

<b>Title: Defamation Bill</b>  <b>IA No: MOJ 145</b>  <b>Lead department or agency:</b> Ministry of Justice  <b>Other departments or agencies:</b> n/a	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 01/04/2012		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
<b>Contact for enquiries:</b> Paul.Norris@justice.gsi.gov.uk			
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Amber

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
N/Q	N/Q	N/Q	Yes
			Zero Net Cost

**What is the problem under consideration? Why is government intervention necessary?**

The Government considers that the current defamation law is not sufficiently clear, and that this is having a detrimental effect on freedom of expression and generates inefficiencies when defamation issues are disputed legally. The Government also considers that in some areas the law requires rebalancing in order to give greater protection to defendants, in particular that the current law is unduly restricting scientific and academic debate. Government intervention is required as the changes can only be made via legislation.

**What are the policy objectives and the intended effects?**

First, the policy aims to shift the balance of the law towards freedom of expression in a manner the Government believes will better match the preferences of society. This is intended to encourage the publication of more material which, though it might potentially cause some reputational damage, is nevertheless socially valuable. Second, it aims to increase the clarity and certainty of the defamation law. This is intended to encourage people to write and speak freely where they are justified in doing so and bring a claim where their reputation has been damaged unjustifiably. It is also intended to reduce the resource costs of understanding the law and bringing or defending claims. Third, it is intended to improve the efficiency of the court processes for defamation claims, and so reduce costs.

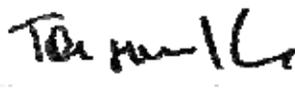
**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

The following options have been considered:  
**Option 0:** Do nothing (base case); **Option 1:** Require claimants to prove that they have suffered 'serious harm' to their reputation; **Option 2:** Codification of defences; **Option 3:** extensions of absolute and qualified privilege; **Option 4:** Replace the multiple publication rule with a single publication rule; **Option 5:** Action against a person not domiciled in the UK or a Member State; **Option 6:** Reverse the presumption of trial by jury in defamation cases; **Option 7:** Responsibility for publication; **Option 8:** extend the court's power to order publication of a summary of its judgment.

Following a previous Government consultation, and a report published by a Parliamentary Select Committee, the preferred option is to implement all Options considered.

<b>Will the policy be reviewed? It will be reviewed. If applicable, set review date:</b> 05/2015					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/Q	<b>Non-traded:</b> N/Q	

*I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.*

Signed by the responsible Minister:  Date: 29/03/2012

# Summary: Analysis & Evidence

All Options – Cumulative assessment

Description: Implement all reforms to defamation law and procedure proposed in the Bill (Options 1-8)

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the cumulative impacts of these proposals.

### Other key non-monetised costs by 'main affected groups'

Claimants are likely to incur reputational costs, as the law will provide them with less protection. Defendants may incur costs from publishing a summary of the court's judgement more often when they lose a case. Legal services providers and ATE insurers may experience a reduction in business/income but are assumed to engage in other business activity and hence incur only adjustment costs. Intermediaries (e.g. internet hosts) may incur costs from performing a new go-between role in defamation disputes.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the cumulative impacts of these proposals.

### Other key non-monetised benefits by 'main affected groups'

Defendants are likely to benefit from publishing more material. Claimants may benefit from defendants publishing a summary of the court's judgement more often when the claimant wins the case. Claimants and defendants are likely to spend less on legal services and ATE insurance. Intermediaries will benefit from greater protection against potential liability. Wider society may benefit from more information being published, freer public debate and greater transparency, and also from more efficient dispute resolution.

### Key assumptions/sensitivities/risks

Discount rate (%)

The financial impact on HM Court and Tribunal Service (HMCTS) and the judiciary of any change in the number of disputes is assumed to be neutral.  
 We assume that overall the reforms will reduce the number of defamation disputes. While some reforms are likely to reduce the cost of bringing a case and so increase the number of disputes, we assume this effect is outweighed by the impact of the other reforms which are expected to reduce the level of disputes.  
 We do not make any assumptions about whether society would view a redistribution from claimants to defendants as positive or negative.

## BUSINESS ASSESSMENT (Cumulative assessment)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 1

Description: Require claimants to prove that they have suffered serious harm to their reputation

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. Claimants will find it harder to bring defamation cases against material published now, and more material may also be published. This is likely to result in financial and reputational costs for claimants. Claimants and defendants may incur costs if preliminary hearings are held to establish sufficient harm. Legal services providers and ATE insurers may experience a reduction in business/income but are assumed to engage in other business activity and hence incur only adjustment costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Defendants will be able to publish more material at lower risk of successful defamation proceedings. Claimants and defendants may need less legal advice and be involved in fewer disputes because the law is clearer. They will save time and the cost of legal services. Wider society may benefit if there is a general preference for free expression relative to protection of reputation from trivial damage. It may also benefit if additional useful material is published.

### Key assumptions/sensitivities/risks

Discount rate (%)

A statutory test of "serious" harm is assumed to increase the protection available to defendants relative to the current common law position and as a result to increase the amount of material published. The impacts on all groups are sensitive to the amount and nature of additional material that is published as a result of introducing the test. The financial impact on HM Court and Tribunal Service (HMCTS) and the judiciary of any change in the number of disputes is assumed to be neutral.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 2

Description: Reforms to defences

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. Some claimants will suffer reputational damage as a consequence of more defensible material being published. Some defendants will incur costs as they will no longer publish some non-defensible material. Legal services providers and ATE insurers may experience a reduction in business/income but are assumed to engage in other business activity and hence incur only adjustment costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Some claimants will suffer less reputational damage as less non-defensible material is published. Some defendants will benefit (financially or otherwise) from publishing more defensible material. Claimants and defendants will need less legal advice and may be involved in fewer disputes because the law is clearer. Wider society is likely to benefit from more defensible material, and less non-defensible material being published. Increased legal certainty is also expected to reduce resources taken up by defamation disputes.

