



Ministry of **JUSTICE**

We would welcome responses to the following questions set out in the consultation paper. You can return this questionnaire by email to defamation@justice.gsi.gov.uk or in hard copy to Paul Norris, Ministry of Justice, Legal Policy Team, 6.38, 102 Petty France, London, SW1H 9AJ

Draft Defamation Bill

List of questions for response

Question 1.	Do you agree with the inclusion of a substantial harm test in the Bill?
Comments:	No. It is unnecessary and does no more than codify the Reynolds test.
Question 2.	Do you have any views on the substance of the clause?
Comments:	No
Question 3.	Do you agree that the Slander of Women Act 1891 and the common law rule referred to in paragraph 6 should be included among the measures for repeal in the Repeals Bill?
Comments:	<p>No. The reason given for repealing The Slander of Women Act 1891 is that it is discriminatory as only women and not men can sue for slander without proving special damage, if they have been falsely accused of adultery or unchastity. This can easily be remedied by amending the Act to provide that <i>“Words spoken and published which impute unchastity or adultery to any <u>person</u> shall not require special damage to render them actionable”</i> and to provide that the Act shall in future be entitled “The Slander Act 1891”.</p> <p>It cannot be suggested that an imputation of unchastity or adultery is not sufficiently serious to be regarded as defamatory. The courts are granting injunctions to restrain newspapers from publishing allegations of unchastity or adultery, <u>even if they are true</u>, on the grounds that they breach human rights in respect of private life. It would therefore be inconsistent to abolish the rule that <u>untrue</u> allegations of unchastity or adultery cannot be published without fear of action without proof of special damage, while continuing to grant injunctions to restrain the publication of <u>true</u> allegations, without proof of special damage, to those who can afford to sue.</p> <p>It may well be extremely difficult or impossible to prove special damage in such cases as the damage is insidious. For example in an election as a way of attacking a rival candidate without the risk of libel action, door-to-door canvassers may repeat to large numbers of voters, untrue allegations of a sexual nature about a rival candidate, who may then lose the election as a result, but cannot hope to prove how many voters have heard and been influenced by such slanderous allegations.</p> <p>The Slander of Women Act 1891 had to be enacted because of the archaic common law rule</p>

that imputations of unchastity against women were not actionable per se in the common law courts. Slander came within the jurisdiction of the ecclesiastical courts.

To repeal rather than amend the 1891 Act would be to undo the progress towards respect for women made over one hundred years ago, and revert to the archaic situation that existed before 1891.

Such untrue imputations of unchastity or contagious disease are likely to have a seriously damaging effect on the private and public life of the defamed. It should not be necessary to prove special damage in such cases.

Question 4. Do you agree with the inclusion of a new public interest defence in the Bill?
Do you consider that this is an improvement on the existing common law defence?

Comments: Yes

Question 5. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that it would not be appropriate to attempt to define “public interest”? If not, what definition would you suggest

Comments: Yes

b) do you consider that the non-exhaustive list of circumstances included in subsection (2) of the clause should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines?

Comments: Yes

c) do you consider that the nature of the publication and its context should be given greater weight than the other circumstances in the list?

Comments: Yes

d) do you agree that the defence should apply to inferences and opinions as well as statements of fact, but that specific reference to this is not required? If so, are any difficulties likely to arise as a result of the overlap between this defence and the new honest opinion defence?

Comments: No, if the inferences and opinions are based on untrue alleged facts, there is no legitimate public interest in their publication. The new honest opinion test goes far enough.

e) do you agree with the approach taken on the issue of “reportage”?

Comments: No, it is not sufficient that the words complained of were part of an accurate and impartial account of a dispute. Under the existing law, the report must not be materially inaccurate and libellous when read as a whole. Difficulties in interpretation would arise from the proposed wording. Does it mean that the words complained of escape censure if they are part of a report which is otherwise accurate and impartial, or that the report escapes censure if, read as a whole, it is not materially inaccurate? If the latter it is not clear why the word "part" is included. This defence could almost always be used to avoid liability for irresponsible reporting of allegations without taking care to check their accuracy. The word "dispute" would give rise to difficulties of interpretation as it could mean no more than that the person libelled has disputed the allegations against him. If this is intended to refer to a dispute in legal proceedings, such reports are privileged in any event. Repeating someone else's libellous statement is just as bad as libelling someone directly.

