not at all clear that such a finding would be "ludicrous". As noted above, the Bill will rightly not protect bare opinions, regardless of whether there is a public interest requirement or not: there must be at least some factual basis for defamatory comment. In the scenario above, newspapers commenting adversely on Mosley's private life would be relying on the facts being generally known to the public (no injunction was granted in Mosley's case). However, where the facts should never have been revealed to the public, because doing so involved a breach of Article 8, it would appear to be arguable that the same or another media body should not be able to rely on the legal wrong of another in publishing those facts, in order to be able to use them to render their defamatory comments immune from liability. The counter-argument would be that, once the facts *are* generally known, it would be futile to try to prevent others commenting on them: the analogy would be the view the courts take that, once confidential *information* has been widely published – even if wrongly – it would be pointless and therefore disproportionate to seek to enjoin further publication of those facts since the "ice-cube" of confidentiality has now melted and the damage to privacy has been done.[197] If this argument were accepted, the result would be that defamatory comment on private matters *would* be permitted in such circumstances *except* where publication of the relevant facts had been enjoined. (Where

193 See n. 137 above.

194 See n. 137 above. The JC was probably here drawing on the view of Lord Lester to the Committee: "Given that these interests are protected by privacy and data protection law, it is no longer necessary to retain this element of the defence." The JC also expresses the non-sequitur view that "it may be a breach of the right to free speech under Article 10 of the ECHR to require a person to prove the truth of a value judgment irrespective of whether it concerns a matter of public interest or not." This, however, is a separate point and there is no question of English law requiring "proof" of the truth of value judgments.

195 See, generally, *Campbell* v *MGN Ltd* [2004] 2 AC 157 (HL), especially at [11]–[22] (Lord Nicholls).

196 See n. 16 above, EV 14. The reference is to *Mosley* [2008] EWHC 1777 (QB) [2008] EMLR 20.

197 See e.g. *Douglas* v *Hello! Ltd (No 3)* [2006] QB 125, at [105] – suggesting that the same principle might not apply to republication of widely seen intrusive photographs.

there *was* an injunction, the commentator would breach it if they published the relevant facts[198] or at least risk incurring liability in damages). However, if the public interest requirement of the honest comment defence were removed, then the message sent to courts would be that comment, *including on private matters*, was always permitted, provided that some facts existed that could lead an honest person to hold the relevant opinion. Thus, the removal of this requirement would put defamation law in tension with privacy law: disparaging *opinions* on private life lacking a public interest would be lawful when the disclosure of the related private *facts* would not.

Second there is the scenario in which a newspaper expresses a defamatory opinion about a person's private life *without* relying on previously stated facts; consider, for example, of a prominent, married QC: "she may be a good advocate but her private life is totally immoral". It is too hasty to say, as the Joint Committee and others do above, that such statements could be dealt with by privacy law. The above is a defamatory *opinion*, not the disclosure of private *information*. The tort of misuse of private information is concerned with the latter,[199] and so seemingly could not capture publication of such an opinion.[200] So in this scenario the privacy tort could *not* in fact help. The issue in defamation law would then turn on whether any facts could be adduced in support of the action. If no facts existed then the opinion would be a bare one and there would be liability in defamation, regardless of whether there was a public interest requirement or not.

However, if the commenter *were* able to produce facts that could give rise to the opinion then we would be in a third scenario. It will be recalled that, under the Bill, the facts do not need to be *referred to* in the article. In this case, suppose the facts relied on were the commenter's knowledge that the QC had an "open relationship" with her husband, whereby both parties occasionally had sex with other people with their spouse's full knowledge and consent. One course here would be for a judge to hold that, where the facts relied on to support the opinion could not be stated without violating Article 8 and incurring liability under the privacy tort, then they should be held to be legally "inadmissible" for the purposes of supporting the honest comment defence in defamation. The argument would be that the defendant could not rely on their own legal wrong of publishing private facts in order to render protected their otherwise defamatory opinion. It would follow that, since the supporting facts could not be adduced in court, the comment would be treated as a bare one and thus not protected by the honest comment defence; liability under defamation would therefore arise. But such a line of reasoning depends on the current requirement that the opinion must be on a matter of public interest. If this requirement were removed, a court would presumably have to take the view that there was simply no question of any opinion supported by some facts incurring liability on the grounds that it concerned private life. The result of this would be to allow a form of circumventing of the private facts tort through the publication of disparaging and damaging opinions on private life: these cannot incur liability under the private facts tort (since that requires publication of private *information*); but nor (on this reading) would they incur liability in defamation, because opinions – even on private matters – would be protected, provided they were honestly held and had some factual support.