### Key assumptions/sensitivities/risks

Discount rate (%)

This option is assumed to clarify the law. We assume this increases the amount of defensible material published and decreases non-defensible material published by a similar amount – so there is no net effect on the total volume of material published, nor on claimants or defendants. The only overall impact is a reduction in the complexity of defamation law and in the number of defamation disputes. The financial impact on HMCTS and the judiciary of any change in the number of disputes is assumed to be neutral.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 3

Description: Extensions of absolute and qualified privilege

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:
<b>COSTS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Cost (Present Value)</b>
Low					
High					
Best Estimate					
<b>Description and scale of key monetised costs by 'main affected groups'</b> It has not been possible to monetise the impacts of this proposal.					
<b>Other key non-monetised costs by 'main affected groups'</b> Claimants are likely to incur greater reputational costs in future because more material will be privileged (i.e. will be allowed to be published). Where this material is already published, claimants will be less likely to bring successful challenges and receive compensation.					
<b>BENEFITS (£m)</b>	<b>Total Transition (Constant Price) Years</b>		<b>Average Annual (excl. Transition) (Constant Price)</b>		<b>Total Benefit (Present Value)</b>
Low					
High					
Best Estimate					
<b>Description and scale of key monetised benefits by 'main affected groups'</b> It has not been possible to monetise the impacts of this proposal.					
<b>Other key non-monetised benefits by 'main affected groups'</b> Defendants will benefit (financially or otherwise) from being able to publish more material that is protected from challenge by privilege. Where this material is already published, they will be less likely to have to pay legal costs and compensation for any reputational harm caused. Wider society may benefit from more material relating to scientific and academic debate and the proceedings of courts and tribunals overseas being published.					
<b>Key assumptions/sensitivities/risks</b>					<b>Discount rate (%)</b>
We assume no significant overall impact on the volume of defamation disputes as this volume relates to cases which are close to the legal boundary of what is acceptable. The reform shifts the boundary, so more material is likely to be published, but the boundary still exists in roughly the same form (it is assumed the proposal would have no impact on the clarity of defamation law) hence the volume of disputes is expected to remain the same. The financial impact on HMCTS and the judiciary of any change in the number of disputes is assumed to be neutral.					

## BUSINESS ASSESSMENT (Option 3)

<b>Direct impact on business (Equivalent Annual) £m:</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 4

Description: Replace the multiple publication rule with a single publication rule

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

Claimants will no longer be able to take action against defamatory material more than a year after it is first published. This may mean they receive less financial compensation, suffer more reputational harm, or incur legal costs to take out injunctions against future publication. They may also incur reputational harm if more material is (re)published. Legal services providers and ATE insurers may experience a reduction in business/income but are assumed to engage in other business activity and hence incur only adjustment costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Defendants will be able to republish material with less risk of being challenged. This may result in financial (or other) benefits from publishing more material, and also fewer compensation payments. Publishers may also benefit from being able to reduce their monitoring of online archives. Wider society may benefit if more material is published, and society places value on access to it (e.g. because it increases transparency and accountability).

### Key assumptions/sensitivities/risks

Discount rate (%)

The impacts are sensitive to claimants' responses to the proposals, including to what extent they bring injunctions against material to prevent it being republished after a year, and to what extent they focus more on finding and tackling material within one year of its publication rather than in relation to subsequent publications over a longer timeframe. The impacts are also sensitive to the number of cases in which claims against material over a year old are allowed by a judge on interests of justice grounds. The financial impact on HMCTS and the judiciary of any change in the number of disputes is assumed to be neutral.

## BUSINESS ASSESSMENT (Option 4)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 5

Description: Action against a person not domiciled in the UK or a Member State

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

Legal services providers, ATE insurers may experience a reduction in business/income due to fewer claims being brought by individuals not domiciled in the UK or a Member State, but they are assumed to engage in other business activity and hence incur only adjustment costs. Only a small number of such claims are brought at present. Therefore our best estimate is that there will be no substantive financial impact on UK residents.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the benefits of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Wider society may benefit if more material that society values (e.g. because it increases transparency and accountability) is published as a result of the proposal and it is accessed by UK residents.

### Key assumptions/sensitivities/risks

Discount rate (%)

Under HM Treasury's Green Book investment appraisal guidance, costs and benefits to individuals not domiciled in the UK (the relevant group affected directly by the proposal) are not included in the overall assessment of impact. These impacts are discussed in the evidence base for completeness. The change in the number of defamation claims issued in England and Wales is assumed to be negligible and the financial impact on HMCTS and the judiciary of any such change is assumed to be neutral.

## BUSINESS ASSESSMENT (Option 5)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 6

Description: Reverse the presumption of trial by jury in defamation cases

## FULL ECONOMIC ASSESSMENT

Price Base Year 2011/12	PV Base Year 2011/12	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0	High: 3	Best Estimate: 1.5

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		0	0
High		0.3	3
Best Estimate		0.15	1.5

### Description and scale of key monetised costs by 'main affected groups'

HMCTS may receive less in court fees due to fewer pre-trial hearings taking place. This reduction in fee income is estimated at around £0m - £0.3m per year.

### Other key non-monetised costs by 'main affected groups'

Legal services providers and ATE insurers may experience a reduction in business/income but are assumed to engage in other business activity and hence incur only adjustment costs.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		0	0
High		0.6	6
Best Estimate		0.3	3

### Description and scale of key monetised benefits by 'main affected groups'

Claimants and defendants may pay less in court fees due to fewer pre-trial hearings taking place. This saving is estimated at around £0m - £0.3m per year. Similarly, the reduction in the court and judicial resources required as a result of this lower volume would mean HMCTS would benefit from a reduction in operating costs of around £0m - £0.3m per year.

### Other key non-monetised benefits by 'main affected groups'

Claimants and defendants may benefit from lower legal costs due to fewer pre-trial hearings taking place. Wider society may benefit from resources being used more efficiently.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

We assume there is no impact on the volume of disputes, or the amount of material published. There is a risk that both of these could rise, resulting in possible reputational costs for claimants, financial (or other) benefits for defendants and legal costs for both groups. The financial impact on HMCTS and the judiciary of any change in the number of pre-trial hearings (or the number of disputes) is assumed to be neutral, as fees are assumed to cover costs in defamation proceedings.

## BUSINESS ASSESSMENT (Option 6)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 7

Description: Responsibility for publication

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

Claimants may incur reputational costs if material remains online for longer, and costs from any resulting legal disputes. Defendants may incur time and financial costs from legal disputes (though as they will have the option of avoiding these costs by agreeing to the removal of material, they are expected to be better off overall as a result of the proposal). Online intermediaries will incur staff costs of acting as a liaison point (though as they will have the option of avoiding these costs by removing material immediately as now, they are expected to be better off overall).

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Claimants may benefit from a simpler statutory process for making a complaint and pursuing legal action. Defendants may benefit from their material being left available longer and having the opportunity to defend it. Intermediaries will benefit from a clear process to follow to avoid liability, saving them the costs of legal advice and any costs of legal proceedings. They may also benefit if more material is published. Wider society may benefit from more defensible material being published (or staying available longer).

### Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that in general intermediaries currently remove material following complaints due to the threat of liability, but in future will follow the new process, leading to the identified impacts. We assume intermediaries do not change the amount of moderation activity they do, or change their behaviour in other ways that might affect freedom of expression, such as restricting author anonymity. The proposal is assumed to benefit defendants relative to claimants. No assumption has been made about how society would value this redistribution. The financial impact on HMCTS and the judiciary of any change in the number of pre-trial hearings (or the number of disputes) is assumed to be neutral. The long run financial impact on legal service providers and ATE insurers of an increase demand due to an increase in disputes is also assumed to be neutral (as resources will be transferred from other productive activities).

## BUSINESS ASSESSMENT (Option 7)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Summary: Analysis & Evidence

# Policy Option 8

**Description:** Power to order publication of a summary of the court's judgement

## FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised costs by 'main affected groups'

Defendants may incur a cost, financial or otherwise, associated with publishing more summary judgments, or publishing judgements more favourable from the perspective of claimants in future. HMCTS may face some ongoing monitoring and enforcement costs. Some greater judicial involvement may also be required on a case by case basis given the court now has the power to intervene. It is possible that the demand for legal services may fall if the proposal results in more efficient agreement between claimants and defendants regarding publication, representing a cost to legal service providers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to monetise the impacts of this proposal.

### Other key non-monetised benefits by 'main affected groups'

Claimants are expected to benefit from more summaries of judgments being published in cases where their claim has succeeded. Both claimants and defendants may benefit from lower legal costs if agreement on the terms of settlements is easier to achieve following the proposal. Society may benefit overall if these efficiency gains outweigh any increase in the court and judicial resources required. It may also benefit if the falseness of defamatory material is highlighted in a more public manner and this is preferred by society.

### Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that the ability of the court to impose a solution regarding publication of its judgements would benefit claimants rather than defendants, and that the proposal would be relevant for cases that were successfully pursued i.e. that claimants win. It is assumed that the proposal would have no impact on the financial damages awarded by the court, and that any change to settlements as a result of the proposal would be to the overall benefit of claimants (and to the detriment of defendants). It is assumed that the proposal will have no impact on the volume of defamation disputes overall, or the volume of cases reaching court. The financial impact on HMCTS and legal service providers is assumed to be neutral.

## BUSINESS ASSESSMENT (Option 7)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/Q	Benefits: N/Q	Net: N/Q	Yes	Zero net cost

# Evidence Base (for summary sheets)

## 1. Introduction

- 1.1 The civil law on defamation has developed through the common law over hundreds of years, periodically being supplemented by statute, most recently by the Defamation Acts of 1952 and 1996.
- 1.2 The Government's Coalition Agreement gave a commitment to review the law of defamation, and on 9 July 2010 the Government announced its intention to publish a draft Defamation Bill for consultation and pre-legislative scrutiny. Proposals were then developed along with an initial Impact Assessment and the draft Defamation Bill was published on 15 March 2011.
- 1.3 The public consultation closed on 10 June and we received 129 responses from a wide range of interested parties. A comprehensive summary of the responses received to consultation was published on 24 November 2011<sup>1</sup>. In addition to the Government consultation, pre-legislative scrutiny of the draft Bill was undertaken by a Parliamentary Joint Committee. The committee held oral evidence sessions between April and July and their final report was published on 19 October 2011.<sup>2</sup>
- 1.4 The draft Defamation Bill focused primarily on reforms to the substantive law of defamation. However, the consultation document also included proposals around the creation of a new preliminary procedure to deal with key issues at an early stage in defamation proceedings. This does not require primary legislation and is being taken forward separately.
- 1.5 This Impact Assessment reflects the Government's response to the Parliamentary Joint Committee, which covers the provisions in the draft Defamation Bill, the recommendations of the Committee and further provisions that the Government proposes to include in the substantive Defamation Bill.
- 1.6 This work is closely linked to the Government's wider reforms of civil litigation funding and costs, being taken forward in the Legal Aid, Sentencing and Punishment of Offenders Bill. The reforms include changes to 'no win no fee' conditional fee agreements (CFAs) including the abolition of the recoverability from the losing side of CFA 'success fees' and after the event (ATE) insurance premiums. This applies to all areas of civil litigation, including defamation.
- 1.7 The current CFA regime with recoverable success fees and ATE insurance is believed to have contributed to high costs across all areas of civil litigation, but there have been particular concerns in defamation and privacy cases. For example, the European Court of Human Rights judgment in January 2011 in *MGN v the UK* found the existing CFA arrangements on recoverability in that particular case to be contrary to Article 10 of the Convention (freedom of expression).
- 1.8 The Government believes that when the reforms of civil litigation funding and costs are implemented meritorious claims will still be able to secure representation under CFAs. However, the substantial additional costs which defendants currently have to pay under the CFA will be reduced. The proposals discussed in this Impact Assessment relate to reforms of defamation law only – not reforms to cost rules in defamation cases, which as set out above are being pursued separately.

## Background & Current Law

- 1.9 Defamation is the collective term for libel and slander, the torts which relate to the protection of a person's reputation. Defamation occurs when a person communicates material to a third party, in words or any other form, containing an imputation against the reputation of the claimant. Material is libellous where it is communicated in a permanent form, or broadcast, or forms part of a theatrical performance. If the material is spoken or takes some other transient form, then it is classed as slander.
- 1.10 Whether material is defamatory is a matter for the courts to determine. The main tests established by the courts in deciding whether material is defamatory are:

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<sup>1</sup> <http://www.justice.gov.uk/downloads/consultations/draft-defamation-bill-consult-summary-responses.pdf>

<sup>2</sup> <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>

- would the imputation “tend to lower the plaintiff [claimant] in the estimation of right-thinking members of society generally”?;
- would the words, without justification or lawful excuse, tend to expose the claimant to “hatred, contempt, or ridicule”?; or
- would the imputation tend to make the claimant “be shunned and avoided and that without any moral discredit on [the claimant’s] part”?

1.11 The burden of proving that the material is defamatory lies with the claimant (the person or organisation claiming to have been defamed). In England and Wales, for an action to be successful, not only does the meaning of the material complained of have to be deemed defamatory, the claimant must also show that it refers to him or her and that it has been communicated to a third party.

