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Litigation Committee response to the Ministry of Justice consultation on the Draft Defamation Bill (CP3/11)

The City of London Law Society ("CLLS") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response in respect of the draft Defamation Bill has been prepared by the CLLS Litigation Committee with, in particular, the assistance of CMS Cameron McKenna LLP and Reynolds Porter Chamberlain LLP.

The Ministry of Justice ("MoJ") consultation dated March 2011 (the "Consultation Paper") asked for views on its draft Defamation Bill. We respond below. In responding, we have addressed the numerous questions posed by the MoJ. We have also included some further general comment in respect of the issues for consultation which have not been included in the Bill at this stage.

Part A - Views on the clauses of the draft Bill

1. Clause 1 - 'Substantial harm' test (Q1 – Q3)

1.1 We are concerned at the proposal in the draft Bill to require a claimant to prove that a statement has caused or is likely to cause 'substantial harm' in order to bring a defamation claim, and thereby to reverse the presumption of damage in defamation claims. Whilst we welcome, in principle, efforts to ensure that trivial and unmeritorious claims are struck out at an early stage, we consider that, if implemented as currently drafted, the Bill could seriously and unjustifiably impinge upon corporate entities' ability to protect their reputations against defamatory statements. The Bill as drafted goes too far in favour of defendants, and represents too great a restriction on individuals' and corporates' rights to defend their reputations.

1.2 Specifically, we consider that neither the Bill nor the Consultation Paper makes clear how a corporate entity will be able to prove that it has suffered, or is likely to suffer, substantial harm. For example, will a corporate entity have to produce expert evidence of a loss of profits/revenues or loss of a

contract as a result of a defamatory statement being made? Equally, how would a corporate entity that is likely to suffer substantial harm as a result of a defamatory statement being made in the future prove that such harm is likely to occur? In any event, it may be the case that the harm suffered or which is likely to be suffered by a corporate entity will not be reflected in any immediately identifiable loss of profits/revenues but, instead, will result in that entity suffering from a long-term loss of goodwill or a diminution of its ability to attract prospective employees. We consider that the Bill is in need of urgent clarification in this regard.

1.3 We understand the need to resolve the problem of defendants being faced with significant costs' bills (including CFA success fees) in cases where only nominal damage has been inflicted (and indeed where only nominal damages have been awarded). However, we consider that the Government's recently outlined plans to abolish the recoverability of ATE premiums and success fees in respect of CFAs, and to reform the costs regime generally, should be sufficient to tackle this issue.

2. Clause 2 – Responsible publication on matters of public interest (Q4 – Q5)

2.1 The CLLS does not consider that it is necessary to codify the matrix of common law in respect of the Reynolds defence. The CLLS considers that clause 2 will, in most cases, have little practical effect as a result of its similarities to the existing common law position.

2.2 Further, that it is unclear as to how the common law defence and the defence under clause 2 of the Bill would inter-relate in practice. This is because the Bill, as currently drafted, does not expressly abolish the common law (Reynolds) defence. We consider that leaving the common law in situ is likely to run the risk of significant satellite litigation, with parties unsure of the extent to which the common law principles should be transposed into the new statutory regime.

2.3 In particular, clarification is required as to whether defendants will be able to run the common law defence and the statutory defence in the alternative or in parallel. This point is particularly relevant in view of the slight differences between the two defences. These differences include, for example, the fact that the statutory defence will be available regardless of whether the statement complained of is a statement of fact, inference or opinion. In this regard, the CLLS notes that the Consultation Paper, at paragraph 23, states that the abolition of the common law defence of justification was necessary because allowing the common law defence to run in parallel "would be contrary to our aim of simplifying and clarifying the law, and there would be a risk of uncertainty and confusion in practice". It is not clear to us why this approach has not been taken in respect of clause 2 of the Bill, and why the MoJ considers that such "uncertainty and confusion" will not arise under clause 2 of the Bill.

2.4 If codification of the Reynolds defence is implemented, the CLLS considers that reference should be made, in the non-exhaustive circumstances referred to in clause 2(2), to the defendant's compliance with any Code(s) of Conduct or guidelines applicable to the making of the relevant statement. The CLLS notes the MoJ's fear that this could lead to satellite litigation, but disagrees that such satellite litigation would ensue. Section 32(3) of the Data Protection Act 1998 allows the court to have regard to a data controller's compliance

with relevant codes of practice in deciding whether or not the controller had a reasonable belief that publication of certain data would be in the public interest; there is no evidence that this provision has caused satellite litigation. In any event, the CLLS considers that it would be paradoxical, in determining whether a publisher has acted responsibly, not to consider whether the publisher had acted in accordance with the professional guidelines to which he or she is subject. Further, the case of *Jameel v Wall Street Journal* [2006] UKHL 44 established that a consideration of the relevant codes of practice was necessary in order to determine whether the relevant publisher had acted responsibly. The CLLS would, at the least, propose wording which gives the court the discretion to take account of such codes of practice, if not an absolute requirement to do so.