198 Depending upon which media bodies the injunction applied to. But see *Attorney General* v *Punch* [2003] 1 AC 1046 in relation to contempt liability for frustrating the purpose of an injunction against one media body by publishing the confidential information covered by that injunction.

199 See e.g. n. 197 above, at [83].

200 Although there could be a remedy under the Data Protection Act 1998; under the Act "personal data" "includes any expression of opinion about the individual" (s. 1(1)).

It is for this reason, then, that the requirement of public interest should *not* be dropped from the public interest test. This also provides a further argument against the Bill dropping the common law's current requirement that the defendant must refer to the relevant facts in the defamatory publication (the first point on comment, considered above). If the defendant were required to state the relevant private facts when advancing their disparaging opinion then the publication (assuming it lacked a public interest) would necessarily disclose private information; in such a case, it *could* be remedied under the private facts tort and the possible loophole in common law protection would be closed.

Finally, it is contended that to provide for liability in relation to disparaging comment about a person's private life would better reflect the Strasbourg approach. Strasbourg has held that states may justifiably punish such comment in order to uphold the Article 8 rights of those disparaged: *Tammer* v *Estonia*.[201] Moreover, the requirement that, to benefit from Article 10 protection, speech should concern a matter of *public* interest, is very firmly established in the Strasbourg caselaw. As the court said in its seminal *Von Hannover* judgment:

> the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the [publication] makes to a debate of general interest.[202]

Thus, where speech is primarily concerned with a critique of someone's private life, it will be seen as of decisively lower value, easily outweighed by reputational or privacy interests. Defamation law should recognise this by requiring that defamatory comments should be on a matter of public interest in order to attract protection under the honest comment defence. This would ensure that both defamation and privacy law continue to develop in a harmonious way that answer to the relevant Article 8 and 10 values. Otherwise the result will merely be complex litigation in which newspapers seek to use "comment" as a way of dragging peoples' personal lives into disrepute in circumstances where to make the *factual* allegations that could justify the opinion would clearly incur liability under the tort of misuse of private information. Encouraging the publication of derogatory opinions about people's private lives, where the relevant facts cannot be published without liability, is scarcely an aim that is in harmony with Article 8 – or indeed Article 10. It should finally be noted on this point that, if Parliament does not include the public interest requirement in the honest comment defence, the courts might read it back in, using s. 3 of the HRA, in reliance on the Article 8 arguments canvassed above. But this would (a) require litigation and (b) result in the statute's prima facie meaning diverging from its judicially interpreted meaning. Such outcomes would detract from the Bill's key aim of enhancing defamation law's clarity and accessibility.

The above leads onto a final issue mentioned briefly above: whether, as Tugendadt J put it in the *Terry* case, it should remain the case that, in defamation law, "the defendant is free to [disclose any facts that are] true, however harmful or distressing, even if there is no public interest or public benefit".[203] The opposite of course is the case in privacy law. This raises the question whether, rather than *removing* the public interest requirement from the

201 (2003) 37 EHRR 43.

202 [2004] EMLR 21 at [76]. In a recent libel case concerning disparaging comments made by Katie Price about whether her ex-husband, Peter Andre, really loved one of his children, H, unconditionally, Tugenhadt J expressly considered whether the requirement that comment must be on a matter of public interest was compatible with Articles 8 and 10 (*Andre* v *Price* [2010] EWHC 2572 (QB)). Although he flagged a cautionary note on this point (at para. 82), his conclusion was strongly that it was compatible: noting the *Von Hannover* case, Tugendadt J concluded that a celebrity's Article 8 rights included the right not to be subject to "comment . . . about their private life" and that in this case the Article 10 rights of Price did not outweigh the Article 8 rights of Andre and the child (at para 92).