1.12 The primary remedy of the common law is damages. The court also has jurisdiction to grant an injunction restraining any further or future publication of the words complained of (or similar defamatory matter). Cases can be dealt with under the summary disposal procedure in sections 8 and 9 of the 1996 Act where the court is satisfied that one or the other party’s case has no realistic prospect of success, and the court has power in these cases to award damages not exceeding £10,000 and other remedies such as the publication of a correction and apology and an injunction against future publication.

1.13 In addition to this general background information, the following sections set out some specific background information relevant for each of the areas the proposals in the Defamation Bill seek to reform. This includes discussion of the current law where appropriate.

### *Defences*

1.14 A number of proposals in the Defamation Bill relate to reforming the defences available to defendants in defamation cases. Under the current law, a defendant is potentially liable for defamation if the relevant material is deemed defamatory on the basis of the criteria outlined above, and the defendant is the primary publisher of the material. Defendants have a range of defences available to them in defamation cases:

- justification i.e. that the material is true;
- that the words were fair comment on a matter of public interest;
- that the publication was absolutely privileged e.g. statements made in Parliamentary and court proceedings;
- that the publication was made in good faith and without malice on a privileged occasion (forms of qualified privilege, for example a fair and accurate report of a public meeting);
- that the publication was on a matter which was the subject of legitimate public interest and the defendant complied with the standards of ‘responsible journalism’ (Reynolds privilege); or
- that the defendant did not know and had no reason to believe that the words were defamatory of the claimant, and the defendant had made an offer of amends for the purposes of section 2 of the Defamation Act 1996 which had not been accepted by the claimant.

1.15 There are also a number of general tort defences available e.g. that the publication was authorised by the claimant or took place with their consent.

1.16 There are also defences that can apply if the defendant has had only a limited role in the publication of the defamatory material. For example, Section 1 of the Defamation Act 1996 also provides that a defendant is not liable where they:

- were not the author, editor or publisher of the statement complained of;
- took reasonable care in relation to its publication; and

- did not know, and had no reason to believe, that what they did caused or contributed to the publication of a defamatory statement.

### ***“Libel tourism”***

- 1.17 Currently it is possible for defamation cases without a strong link to England and Wales to be brought in this jurisdiction. For example, a person who is based overseas may be able to bring a defamation action in a court in England and Wales against a defendant who is also based overseas even when the level of publication in England and Wales may have been small in comparison with elsewhere. This is often referred to as “libel tourism.” Cases involving defendants who are domiciled in EU Member States are governed by European rules (in particular the Brussels I Regulation on jurisdictional matters).
- 1.18 The basic principle contained in Article 2 of Brussels I is that jurisdiction is to be exercised by the Member State in which the defendant is domiciled (so where the defendant is domiciled in England and Wales, the court has no discretion to refuse jurisdiction). Article 5(3) of Brussels I also enables a person domiciled in another Member State to be sued in matters relating to tort in the courts where the harmful event occurred (the act of publication of defamatory material in this jurisdiction is a harmful event). However, significant concerns have been raised in relation to cases that fall outside of the European legislation.

### ***Multiple publication rule***

- 1.19 It is a longstanding principle of the civil law that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the time period in which a defamation case can be brought by a claimant) - the “multiple publication rule”. Issues in relation to the multiple publication rule have become more prominent in recent years as a result of the development of online archives. It is now common for organisations, particularly the media, to make previously published material available through an online archive.
- 1.20 The effect of the multiple publication rule in relation to online material is that each “hit” on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication.
- 1.21 In the case of *Loutchansky v Times Newspapers*, a Russian businessman brought two actions against *The Times* for libel. The first related to articles published in October 1999, which were subsequently placed on *The Times*’s online archive and were available for the public to access. The claimant brought a second action in December 2000 (more than one year after the original publication) in relation to the online archive. The High Court and Court of Appeal ruled in favour of Loutchansky. *The Times* brought a case before the European Court of Human Rights on the basis that the multiple publication rule breached Article 10 of the European Convention on Human Rights and represented a disproportionate restriction on the newspaper’s freedom of expression. The European Court held that in the circumstances of the case there was no breach of Article 10, but indicated that in the event of a case being brought long after the expiry of the limitation period it was possible that this could contravene the European Convention on Human Rights. Concerns have continued to be raised about the open ended liability that this could lead to in relation to online archives.
- 1.22 Following the ECHR judgment the Ministry of Justice published a consultation paper in September 2009 entitled *“Defamation and the Internet: the multiple publication rule”* which considered the arguments for moving to a single publication rule and sought views on whether this would be appropriate. We received 34 responses to the consultation of which around 55% favoured a move to a single publication rule. 29% favoured retaining the present position, whilst the remainder favoured an alternative approach of retaining the multiple publication but introducing a form of qualified privilege to protect online archives.

### ***Trial by Jury***

- 1.23 Currently section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 provide for a right to trial with a jury in defamation proceedings on the application of any party,

### ***Responsibility for Publication***

- 1.24 Under the current law Section 1 of the Defamation Act 1996 provides a defence which is available to people who are not the author, editor or commercial publisher of a defamatory statement. Under this defence, secondary publishers such as website operators and booksellers are not liable for third party defamatory material which they have made available, if they can show that they took reasonable care in relation to its publication and that they did not know, or had no reason to believe that what they did caused or contributed to the publication of a defamatory statement.
- 1.25 In addition, the Electronic Commerce (EC Directive) Regulations 2002<sup>3</sup> have implemented the E-Commerce Directive<sup>4</sup>. This provides protection along broadly similar lines to section 1 of the Defamation Act 1996 to certain types of online intermediary services (namely hosting, caching and mere conduits). The Directive may indicate the circumstances not only in which ISPs should not be liable, but also those where they should be liable (for example where they have knowledge that the material is unlawful and do not act expeditiously to remove it).
- 1.26 The way that the current law operates in practice, is that an internet intermediary hosting third party content can potentially be held liable where they can be shown to have knowledge that the content is unlawful. In reality this creates a position where as soon as an intermediary receives a defamation complaint about third party content that they are hosting, they often immediately remove it from their website in order to protect themselves from the possibility of being sued. There are also concerns around the position relating to the moderation of third party content, as an intermediary who edits content as part of a responsible moderation process could be seen under the provisions of the 1996 Act and the E-Commerce Directive as an editor rather than a host and therefore could lose the protections that the current law provides. There are also concerns that the 1996 Act does not provide adequate protection for offline intermediaries such as booksellers.