3. **Clause 3 – Truth (Q6 - Q9)**

3.1 The CLLS has no objection, in principle, to the codification of the common law principles in this area, and the introduction of the truth defence generally. However, it does have some concerns.

3.2 The Consultation Paper states that the common law defence of justification is to be abolished, however, it also states 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". The CLLS considers that, as with the honest opinion defence (codified by clause 4), it is unclear from the Consultation Paper to what extent the common law will illuminate the courts' reasoning and decisions in respect of this defence. We would request clarification in this regard.

4. **Clause 4 – Honest opinion (Q10 - Q12)**

4.1 The CLLS has severe concerns that the current wording of clause 4 of the Bill goes too far in favour of defendants, and represents too radical a shift in an attempt to give greater weight to freedom of expression. In particular, the CLLS does not agree with the conversion of the defence from what was previously a defence which contained both subjective and objective elements, to one which is almost entirely objective. We do not consider that this achieves the MoJ's objective of simplifying the law in this area.

4.2 Specifically, the CLLS is concerned by the removal of the requirement for defendants to show that they were actually aware of a fact that justified their asserting an opinion, and the introduction of wording that allows a defendant to rely upon a fact that was in existence but was unknown to the author at the time the statement was made. As a result, the Bill will allow defendants to escape culpability for making a defamatory statement by searching for and referring to facts which were not known to them at the time they made the statement. This would allow too great a scope for defendants to publish in the hope or expectation that exculpatory facts will later emerge, perhaps through the disclosure process. As a result, we propose re-introducing wording in clause 4(b) to reflect the current common law position in this respect.

4.3 The CLLS agrees, in principle, with the approach taken in clause 4(4) of the Bill to abandon the requirement that a comment must indicate expressly or impliedly the facts upon which the opinion is based. However, when paired with the radical changes to the common law position in respect of defendants' knowledge of the facts upon which they make a statement (as per clause 4(4)

of the Bill – see above), this again represents a step too far in respect of pursuing greater freedom of expression for defendants.

4.4 The CLLS agrees with the approach taken in the Bill not to attempt to define 'public interest' and agrees with the MoJ's reasoning in this regard.

5. Clause 5 – Privilege (Q13 – Q15)

5.1 The CLLS has significant concerns generally about the Parliamentary privilege defence, and considers that the Bill, as drafted, has failed to exploit an excellent opportunity to modernise the law in this area.

5.2 The CLLS recognises the need to ensure that Parliamentary privilege is retained and that, in principle, the press should be allowed to report freely on comments made during genuine Parliamentary debates. However, the CLLS has real concerns as to the lack of redress available to persons who have been harmed by comments made by MPs which are extraneous to the debate, unjustified and potentially driven by malice. We understand from our members that instances of this have occurred over recent years. This represents an abuse of privilege, in respect of which there is currently no right of redress for claimants. Indeed, we note that the only controls in place to mitigate the risk of this occurring is the Code of Conduct for Members of Parliament, which MPs are required to abide by (the "Code"). We do not consider that the Code, in itself, is an adequate deterrent to prevent abuses of parliamentary privilege occurring.

5.3 The CLLS recognises that this particular consultation may not be the appropriate forum to deal with this issue. However, this issue is inextricably linked to the current proposed reforms on defamation law and, as such, the CLLS would encourage the urgent consideration of this issue by the MoJ and by Parliament. The CLLS would be happy to consult with the MoJ on proposals to deal with this issue, which, for example, could include the creation of a specific Parliamentary Committee to regulate such matters.

6. Clause 6 – Single Publication Rule (Q16 – Q18)

6.1 The CLLS recognises the fact that the multiple publication rule, as it stands, requires modernisation, particularly in an online context where each download of online material starts the running of new limitation period. However, the CLLS considers a single publication rule, completely reversing the current position, will not achieve the balance between Article 8 and Article 10 that is necessarily the objective of the Bill.

6.2 The CLLS recognises the tension between the facts that past statements remaining online (or in hard copy archives) can continue to be damaging long after defamation has been made out or the initial damage has been done but, at the same time, that archives of information are of historical importance and should be maintained where possible.