203 *John Terry* v *Persons Unknown* [2010] EWHC 119 (QB), at [80].

honest comment defence, it should be *added* as a requirement of the truth defence to the publication of defamatory factual allegations. There is a view, discussed briefly above,[204] that the absolute nature of the truth defence may not be compatible with Article 8. The relevant issue is *not* where the facts disclosed relate to private life: even though true, such disclosures could be remedied under the privacy tort. Rather it concerns disclosures of fact that, although *not* concerning a person's private life, are so damaging that they affect the claimant's personal integrity, thus engaging Article 8. An example might be the public exposure of dishonesty or gross incompetence in a hitherto non-public figure in circumstances where the publicity had a devastating effect upon them. Is the mere truth of such allegations, with no broader public interest in them, sufficient to justify the damage to their Article 8 rights? No opinion is offered on that issue here, but it illustrates the point that the removal of the public interest requirement from the honest comment defence could take the law in the wrong direction – away, rather than towards the values underpinning Article 8.

Extension of absolute and qualified privilege: clause 5

Some of the Bill's most important proposals are the broad extensions to absolute and qualified privilege that it sets out. Clause 5 significantly modifies the categories set out in the Defamation Act 1996 and expands the circumstances in which the defences can be used. Clause 5(1) extends the existing absolute privilege that applies to fair and accurate court reports published contemporaneously with the proceedings from UK, European courts and UN-established tribunals[205] to courts of other jurisdictions and a broader range of international courts and tribunals. This amounts to a modest and uncontroversial step. The proposed changes to qualified privilege go further.[206] Thus, reports from legislative, governmental and NGO/public interest associations, emanating from *all*, rather than just European states, will be covered by the Bill.[207] Similarly, the privilege at present provided to reports of proceedings at various "public meetings" is extended from European to include all states,[208] while the privilege covering reports of general meetings of UK companies is extended to reports of meetings of *all* quoted companies.[209] Moreover, where the 1996 Act covers "fair and accurate copies or extracts from" the protected categories of documents, cl. 5 additionally protects "fair and accurate summaries".[210] Significantly, in light of the well-founded concerns recently experienced about attacks on scientists, cl. 5(7) adds a wholly new category of privilege: "fair and accurate reports of a scientific or academic conference" and a "fair and accurate copy of, extract from, or summary of matter published by such a conference". Mullis and Scott contend that such protection may already be afforded under common law[211] but agree that it is plainly valuable to have such protection expressly afforded. In this area, the Joint Committee sensibly proposes going further and granting qualified privilege to "peer reviewed articles" in scientific and academic

204 See pp. 160.

205 Defamation Act 1995, s. 14(3).

206 S. 5(2)–(8) amends Pt II of Sch. 1 to the Defamation Act 1996. Those in Pt I of Sch. 1 to the Defamation Act are given privilege; those in Sch. 2 are only afforded privilege if, upon challenge by the claimant, the publisher produces "a reasonable letter or statement by way of explanation or contradiction" (s. 15(1)).

207 Cl. 5(3).

208 Cl. 5(4).

209 Cl. 5(5)

210 In s. 5(3),(5), (7), (8).

211 *JML*, n. 98 above, pp. 8–9, citing *Vassiliev* v *Frank Cass & Co.* [2003] EWHC 1428. They note also that some conferences are also afforded statutory qualified privilege under paras 4, 8 and 14a of Pt I of Sch. 1 to the 1996 Act.

journals, a change the government has now agreed to in principle.[212] At a stroke, these changes would greatly enhance the protection of scientists against attempts to silence their critical scrutiny of issues of the highest public importance, and as such are to warmly commended. Moreover, these changes are of particular significance for two further reasons. First, they amount to plain and unequivocal changes to the existing law – there is no ambiguity as to whether they are intended merely to codify existing law or use the common law as a guide to interpretation of modified provisions of the type explored above. Second, because privilege categories have relatively hard edges, they are not as susceptible to being read down by unsympathetic judges as are some of the more generally worded changes considered above.