Question 6. Do you agree that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth?

Comments: Yes

Question 7. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Comments: The existing case law on justification would not be binding on the courts when they are considering the new defence of truth. There is therefore no need to abolish the defence of justification.

Question 8. Do you have any views on the substance of the draft clause?

Comments: It is well drafted.

Question 9. Do you consider that the current law is producing unfair results where there is a single defamatory imputation with different shades of meaning? If so, how could this best be addressed?

Comments: There have been cases where judges at first instance have held unfairly that newspapers have adopted defamatory allegations as their own, when merely reporting that suspicions have arisen about the claimant. This tendency has been corrected by the Court of Appeal (Curistan v Times Newspapers [2008] EWCA Civ 432).

Question 10. Do you agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence, and that this should be called a defence of honest opinion?

Comments: The new statutory defence can be introduced without abolishing the existing common law defence.

Question 11. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?

Comments: The existing case law, which relates to the existing common law defence, will not be binding on the court when it is considering the new statutory defence. There is a danger in abolishing the existing defence, that for some reason the new statutory defence may not apply.

Question 12. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that condition 1 adequately reflects the current law that the statement must be recognisable as comment?

Comments: A “statement of opinion” may make an imputation of fact, so Condition 1 does not adequately reflect this. The defence of honest opinion could therefore cut across the defence of truth.

b) do you consider that the requirement in condition 2 that the matter in respect of which the opinion is expressed must be a matter of public interest should be retained?

Comments: No. There is a new public interest defence, and honest opinion should be allowed to be expressed whether or not it is necessary or desirable in the public interest to express it. This change in the law would recognise the human right of free expression.

c) do you agree with the approach taken in relation to condition 3 that the opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or an earlier privileged statement?

Comments: There is no need to include the words “a fact which existed at the time the statement was published”. This could cause difficulties as the time of publication will be later than the time when the facts are observed by the reporter, in some cases much later if the single publication rule is abolished. “On the basis of fact” would suffice, or “a fact which existed at the time intended to be referred to in the publication”.

d) do you consider that the defendant should be allowed to rely on the honest opinion defence where they have made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong?

Comments: I would add “and had what reasonably seemed to him to be grounds for believing”.

e) do you agree that the new defence should not apply to statements to which the public interest defence in clause 2 of the Bill applies?

Comments: No, it is a separate defence and in some cases it may be possible to use either defence or both.

f) do you agree that an objective test of whether an honest person could have held the

opinion should apply? If not, would a subjective test of whether the defendant believed that his or her opinion was justified be appropriate?

Comments: It should be basically a subjective test but if no reasonable person could have held the opinion, the test should not be met.

Question 13. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular:

a) Do you agree that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed? If not, what extension (if any) would be appropriate?

Comments: Yes. I also think that “an authority performing governmental functions” in the amended para 9(1)(b) of the Schedule 1 to the Defamation Act 1996 needs a wide definition, such as “any public authority as defined in the Human Rights Act 1998 or equivalent legislation anywhere in the world”.

b) Would it be helpful to define the term “contemporaneous” in relation to absolute privilege for reports of court proceedings? If so, how should this be defined?

Comments: I do not think absolute privilege should be confined to contemporaneous reports, as law reports are often published and republished several months or years after the proceedings.

c) Alternatively, should the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports be removed? If so, which form of privilege should apply?

Comments: Yes, absolute privilege should apply.

d) Do you agree that Part 2 qualified privilege should be extended to summaries of material? If so, do you have any views on the approach taken?