6.3 However, the single publication rule risks leaving claimants with little recourse should their reputation be damaged, or damaged further, by the same material long after the end of the limitation period. As drafted, claimants would be forced to rely upon the court's discretion under section 32A of the Limitation Act 1980 to exclude the limitation period, which discretion to date has only been exercised in exceptional circumstances. The CLLS considers that defendants should not necessarily be interminably 'on the hook' but neither should claimants be left with no remedy in the event that the material

is given greater prominence or is re-circulated at a point in the future when the material could have a more damaging impact on reputation.

6.4 A middle ground needs to be found which balances more fairly the publisher and archivist's needs against those of the potential claimant. The CLLS would propose two suggestions in order to remedy this issue. First, the CLLS considers that the limitation period in respect of the single publication rule should be extended from one year to three years so as to give potential claimants a longer and more equitable period in which to bring a claim against a publisher.

6.5 Secondly, the CLLS proposes introducing a further condition into clause 6(5) of the Bill, which would provide that, 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 should also include:

> "whether the damage which is caused, or is likely to be caused to the claimant by the subsequent publication, is materially different from the damage caused to the claimant by the original publication".

6.6 This wording would prevent circumstances arising where, for example, an original publication which did not cause substantial harm to a claimant when originally published (by way of example, where a defamatory publication receives low publicity on the basis that the claimant is not in the public sphere or does not have an established reputation), causes that claimant substantial harm when subsequently published over a year later, as a result of that individual subsequently gaining a significant reputation and/or publicity in the intervening period. Under the Bill as drafted, such a claimant would have no right of redress; we consider that our proposed measures (or iterations thereof) would go some way to addressing this issue.

7. Clause 7 – Libel Tourism (Q19 – Q20)

7.1 The CLLS considers that clause 7 is largely redundant in that the libel tourism that it seeks to prevent is not in reality a problem. Taking an example of a publication with a worldwide readership, such as a weekly news magazine, it may be that more copies are circulated in, say, the USA than the UK simply because demographics demand this to be the case. This does not mean that the claimant subject to defamatory material in that magazine does not experience greater reputational damage in the UK; it may be that its business is focused in the UK.

7.2 As such, the CLLS agrees that consideration as to whether jurisdiction is granted or rejected should necessarily be holistic, as set out in the consultation proposals, and due weight should be given to where the damage has been sustained. Nonetheless, we consider that this clause will have a limited impact on the number of cases seen in the courts of England & Wales.

8. Clause 8 – Jury Trials (Q21 – Q22)

8.1 The CLLS supports this move away from the presumption in favour of jury trials and considers that this is an accurate reflection of what has been happening in practice for some years.

8.2 Past cases have shown that jury trials result in the interpretation, by the jury, of a meaning in question being unpredictable. This creates uncertainty for

both claimant and defendant. It can drag them into protracted hearings to decide on the meaning, adding to the costs of the case. The determination of meaning by a judge at an early stage so that it is binding on a jury where a jury trial is ordered should help avoid long jury deliberations, and could possibly help pave the way to early settlement in some cases. In order to achieve the above, provision should be made in section 69 of the Senior Courts Act 1981 and CPR 53.

Part B - Comments on Other Issues for Consultation

9. **Liability of Internet Service Providers and other Secondary Publishers (Q23 – Q29)**

9.1 Whilst the CLLS is not in a position to comment directly on practical problems arising from interpretation of the existing law (section 1 of the 1996 Act and the E-Commerce Directive), it is concerned that the current law does not provide sufficient certainty to ISPs and other secondary publishers. The growth of the internet, and especially of user-generated content, brings the issue into sharper focus. The use of the internet should not be restricted or constrained by legal uncertainty which, at best, could lead to unnecessary litigation and, at worst, unduly limit freedom of expression.

9.2 A balance needs to be struck, of course, between the right to freedom of expression on the part of the publishers of information, and the rights of an individual or organisation whose reputation has been unfairly damaged.

9.3 The CLLS supports the proposal of a system whereby the ISP acts as a liaison point between the complainant and the person posting the offending material, thereby providing a relatively quick and easy remedy for the complainant. Such a regime would need to establish a clear limit on the extent which the ISP becomes involved. If there was no prompt resolution within the defined parameters laid down by statute, it would be for the complainant to initiate legal proceedings against the person who posted the material. The effect would be that the passive ISP does not face liability for defamatory material posted by a third party and so freedom of expression is not unduly inhibited. However, the ISP's provision of its service carries with it a responsibility for providing a limited platform for early resolution of complaints.