Single publication rule: clause 6

Reform in this area has been long-mooted. In essence the problem arises because, while there is a one-year limitation period for defamation actions,[213] each time a publication is viewed, sold or otherwise republished, English law treats it as a fresh publication, giving rise to fresh liability. Thus, each republication of the material restarts the limitation period. This is the "multiple publication" rule, sometimes known as "the rule in the *Duke of Brunswick's* case".[214] It means that, in effect, there is no limitation period for libel, something that creates particular problems for newspapers, which now maintain enormous online archives, and are thus faced by indefinite liability in time. The Bill proposes to replace this position with a single publication rule, under which the limitation period would run from the date of first publication. But this change, which clearly favours defendants, is subject to significant provisos in the Bill. Clause 6 provides:

6 Single publication rule

(1) This section applies if a person:

(a) publishes a statement to the public ("the first publication"), and

(b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

. . .

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters):

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication.

(6) Where this section applies:

(a) it does not affect the courts' discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc) . . .

212 Report at paras 47–8. Response at para. 43.

213 Limitation Act 1980, s. 4A.

214 *Duke of Brunswick* v *Harmer* [1849] 14 QB 185.

Notably, therefore, this provision only applies to republication by the *same person*, thus answering the concern that a single publication rule would preclude redress for a serious libel by a mass-circulation newspaper on the basis that the substantially same statement had been published two years previously in an obscure pamphlet. Moreover, even republication by the *same* person is not automatically free from liability: it may still arise if the new publication is "materially different" from the old. This would clearly include cases in which, for example, a defamatory allegation was initially published in an obscure corner of a newspaper, but over a year later – after the person in question had acquired much greater prominence – was republished as a prominent headline in the same paper. This restriction ensures that a libellous publication that is significantly more likely to have been widely read than a previous such publication will not be protected by the new provisions. It will thus ensure that claimants who simply do not learn that a libellous statement has been made about them until it is later given greater prominence by the media will not be barred from redress.

A particular question has arisen as to whether it is necessary for the new single publication rule only to apply to the same publisher. James Price QC has argued that there is:

> some difficulty with the notion that, when a person has once published a defamatory statement, he should be free indefinitely, after a year, to publish it again (in a manner not materially different) as much as he likes, however irresponsibly or maliciously, without redress to the subject, *but no-one else is free to publish it*.[215]

Perhaps attracted by this argument,[216] the Joint Committee has suggested going further, so that the new single publication rule would "protect *anyone* who republishes the same material in a similar manner after it has been in the public domain for more than one year"; this is not a change the government has agreed to.[217] The argument in favour of the Joint Committee's proposal is that the Bill arguably offers unnecessary double protection by applying the single publication rule only to the original publisher *and* where republication is not materially different from the original publication. Both conditions appear to cater for the same mischief: that those defamed should not be disabled from suing by a further publication occurring more than a year later that has the effect of publicising the libel much more widely or accessibly, thus causing much greater harm to reputation. But, surely, the not materially different condition could cater for both: where a different publisher had far greater prominence or credibility (e.g. a national newspaper republishing a libel originally published on an obscure blog), then plainly the new publication would be in materially different circumstances and so not covered by the new rule anyway.

The Joint Committee – echoing here the views of JUSTICE – suggested going much further in a pro-defendant direction, by including a specific provision to the effect that merely transferring a paper-based publication onto the internet, or vice versa, does not in itself amount to republishing in a materially different manner. This is somewhat mystifying and this recommendation was fortunately *not* accepted by the government (Response at para. 52). The whole point about placing defamatory material on the internet is that *the very act of doing so* renders it potentially vastly more damaging. As the Joint Committee itself acknowledges in another part of its report:

> whereas newspapers are quickly thrown away, online archives will ensure that defamatory material will instantly be flagged up on an internet search. Not only does this last until taken down, it can be easily and instantly spread around the