Comments: Yes. I think qualified privilege should be extended to cover all situations where reporters are reporting on any official business of a governmental body anywhere in the world and producing accurate extracts or summaries of what was said.

e) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of scientific and academic conferences? If so, should definitions of these terms be included in the Bill, and how should any definitions be framed

Comments: Yes. No definitions are necessary but the wording should be as wide as possible to cover every type of meeting, including virtual meetings and meetings conducted remotely, and not merely conferences.

f) Do you agree that Part 2 qualified privilege should be extended to cover proceedings in other countries? If so, do you have any views on the approach taken?

Comments: Yes

g) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of proceedings at general meetings and documents circulated by public companies anywhere in the world? If so, do you have any views on the approach taken?

Comments: Yes

h) Do you agree that no action is needed to include a specific reference to press conferences? If not, please give reasons and indicate what problems are caused by the absence of such a provision

Comments: Yes

i) Do you consider that qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired? If so, how should an archive be defined for these purposes to reflect the core focus of the qualified privilege defence?

Comments: Yes; an archive is a repository for material which is open to public inspection or which can be searched for electronically but is no longer actively being disseminated.

Question 14. Do you consider that any further rationalisation and clarification of the provisions in schedule 1 to the 1996 Act is needed? If so, please indicate any particular aspects which you think require attention.

Comments: Yes, schedule 1 is too restrictive. There does not appear to be any particular reason for international conferences to be given special treatment. All conferences anywhere in the world should be afforded qualified privilege.

Question 15. Does the specific issue raised by the National Archives affect any other forms of archive, and have problems arisen in practice? If so, would it be right to create a new form of qualified privilege in this situation?

Comments: There should be absolute privilege for the historical records in any National, Regional, County or Local Archive whether held by a governmental body or private archeological or historical society.

Question 16. Do you agree with the inclusion of a clause in the Bill providing for a single publication rule?

Comments: No, any person aggrieved by libellous material being republished about him, he should be entitled to claim an injunction or damages to prevent the libellous material being republished. There is no good reason for publishers to be allowed to continue to republish libellous material, merely because the original limitation period has expired.

Question 17. Do you have any views on the substance of the draft clause? In particular,

a) do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope?

Comments: Publication is always to the public or a section of the public, as that is what publication means. The wording can be simplified by deleting "to the public".

b) do you agree that the single publication rule should not apply where the manner of the subsequent publication of the material is materially different from the manner of the first publication? If not, what other test would be appropriate?

Comments: If there has to be a single publication rule, I would suggest that the manner of publication and the circumstances of publication should not be materially different, as otherwise the new publication is would not be right to treat the new publication as a continuation of the original publication. For example, if the original publication was saved from libel by the defence under sections 2 or 4, by the time of republication the publisher should have been able to check the facts and should be aware that the report is libellous, so the republication should not be protected from libel action as the circumstances are different.

Question 18. Do you consider that any specific provision is needed in addition to the court's discretion under section 32A of the Limitation Act 1980 to allow a claim to proceed outside the limitation period of one year from the date of the first publication?

Comments: If the single publication rule is introduced, there will need to be an addition to section 32A(2) of the Limitation Act 1980: (d) the fact that the words complained of have been republished after the expiration of the limitation period, particularly if: (i) the applicant has previously complained to the respondent about the publication or (ii) the respondent has previously published a correction, apology or response which has been omitted from the subsequent publication or (iii) the respondent has given fresh prominence to the publication

Question 19. Do you agree that the proposed provisions on libel tourism should be included in the draft Bill?

Comments: No. The question of jurisdiction is better left to the Court. The mere fact that a defendant is not domiciled in the UK is not a good reason for not allowing an action against him. This rule would discriminate against UK citizens and allow foreigners living here to commit libel with impunity.

Question 20. Do you have any views on the substance of the draft clause?

Comments: Only that it should be deleted entirely.

Question 21. Do you agree that the presumption in favour of jury trial in defamation proceedings should be removed?

Comments: Yes

Question 22. Do you have any views on the substance of the draft clause? In particular:

a) do you consider that guidelines on the circumstances governing the courts' exercise of its discretion to order jury trial should be included on the face of the Bill? If so, what factors or criteria do you consider would be appropriate? Please provide examples.