### ***Power to order publication of a summary of the court's judgment***

- 1.27 Sections 8 and 9 of the Defamation Act 1996 provide for the summary disposal of claims by a judge alone where the court is satisfied either that the claimant's case has no realistic prospect of success, or that the defendant has no defence with a realistic prospect of success, and that in either situation there is no other reason why the claim should be tried. A list of factors is provided for consideration in deciding whether a claim should be tried, including whether all the persons who are or might be defendants are before the court; the extent to which there is a conflict of evidence; and the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication).
- 1.28 Where the court is satisfied that summary judgment should be given in favour of a claimant, it can grant summary relief. The relief that can be granted under the summary procedure includes an order that the defendant publish or cause to be published a suitable correction and apology. If agreement cannot be reached between the parties on the content of the correction and apology, the court can order publication of a summary of its judgment. If agreement cannot be reached on the time, manner, form or place of publication the court can direct the defendant to take such reasonable and practicable steps as it considers appropriate.
- 1.29 However, if the case proceeds to a full court hearing, the court does not have the power to order a summary of the judgement to be published. While a claimant could in theory specify this as part of the damages settlement if they wished, it would be for the claimant and defendant to agree on the time, manner, form and place of the summary. The court would have no power to direct the defendant if required when an agreement was not reached.

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<sup>3</sup> SI 2002/2013

<sup>4</sup> European Council and Parliament Directive 2000/31/EC, OJ 2000 L178 p1

## Problem under consideration

- 1.30 The Bill represents one of a number of strands of work that the Government is taking forward to improve the clarity and certainty of the law on defamation and to reduce costs and reform procedures to enable cases to be dealt with more quickly and effectively. Reforms to civil litigation costs, including in respect of defamation, have been taken forward in the Legal Aid, Sentencing and Punishment of Offenders Bill that has been before Parliament in the first session. In addition, the Government intends to take forward a number of procedural reforms to defamation cases alongside passage of the Bill to reduce delay and encourage early resolution. The problems considered in this Impact Assessment relate to issues covered specifically in the Bill.
- 1.31 The Government considers that the current law is not sufficiently clear, and that this is having a detrimental effect on freedom of expression and generates inefficiencies when defamation issues are disputed legally. The Government also considers that the current law is unduly restricting scientific and academic debate and that the law requires rebalancing in order to give greater protection to defendants. This means that material that might otherwise be published is not because of the uncertainty around the state of the law. For each of the proposals considered in this Impact Assessment, the specific problem is set out below.

### *Serious Harm*

- 1.32 The Government considers that under the current law it is too easy to bring defamation actions, and consequently that this has led to a detrimental impact on freedom of expression. Tests have been developed through the common law governing whether a defamation case can be pursued, for example in *Thornton v Telegraph Media Group Ltd*<sup>5</sup> in which an earlier House of Lords decision in *Sim v Stretch*<sup>6</sup> was identified as authority for the existence of a “threshold of seriousness” that must be met in order for material to be deemed defamatory. In addition, in the case of *Jameel v Dow Jones & Co*<sup>7</sup> it was established that there needs to be a real and substantial wrong suffered by the claimant in order for a defamation case to be brought. However, these thresholds are not considered to be sufficiently high in practice. Legislating to create a statutory threshold higher than the currently applied thresholds would provide greater certainty and help discourage trivial claims.

### *Responsible publication on a matter of public interest*

- 1.33 The Government considers that there is a lack of certainty over how the *Reynolds* common law defence applies outside the context of mainstream journalism, and that this has led to a detrimental impact on freedom of expression and reporting. The Government also considers that the current common law provisions in *Reynolds* can be complex and difficult to rely on, meaning the defence is seldom used in practice, even in circumstances where it would be appropriate.

### *Truth*

- 1.34 The Government considers that the common law defence of justification needs to be put on a statutory footing to create greater certainty than currently exists. The current uncertainty is having a detrimental effect on freedom of expression and generates inefficiencies when defamation issues are disputed legally.

### *Honest opinion*

- 1.35 The Government considers that the common law relating to the defence of honest opinion is complex and generates uncertainty, and that consequently the key elements of the defence should be articulated in statute in as clear and simple a way as possible. The current uncertainty is having a detrimental effect on freedom of expression and generates inefficiencies when defamation issues are disputed legally.
- 1.36 In addition, there are particular concerns in the context of a number of recent cases involving comment on issues of scientific and academic debate (for example *British Chiropractic Association v Singh*<sup>8</sup>). The Government believes the current uncertainty makes it difficult to resolve issues around meaning and the distinction between fact and opinion. This creates an inefficiency in the

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<sup>5</sup> [2010] EWHC 1414 (QB)

<sup>6</sup> [1936] 2 All ER 1237

<sup>7</sup> [2005] EWCA Civ 75

<sup>8</sup> [2010] EWCA Civ 350

use of defamation law to deal with professional disagreements instead of the usual means of scientific debate and discourse.

### *Privilege*

1.37 Privilege is a long-standing defence in defamation law, based on the recognition that there are certain situations (privileged occasions) in which it is in the public benefit that a person should be able to speak or write freely and that this should override or qualify the protection normally given by the law to reputation. For all privilege there has to be some foundation in the public interest. The Government considers that the current scope of these provisions is too narrow, in particular in relation to reports of proceedings at courts and tribunals overseas, international courts and tribunals, and academic and scientific conferences. This has led to a detrimental impact on freedom of expression as it can lead to publishers being wary about reporting on material that is available in the public domain.

### *Single publication rule*

1.38 Issues in relation to the multiple publication rule have become more prominent in recent years as a result of the development of online archives. The effect of the multiple publication rule in relation to online material is that each “hit” on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication. This is also the case with offline archive material (for example a library archive), but the accessibility of online archives means that the potential for claims is much greater in respect of material accessed online.

1.39 The Government considers that the current position is not suitable for the modern internet age. A major problem is that the current law creates the potential of open ended liability for online publishers who store information on their archives, and therefore undermines the basis of the limitation period in defamation proceedings. The current law generates uncertainty for publishers and is considered to have a detrimental effect on freedom of expression online.

### *Action against a person not domiciled in the UK or a Member State*

1.40 Significant concerns have been raised over the need for changes to address problems relating to libel tourism (where cases with a tenuous link to England and Wales are brought in this jurisdiction). This reflects a widespread perception that the English courts have become the forum of choice for those who wish to sue for libel and that this is having a negative impact on freedom of expression throughout the world, for example in the USA where legislation (The Securing the Protection of our Enduring and Established Constitutional Heritage Act - known as the SPEECH Act) was introduced in 2010 to prevent foreign libel judgments being enforced there.