215 See n. 16 above, EV 26, para. 13.

216 Although not necessarily in accordance with Price's intention!

217 JC Report, n. 4 above, para. 59. Response at paras 50–1.

> world. One well-publicised accusation, even if subsequently found to be untrue, can destroy a reputation . . .[218]

Precisely so, and this is why transfer of paper-based material to the internet will inevitably amount to republication in a materially different manner. JUSTICE recognised this and hence called for the removal of the materially different proviso precisely because otherwise such transfers of material to online archives would probably fall into this exception.[219] This, of course, would rob claimants of protection even in the extreme case where an obscure leaflet was transferred into a prominently displayed online article by a newspaper after a year, and simply reflects the one-sided nature of JUSTICE's approach to the whole area of libel reform. The point is, however, that the Joint Committee's compromise proposal here is simply unworkable.

In contrast Mullis and Scott argue that the proposed change goes too far:

> At whatever remove it is made from the first uploading of the impugned statement, each reading has the potential to harm the reputation of the person defamed. Indeed, secondary publication after the elapse of time may arguably, perhaps counter-intuitively, be more damaging than much initial publication. Often, only those with a particular interest in a subject or individual will be motivated to access the material at the later point in time, so that any impact on reputation may be especially poignant . . .
>
> On occasion, the proposed new rule will frustrate justice. It does not allow for an appropriate balance to be struck between Article 10 rights to communicative freedom and competing Article 8 rights to reputation. Such occasions may be infrequent and they may be covered by the discretion of the court to set aside the limitation period for action under s 32A of the Limitation Act 1980. At present, however, this is done only in exceptional circumstances, and it may not be reasonable to expect that judges will use this power to address the potential problems.[220]

There may of course be other reasons why the victim of a libel could be out of time, including a long period of travel abroad, or prolonged illness. However, it is arguable that the concern Mullis and Scott point up can be catered for under the proposed change.[221] This is because s. 32A of the Limitation Act 1980 – allowing a claim to be brought out of time when it would be "equitable" to do so[222] – may offer much greater scope for protection than is currently perceived. In determining such an application under the Limitation Act 1980, a court will be required, under s. 3 of the HRA, to interpret and apply the provisions of the Act in a way that upholds the parties' Convention rights. Thus although it is apparently rare at present for limitation periods to be set aside, if a judge were to be convinced in a particular case that Article 8 *required* the case to be heard, then they would be bound to set aside the limitation period – something that the broad terms of s. 32A easily allow for. In this sense, therefore the limitation period will become a much "softer" limit than at present, subject, in effect, to an Article 8 exception.

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218 JC Report, n. 4 above, para. 15.

219 See n. 16 above, pp 18–19.

220 *JML*, n. 98 above, pp. at 13–14.

221 For an alternative solution, see A Mullis and A Scott, "Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation" (2009) 14 *Communications Law* 173–83.

222 See text to n. 132 above.

Libel tourism

Finally, the Bill seeks to address the much vaunted problem of "libel tourism" – the use of English courts by those with little or no real connection to this jurisdiction.[223] This issue is considered extensively by Trevor Hartley's essay in this volume so only brief consideration is required here. The Bill provides:

> **7 Action against a person not domiciled in the UK or a Member State etc**
>
> (1) This section applies to an action for defamation against a person who is not domiciled:
>
> (a) in the United Kingdom;
>
> (b) in another Member State; or
>
> (c) in a state which is for the time being a contracting party to the Lugano Convention.
>
> (2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.[224]

In practice it seems doubtful whether this provision is now needed,[225] although it may have some declaratory value. The drafting of the Bill also appears defective in that it refers only to the domicile of the *defendant*. It thus does not make clear that a *claimant* who is domiciled in the UK, but libelled by a non-domiciled defendant, may still sue within their own jurisdiction. In other words, it needs to, but does not, distinguish between: (a) a non-national suing a non-national in an English court (the main libel tourism issue); and (b) a national claimant suing a non-national defendant. The Joint Committee identified this as a drafting problem that required resolution.[226] Additionally, it may be argued that subs. (2) goes too far in providing that England may only be used if it is "*the most* appropriate" jurisdiction. There are clearly persons who have real reputations in a number of different countries; England may not be where they have their main reputation (that will generally be in their country of residence) but they may nevertheless suffer very substantial damage to their reputation in England by a publication accessible all over the world. Were courts to interpret the most appropriate jurisdiction as being the country where the claimant had their main reputation, this could prevent them suing in England in such situations. Courts could, however, remedy this by taking account of the unlikelihood of the person receiving a fair trial in places such as Russia and by having regard to the fact that the *Sullivan* doctrine could

223 Notably the Law Society thought there was a lack of "substantial evidence" of a problem in this area: n. 16 above, EV 21.