Comments: No, this should be left to the discretion of the Judge.

b) would it be appropriate for any provisions to be included in the Bill to clarify which issues should be for the judge to decide and which for the jury (where there is one)? If so, do you consider that any changes are needed to the role of the jury on any particular issue (in particular in relation to determining meaning)?

Comments: No, the existing common law provides adequately for this.

Question 23. Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?

Comments: No.

Question 24. If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who are defamed on the internet be protected? Do you have any alternative suggestions?

Comments: As mentioned above I would not abolish the single publication rule, but if it is abolished the Court should be encouraged to extend the limitation period where justice requires this.

Question 25. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?

Comments: Presumably.

Question 26. Do you consider that clause 9 of Lord Lester's Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?

Comments: Yes, I agree with clause 9 of Lord Lester's Bill which would give reasonable protection to internet service providers and broadcasters.

Question 27. If Lord Lester's approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?

Comments: N/A

Question 28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.

Comments: Don't know.

Question 29. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?

Comments: This is covered by Lord Lester's clause.

Question 30. Do you consider that a new court procedure to resolve key preliminary issues at an early stage would be helpful?

Comments: No, it could add to costs and prevent claimants from proceeding. The parties can apply for preliminary issues to be decided if this is appropriate and this does not have to be done in all cases.

Question 31. If so, do you agree that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute?

Comments: It is for the defendant to raise this.

Question 32. Do you consider that the issues identified in paragraph 127 above should also be determined (where relevant) under the new procedure? Please give your reasons.

Comments: Don't understand this question.

Question 33. Are there any other issues that could usefully be determined under the new procedure? Please give your reasons.

Comments: This is a matter for the parties in each case.

Question 34. Do you have any comments on the procedural issues raised in the note at Annex D and on how the new procedure could best operate in practice?

Comments: This is best left for the Judges to issue practice directions on if a new procedure is adopted.

Question 35. Do you consider that the summary disposal procedure under sections 8 and 9 of the 1996 Act should be retained?

Comments: Yes

Question 36. If so, do you consider that any amendments could be made to the procedure to make it more useful in practice, and if so, what? In particular, should the Lord Chancellor exercise his power to amend the level of damages which can be ordered under the summary procedure? If so, what level should be set?

Comments: No amendments are necessary. I suggest the level of damages is increased now to £30,000.

Question 37. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?

Comments: Yes

Question 38. Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases brought by corporations or more generally)? If so, what provisions would be appropriate?

Comments: There need to be new costs rules to make sure that lawyers do not charge more than a reasonable hourly rate and costs judges need to be stricter in disallowing costs for work which was not reasonably necessary or was disproportionate. This should be provided for in the new costs rules.

Question 39. Do you agree that it would not be appropriate to legislate to place the *Derbyshire* principle in statute? If not, please give reasons and provide evidence of any difficulties that have arisen in practice in this area.

Comments: Yes. It is a clear common law rule which works and does not need amending.

Question 40. Do you agree that it would not be appropriate to legislate to extend the *Derbyshire* principle to restrict the ability of public authorities or individuals more generally to bring a defamation action? If not, please give reasons and indicate how any such provisions should be defined.

Comments: Yes, it would not be appropriate to fetter the Courts jurisdiction to decide on such matters.

Question 41. Do you have any comments on the costs and benefits analysis as set out in the Impact Assessment?

Comments: No.

Question 42. Do you have any information that you believe would be useful in assisting us in developing a more detailed Impact Assessment?

Comments: No

Question 43. Do you consider that any of the proposals could have impacts upon the following equality groups?

Comments: No

Please complete the section overleaf to tell us more about you.

About you

Please use this section to tell us about yourself

Full name	Michael Hall
Job title or capacity in which you are responding (e.g. member of the public etc.)	Locum Solicitor in private practice, responding in a private capacity. I am a member of the Committee of the Liberal Democrat Lawyers' Association but my views are my own and not endorsed by the Association.
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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