### *Trial to be without a jury unless the court orders otherwise*

1.41 The Government considers that the current right for either party to opt for jury trial and the role which juries (if used) have, for example in determining the meaning of allegedly defamatory material, means that issues which could otherwise have been decided by a judge at an early stage in all defamation cases cannot be resolved until the case reaches trial. This has led to higher costs being incurred and cases taking longer than could otherwise be the case.

### *Publication on the Internet*

1.42 Concerns have been raised about the need to clarify and change the law as it operates in relation to material published on the internet. The growth of the internet and the increase in the use of user-generated content has raised concerns that the provision contained within section 1 of the Defamation Act 1996 may not sufficiently protect secondary publishers engaging in multimedia communications and that the relationship between section 1 and the E-Commerce Directive may be unclear.

1.43 The variety of internet services which are now available means that a wide range of people and organisations can potentially be affected by issues relating to defamatory material, from large scale internet service providers such as Google and Yahoo and social networking sites such as

- 1.44 In particular, the Government considers that the current law is creating a situation where intermediaries are immediately removing content from their sites as soon as they receive a complaint alleging material is defamatory, in order to avoid liability for third party generated content hosted on their websites. The Government believes this is inhibiting freedom of expression online.
- 1.45 In addition, the current lack of clarity in relation to the way that the current law impacts on intermediaries carrying out responsible moderation of content could lead to a situation where organisations take the decision not to moderate, therefore eroding the culture of responsibility that exists in many of the major online organisations currently and potentially increasing the amount of reputationally damaging material that is published online.

#### *Power to order publication of a summary of the court's judgment*

- 1.46 Interested parties have argued that in the majority of defamation actions the main priority for the claimant is to have their reputation restored, rather than to obtain large damages settlements. A concern has been raised that the way in which the current law operates does not offer sufficient remedies beyond the payment of damages, that can help restore the reputation of the claimant, given the very limited circumstances in which the court has the power to order the publication of a summary of its judgment currently. It is therefore proposed to make this power available in defamation proceedings generally. This is intended to ensure that in cases where claimants wish for such a summary to be published, the court has the power to determine how this is done in practice, in instances where the claimant and defendant do not reach agreement.

#### **Responses to consultation and Joint Committee Report**

- 1.47 The Government published a draft defamation Bill proposing reforms to the law of defamation on 15 March 2011. In general the responses to the consultation were supportive of the Government's position and a summary of those responses on specific areas is included below. This section also summarises the views of the Joint Select Committee. Summarising the views collected since March 2011 in this way is designed to explain why the proposals set out in this Impact Assessment were chosen for implementation.

#### *Clause 1 – Serious Harm*

- 1.48 The Government consultation sought views on the inclusion of a test aimed at deterring trivial or unfounded claims. In the draft Bill it asked for views on whether the test should be one of "substantial harm."
- 1.49 Over two-thirds of respondents (around 72%) agreed in principle with the proposal to adopt a threshold test (including individuals, media organisations, members of the legal profession, members of the scientific and medical professions, public bodies, non-governmental organisations), but there were a wide range of views on how the test should be framed. Around 40% of respondents (including media organisations, members of the scientific and medical professions and non-governmental organisations) argued for creating a higher hurdle than the current common law test for making a claim. Others suggested a range of different approaches to encapsulate the current law.
- 1.50 The main areas of concern raised were about the ambiguity and consequent litigation that a new statutory test could create, and uncertainty as to how the test would need to be satisfied in evidential terms. Whilst the Government accepts that there may be initial litigation to "test" the new statute, which is often the case with new legislation, it takes the view that in the longer term having the test set out in statute rather than existing in various areas of the common law will provide extra clarity and certainty for both claimants and defendants.
- 1.51 The Parliamentary Joint Committee proposed that a higher hurdle than the current common law test should be applied, and that this should be reflected in a test of "serious and substantial harm". We are concerned that the use of two separate terms alongside each other would be likely to cause uncertainty and litigation over what difference may exist between the two terms, which would add to disputes and costs. However, in the light of the Committee's views and the balance of

1.52 The Government therefore intends to amend the draft Bill to provide for a test of “serious harm” in the substantive Defamation Bill.

### *Clause 2 – Responsible publication on a matter of public interest*

1.53 In the draft Bill the Government proposed to introduce a new statutory defence which would build on the principles established by the common law defence in *Reynolds v Times Newspapers* (which provides the defendant with a defence where the publication was on a matter which was the subject of legitimate public interest and the defendant complied with the standards of ‘responsible journalism’). This would be expressed in more flexible terms, and would be widely applicable to forms of publication beyond mainstream journalism. The Government consulted on this approach.

1.54 Over two-thirds of respondents (around 74%) supported a new statutory defence in principle (including individuals, media organisations, academics, members of the legal profession, members of the scientific and medical professions, non-governmental organisations). Some supported the approach taken in the draft Bill of codifying the current law in a more flexible and inclusive way, while others argued that the clause should provide greater protection for publications in the public interest. Those opposed to the clause (around 19%) argued that the common law is already clear and that a statutory provision would reduce flexibility and create additional litigation (this included legal profession, individuals and legal academics).

1.55 The Committee rejected a suggestion to protect any statement made in the public interest provided that the author had not acted recklessly or maliciously. On balance they expressed broad support for the approach that was taken by the Government to the public interest defence in the draft Defamation Bill subject to certain suggested drafting changes. They also recommended that for the sake of clarity the existing common law defence should be repealed.

1.56 After taking into consideration the responses to the Government consultation, and the views of the Committee, the Government intends to include provisions relating to responsible publication on a matter of public interest in the substantive Defamation Bill. These generally reflect those included in the draft Bill by providing for the defence to be available in circumstances where the defendant can show that the statement complained of is, or forms part of, a statement on a matter of public interest and that he or she acted responsibly in publishing the statement. However, in view of the responses to consultation we also intend to include provisions to repeal the existing common law defence.

### *Clause 3 – Truth*

1.57 In the draft Bill the Government proposed to introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of “justification”. The defence would be renamed “truth”. In the consultation we sought views on the name change and on the content of the clause.

1.58 Two-thirds of respondents (66%) supported clarifying and simplifying the law by replacing the common law defence of justification with a statutory defence of truth, and most agreed with the wording used in the draft clause (this included individuals, media organisations, members of the legal profession, academics). The main concern raised by those opposing (28%, including individuals, members of the legal profession, academics and publishing and journalism trade organisations) was that this was unnecessary and could lead to costly litigation.