224 The Bill goes on to provide: "(3) For the purposes of this section: (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation; (b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention."

225 Craven and White, "Draft Defamation Bill", n. 160 above, Pt 3, point out that: "In cases where the defendant is not domiciled in a Member State the English courts have a discretion to decline jurisdiction if not satisfied that there was a real and substantial tort committed within the jurisdiction (*Jameel* at [70]; CPR 6.37 and Practice Direction 6B para 3.1(9)), or if the Claimant cannot establish that England and Wales is the proper place in which to bring the claim (CPR 6.37(3)). These provisions are already available to the court to prevent 'libel tourism' in an appropriate case – see for example the recent decision in *Firtash* v *Public Media & Ors*, 24/2/11."

226 The government did not accept that re-drafting was required but undertook to indicate its view via Hansard to courts that, where a claimant *was* domiciled in England Wales, then cl. 7(2) should normally be deemed satisfied: JC Report, n. 4 above, paras 56 and 72.

act as a practical bar to success to US "public figures" suing in their own country. Provided it is interpreted in this way, then, the clause may provide, as the Law Society put it, "a useful tool in exceptional cases for exercising its discretion about the most appropriate place for litigation to take place".[227]

6 What is *not* in the Bill

As noted above, perhaps the key things missing from the Bill are the kinds of real reforms to costs and procedure that nearly all agree are a prerequisite for realising real change on the ground. The Joint Committee has some good ideas on early resolution of cases and rigorous enforcement of the pre-action protocol in order to keep costs down and enable unmeritorious cases – or defences – to be swiftly disposed of.[228] But as also noted above, its suggestions will need to be picked up by government – or determined MPs or peers in Parliament – to make their way into the Bill. A hopeful sign here was the evidence given by the government to the Joint Committee, which indicates that active consideration is being given to introducing procedural reforms to defamation law, as proposed in the consultation paper.[229] It is to be fervently hoped that concrete proposals on this are published soon. If that does not happen, a major opportunity will have been missed, and the ability of libel law to chill legitimate public debate will continue, however good the reforms to substantive law turn out to be.

The other main thing missing from the Bill is some kind of restriction on the ability of corporations to sue in libel. The arguments in favour of removing or restricting this right have been set out extensively elsewhere, and there is no need to rehearse them here. It is ironic that, in leaving the position of corporate claimants untouched, the government has refused to make change in one of the areas where those on both sides of the libel reform debate agree that reform is both necessary and right; in this respect the reasoning given for taking no action at all in the consultation document[230] seems wholly unconvincing. Particularly given the new Article 8-focused view of defamation, it seems clear that it is incoherent to treat corporate claimants – who have neither personal integrity, feelings nor dignity – identically with natural persons.[231] It is also notable that a large majority of the notorious cases of the misuse of libel laws to attack scientists or science writers have involved corporate claimants.[232] Howarth, in an article that is largely critical of the current reform proposals, argues that: "Removing corporate rights to sue comes closest to eliminating those cases in which purely scientific debates have become embroiled in defamation."[233] Evan Harris similarly contends that this would "at a stroke remove much

227 See n. 187 above.

228 See, in particular, JC Report, n. 4 above, para. 82: "We believe that ordinarily the first step following the initial exchange of letters under the Pre-Action Protocol should (in the absence of an offer of amends) be mediation or assessment by a suitably qualified third party, known as 'early neutral evaluation'. Mediation could take place under the umbrella of existing bodies or a designated service established by the Government . . . the mediation process must be swift, inexpensive and resistant to delaying tactics. To counter this latter possibility, any failure to engage constructively with the process should be punished if and when it comes to the awarding of costs. If there has been no mediation or neutral evaluation, the judge should have power to order it at the first hearing in the case."