Notice and take down

9.4 The most effective means of stemming potential damage flowing from a defamatory publication is likely to be its early removal. Notice and take down, if conducted within a clear framework, is a quick and inexpensive remedy.

9.5 The proposal to clarify the framework by codifying a notice and take-down procedure is welcome. The CLLS considers that such a procedure should include:-

(a) clear written formulation of the nature of the complaint, i.e. the words complained of and why they are defamatory;

(b) a relatively short period for take down. This should be not more than seven days; and

(c) the right of resort to the Court if take down is not effected.

10. **A new procedure for defamation cases and summary disposal procedure (Q30 – Q37)**

10.1 The CLLS considers that it is sensible, and in keeping with the proposals and pilot projects designed to contain the cost of litigation, to introduce a new procedure for defamation cases. This is particularly apposite in defamation cases, where costs can dwarf the potential damages.

10.2 The procedure envisaged in the consultation paper is a reasonable approach in that direction. However, the CLLS is concerned that under the current proposal, certain issues would automatically be treated as preliminary issues. This disregards the fact that there may well be cases in which the determination of these issues as a preliminary matter will not in fact result in a saving of costs or time overall. Court management of a case should not be fettered. Accordingly, the Court should have residual discretion in any case to determine which, if any, of the key issues identified in the paper (and we agree with the nature of those) should be dealt with as a preliminary issue.

10.3 Consideration should also be given to instituting a system where a shorter summary process, more akin to the adjudications used in construction cases, is available where the potential quantum of damages, the nature of the defamatory statement or some other reason dictates that full scale litigation is not appropriate. Such a process could be engaged either by agreement of the parties or by the Court on the application of a party. This would replace the current summary disposal procedure, which is seldom used in practice, although the reasons for its unpopularity have not been identified. The process proposed would not have the same constraints as the existing summary disposal procedure. Whilst it would involve a truncated litigation process, there would be no restriction on the amount of damages that could be awarded.

11. **Ability of corporations to bring a defamation action (Q38)**

11.1 As the consultation paper acknowledges, corporations have reputations, and a damaged corporate reputation can be extremely expensive, ultimately affecting individuals. Accordingly, the CLLS considers that corporations should not, as a matter of principle, be restricted from being able to bring proceedings for defamation; it should not be made more difficult for corporations to sue by requiring proof of financial or other loss. The CLLS does not consider, as has been suggested, that any restriction on the ability of a corporation to sue would, in some cases, be off-set by the right of individual directors to sue in their own names; this ignores the damage to the corporation and that of its stakeholders, such as employees and shareholders.

11.2 The principal argument in favour of restricting the rights of corporations to sue is the supposed inequality of arms between the corporation and the potential defendant. This argument can be made for any case in which a large corporation faces an individual or impecunious counterparty. The CLLS does not consider that there is any reason in principle why a corporation harmed by a defamatory statement should be treated any differently than it would if harmed by other means.

11.3 Moreover, the CLLS considers that to introduce legislation limiting a corporation's right to sue for libel in the manner contemplated could expose corporations to attack and serious risk of reputational damage from careless

reporting, disgruntled employees, disappointed investors and others. The impact on a corporation of defamatory statements in respect of which it has no redress could be profound. Even if ultimately the loss is financial, this may not be apparent except with the benefit of lengthy hindsight. Accordingly, the harmed corporation would not pass the financial loss threshold for bringing a claim under the proposals being considered.

11.4 The CLLS considers that the proposals for the reform of civil litigation funding costs referred to in the consultation paper should be adequate to address the inequality of arms argument, and that further safeguards are not necessary.

12. **Ability of public authorities and bodies exercising public functions to bring a defamation action (Q39-40)**

12.1 In contrast, the CLLS considers that the position of public authorities is different. Damage to reputation of a public body is unlikely to generate the same potential for damage to individuals as is possible in the case of a non-public corporation. The principles in the case of *Derbyshire County Council v Times Newspapers Limite*d [1993] AC 534 should be preserved.

12.2 There is merit in codifying this through statute to avoid uncertainty and to identify by what is meant by a public authority. The CLLS considers that it would be helpful to have a definition of what is a public body within the meaning of the legislation in the event that the *Derbyshire* principle becomes enshrined in statute. Whilst it is recognised that the current definition applicable to the Human Rights Act 1998 has been the subject of litigation, such litigation can be drawn upon as a basis for honing a new definition to be used for the purposes of a Defamation Act.

THE CITY OF LONDON LAW SOCIETY

LITIGATION COMMITTEE

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