1.59 The Parliamentary Joint Committee report recommended renaming the defence as one of “substantial truth” as they believe that this better describes the test that is currently applied. In addition, the report recommended that the Bill should be amended, if necessary by a new clause, to provide the judge deciding a defamation case at final trial with the power to order the defendant to publish, with proportionate prominence, a reasonable summary of the court’s judgment.

1.60 After taking into consideration the responses to the Government consultation, plus the views of the Committee, the Government intends to include provisions aimed at renaming the common law defence of justification as a defence of truth, and codifying and clarifying the existing common law. It does not propose to rename the defence “substantial truth,” as this is not considered necessary.

#### *Clause 4 – Honest opinion*

- 1.61 In the draft Bill the Government proposed to introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of “fair comment” (recently renamed “honest comment” by the Supreme Court). The defence would be renamed “honest opinion” and the Government consultation sought views on the name change and on the content of the clause.
- 1.62 About three-quarters (74%) of respondents supported a new statutory defence to replace the common law defence of fair comment, and most of these agreed that it should be called “honest opinion” (these included individuals, media organisations, legal professionals, members of the publishing and journalism professions, academics and non-governmental organisations). There were a wide range of views on different aspects of the draft clause and a number of suggestions for amendments.
- 1.63 The Parliamentary Joint Committee broadly supported the Government’s proposal to place the defence of honest opinion on a statutory footing. The committee made a number of recommendations on drafting issues and points of detail. For example, they recommended that the Bill should be amended to require the subject area of the facts on which the defendant’s opinion is based to be sufficiently indicated either in the defendant’s statement itself or by the general context.
- 1.64 After taking into consideration the responses to the Government consultation, plus the views of the Committee, the Government proposes to include provisions aimed at renaming the common law defence of fair comment as a defence of honest opinion, and codifying and clarifying the existing common law. The Government intends to amend the clause that appeared in the draft Bill to require the subject area of the facts on which the defendant’s opinion is based to be sufficiently indicated whether in general or specific terms.

#### *Clause 5 – Privilege*

- 1.65 In the draft Bill the Government proposed to update and extend the circumstances in which the defences of qualified privilege and absolute privilege are available in order to improve the protection given to fair and accurate reports of court proceedings and of academic and scientific conferences.
- 1.66 There was clear majority support for the proposals in the draft Bill to extend the availability of the defences of absolute and qualified privilege. For example, 79% of respondents (including individuals, media organisations, legal professionals, and non-governmental organisations. and to reports of scientific and academic conferences) agreed with the proposed extension of absolute privilege to reports of court and tribunal proceedings internationally, and 84% of respondents (including individuals, legal professionals, media organisations, members of the scientific and medical professions, and non-governmental organisations) agreed with the proposed extension to qualified privilege to cover fair and accurate reports of scientific and academic conferences.
- 1.67 However, only a minority (30%) supported reviewing schedule 1 to the Defamation Act 1996 more generally to rationalise and clarify the existing provisions which are considered by some quarters complex and difficult to interpret (this group included a media organisation, academics, legal professionals, a consumer organisation, an internet organisation and a media marketing company). There was also support for inclusion of a provision extending qualified privilege to archives and mixed views on whether a specific provision in relation to press conferences was necessary.
- 1.68 The Committee strongly supported the Government’s proposals contained in the draft Bill, and recommended extending qualified privilege further to include peer reviewed articles in scientific and academic journals.
- 1.69 After taking into consideration the responses to the Government consultation, plus the views of the Committee, the Government intends to include provisions to extend privilege in the way proposed in the draft Bill (which amended the provisions contained in the Defamation Act 1996 relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used), in order to protect the reporting of academic and scientific discourse. It also intends to extend qualified privilege to peer-reviewed articles in scientific and academic journals.

## *Clause 6 – Single publication rule*

- 1.70 The government indicated in its consultation that it does not believe that the current position where each communication of defamatory matter is a separate publication giving rise to a separate cause of action is suitable for the modern internet age. In light of this the consultation sought views on the terms of a clause providing for a single publication rule.
- 1.71 The majority of respondents (86%) supported the introduction of a single publication rule (including individuals, media organisations, legal professionals, members of the publishing and journalism professions, academics and non-governmental organisations). A number of issues were raised on the drafting of the clause, for example, the circumstances in which the rule would be disapplied because of a subsequent publication being made in a “materially different manner.” In the consultation we had indicated that “materially different manner” was intended to cover situations such as where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives. There was a mix of views on this from consultees. Around 43% agreed with the inclusion of a “materially different manner test” however, a small number (around 10%) of respondents argued that such a test was unnecessary. The remainder, whilst not opposing such a test in principle, argued that as drafted the test was too restrictive.
- 1.72 The Committee recommended extending the proposed single publication rule to protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year (rather than just the same publisher).
- 1.73 After taking into consideration the responses to the Government consultation, plus the views of the Committee, the Government intends to include provisions in the Defamation Bill to introduce a single publication rule. The Government does not intend to accept the Committee recommendation that the rule should be extended further to protect anyone who republishes the same material in a similar manner after it has been in the public domain for more than one year. It is the Government’s view that to extend the law in this way would create potential unfairness for claimants wishing to protect their reputation.

## *Clause 7 - Action against a person not domiciled in the UK or a Member State*

- 1.74 In the draft Bill the Government proposed a clause providing that when considering whether to grant permission for a claim to be served outside England and Wales the court should be satisfied that it is clearly more appropriate for the claim to be brought in England and Wales than elsewhere.
- 1.75 Views were broadly divided three ways between those who supported the provision in the draft Bill; those who wanted it to be extended further to cover all defendants based in England and Wales against claimants suing in England over international publications where it is more appropriate for proceedings to be brought in a different jurisdiction; and those who didn’t consider libel tourism to be a problem requiring attention. Overall around 70% of respondents considered that some action was needed, although there was a range of views about what should be done.
- 1.76 The Parliamentary Joint Committee was broadly in favour of the Government’s proposals set out in the draft Bill, but recommended that this section of the Bill should not apply to claimants domiciled in England and Wales who wish to sue in respect of publication abroad and that the clause should be confined to foreign parties using English courts to resolve disputes where the principal damage has not been suffered here.
- 1.77 The Government shares the Committee’s concern that claimants domiciled in England and Wales who wish to bring an action here in respect of publication abroad should not be put at a disadvantage as a result of the Bill’s provisions. However, amending the clause to exclude claimants domiciled in this jurisdiction could raise difficulties in relation to anti-discrimination principles in European law as this would be giving more favourable treatment to English-domiciled claimants than claimants from elsewhere in the European Union.
- 1.78 In practice, we consider that if a claimant is domiciled in this jurisdiction the courts would be extremely slow to find that he or she did not meet the test of England and Wales being clearly the most appropriate place to bring an action, and that it will also often be the case that more harm will have been done here than elsewhere. In view of the difficulties which make a provision on the face