229 Annex D. See n. 132 above (Note on Procedural Issues). And see the government Response, at paras 65–76.

230 See paras 136–45.

231 See, in particular, Mullis and Scott, "Swing of the pendulum", n. 25 above; Howarth, "Libel", n. 26 above.

232 Howarth notes that this holds for "all except one of the cases" referred to in T Brown, "Science and libel" (2011) 122 *The Author* 13. See also the list of cases cited by the Libel Reform Campaign in written evidence to the Joint Committee, n. 11 above, at p. 73.

233 See, Howarth, "Libel", n. 26 above, p. 875.

of the chill from the worlds of investigative journalism and the citizen critic".[234] However, there are good arguments to the effect that this would be too drastic, particularly in the case of small, incorporated businesses, which could be ruined by a defamatory allegation, but would have little or no chance of succeeding under the tort of malicious falsehood.[235] Hence the proposal of the Joint Committee may be a good compromise here. They suggest first limiting libel claims to situations where the corporation can prove the likelihood of "substantial financial loss" ("substantial and serious" would be preferable) and second, requiring the permission of the court for a corporate claimant to sue.[236] The latter proposal would also be a powerful bulwark against the *fear* of even unwinnable libel suits that allows corporations to "bully" scientists and writers. An alternative approach would restrict corporations to discursive remedies, such as a retraction, unless they *can* show substantial financial harm.[237] However, this would still raise the spectre of large legal costs for defendants, continuing the current chilling effect.

7 Conclusion

All of us who care about free speech, and the quality, range and robustness of public debate on all matters of social, intellectual, scientific and political importance, must regard what happened to Peter Wilmshurst, [238] for example, as a something that must, if possible, be prevented from happening again. However, we must also be alive, when seeking to reform defamation law, to the converse possibility: of a newspaper carelessly or wilfully destroying the reputation of an individual and then relying on its greater financial resources and the huge current costs of libel proceedings to deter that person from seeking to obtain a remedy. Libel reform must then pass a twin test: it must do all it can to deter corporate bodies and others from using defamation law to close down legitimate debate and critique; but it must also seek to ensure that individuals cannot have their lives destroyed by careless – or even deliberate – media smears that they cannot remedy. Following the phone-hacking scandal and the revelations by Leveson of the often utterly amoral attitudes of parts of the press, we are surely no longer so naive – if we ever were – as to believe that the latter possibility is not a very real one.

The Bill will not stop the chilling effect of unscrupulous *threats* of legal action, even if implausible. It is impossible for law reform itself to achieve this. But it will – particularly if it adopts the Joint Committee's suggestions in relation to corporate claimants – do much to prevent the attacks upon writers and scientists genuinely pursuing the public interest, who have suffered from unscrupulous libel claims, such as Dr Wilmhurst and others, and for that reason is worthy of support. However, unless the government brings forward proposals to address seriously the problems of cost, complexity and access to justice in libel proceedings, the law may fail the other side of the test: offering reasonable protection to individuals seriously defamed by powerful and deep-pocketed corporate news organisations. Law reformers who recognise the congruence of values underlying free speech and the right to reputation should not be satisfied with reform that passes only half this test.

234 See n. 8 above.

235 See the view of Hugh Tomlinson that "malicious falsehood is a 'non-starter' . . . successful actions are vanishingly rare because the burden of proof is so high": n. 19 above, Q600.

236 JC Report, n. 4 above, para. 116. The government in its Response rejected the first of these as unnecessary, given the fact that claimants must satisfy the new threshold of "serious harm" and in practice corporate claimants will only be able to do this by pointing to the likelihood of substantial financial loss. It also rejected the second proposal (paras 91 and 92).

237 See Mullis and Scott, "Reframing libel", n. 23 above.

238 See his article "The effects of the libel laws on science – a personal experience" (2011) 104 *Radical Statistics* 13–23.