### *Clause 8 - Trial to be without a jury unless the court orders otherwise*

- 1.79 In light of the concerns raised in relation to the existing presumption in favour of jury trial (which allows for a claimant to have their case heard by a jury if they request one) the draft Bill contained a provision designed to remove that presumption.
- 1.80 Around 84% of respondents supported the proposal to remove the presumption in favour of jury trial (this included individuals, media organisations, legal professionals, members of the publishing and journalism professions, and non-governmental organisations). A majority of respondents (56%) did not consider that there was a need for guidelines in the Bill to govern the courts' exercise of their remaining discretion. There were a range of suggestions from those who did support guidelines, including that guidance should support jury trial where there was large scale publication including to the public at large, and by public authorities; where there were allegations or imputations of criminality; on matters of great public interest; or in cases involving the police and government agencies.
- 1.81 The Committee supported the Government's position set out in the draft Bill, and concluded that the presumption in favour of jury trials works against the principles of reducing costs and promoting early case resolution. The Committee also recommended that guidelines on when a judge may order trial by jury should be set out on the face of the Bill.
- 1.82 After taking into consideration the responses to the Government consultation, and the views of the Committee, the Government intends to include provisions in the Defamation Bill seeking to remove the presumption for jury trial in defamation cases. It believes that this would have the effect of improving clarity in the law and enabling proceedings to be progressed more quickly and effectively.
- 1.83 On the basis that a clear majority of responses to our consultation, including from members of the senior judiciary, took the view that guidelines on the face of the Bill would not be necessary, the Government does not intend to pursue this. Concerns were expressed that including guidelines in the Bill could be too prescriptive and generate disputes. There would also be a risk that detailed provisions setting out when jury trial may be appropriate could inadvertently lead to more cases being deemed suitable for a jury than at present, which would work against the Committee's view (which the Government shares) that jury trial should be exceptional.

### *Responsibility for publication*

- 1.84 In view of the significant concerns that had been raised in relation to publication on the internet the Government considered that it would benefit from further consultation before drafting legislative provisions and therefore did not include a specific clause in the draft Defamation Bill. However, in the consultation document views were sought on a wide range of options.
- 1.85 The majority of respondents (73%) offered support, in principle, for giving greater protection to internet intermediaries and discussion boards (those in favour included individuals, media organisations, members of the legal profession, internet organisations, a non-governmental organisation, a public body, members of the scientific and medical professions and publishing and journalism trade organisations). Although a specific question was not asked, some also supported greater protection for offline intermediaries.
- 1.86 The consultation paper set out a number of options and asked a series of different questions about these options. The option which received the greatest level of support, around 39%, (mainly from media organisations) was for a system akin to that in US copyright law, where the intermediary acts as an liaison point between the defamed person and the poster of the material so that the former can bring an action against the latter if they wish and the internet body cannot be sued. Others (around 19%, mainly coming from non-governmental organisations and members of the scientific and academic communities) argued for an approach whereby a court order would be needed in all cases before the internet intermediary would be obliged to remove material.
- 1.87 A number of respondents (around 22%) did not see any need for a change in the law (mainly legal professional and academics). There was some support for a provision to clarify the existing law

- 1.88 The Committee proposed a two-track system to dealing with responsibility for publication on the internet in its report, depending on whether the author of the material is identifiable or not. Where a complaint is received about allegedly defamatory material that is written by an identifiable author, they recommended that the host or service provider must publish promptly a notice of complaint alongside that material. If the host or provider were not to do so, then they would only be able to rely on the standard defences available to a primary publisher, if sued for defamation. Following the notice of complaint being posted the complainant may apply to a court for a take-down order. The host or service provider should inform the author about the application and both sides should be able to submit brief paper-based submissions on which a judge should be able to make a prompt decision.
- 1.89 Where the material was posted by an unidentified person it should be taken down by the host or service provider upon receipt of complaint, unless the author promptly responds positively to a request to identify themselves, in which case a notice of complaint should be attached or unless the internet service provider believes that there are significant reasons of public interest that justify publishing the unidentified material. Where this is the case it should have the right to apply to a judge for an exemption from the take-down procedure and secure a “leave-up” order.
- 1.90 However, in the light of discussions with internet organisations, the Government is concerned that there are significant practical and technical difficulties with the proposal that, where the author can be identified, a notice of complaint should be published alongside the allegedly defamatory material. For example, the content complained about may be embedded within a number of different sites, making it unclear who should be responsible for attaching the notice and where exactly it should be placed. There could also be difficulties arising from the fact that audio-visual material cannot be edited easily, and imposing a caption over the material would be unnecessarily intrusive. In addition, it would be very difficult to ensure that the notice was transferred across to any subsequent site on which the material might appear, particularly since the notice could potentially need to remain posted in perpetuity if the complainant chose to take no further action.
- 1.91 Therefore, after taking into consideration the responses to the Government consultation, plus the views of the Committee, the Government intends to include within the Bill provisions aimed at establishing a system which encourages the claimant to engage with the primary publisher of the material directly and for the intermediary to act as an liaison point between the defamed person and the primary publisher so that the former can bring an action against the latter if they wish and the intermediary cannot be sued.

#### *Power to order publication of a summary of the court’s judgment*

- 1.92 Concerns around the need for provisions to assist in restoring the claimant’s reputation led to the Government including a question in its consultation paper on whether it would be appropriate to extend the circumstances in which the court had the power to order publication of a summary of its judgment. Just over half the responses supported the court being able to order publication of a summary of its judgment more widely than is currently the case, although only a minority (five of 34 respondents) believed that they should also have the power to order the publication of an apology.
- 1.93 The Joint Committee argued that whilst damages awards may provide some compensation they will be of little comfort to someone whose friends, relatives and business associates have been exposed to untrue allegations about them and that a published summary of the courts judgment may be more effective in correcting the record. However, they also did not support proposals to give the court the power to order the defendant to publish an apology.
- 1.94 After taking into consideration the views of both the Committee and the consultation responses the Government intends to extend the courts power to order publication of a summary of its judgment more widely than is provided by the current law. The wording of the summary and the time, manner, form and place of its publication will primarily be matters for the parties to agree although the court will be able to settle the wording and give directions on the other issues in the event that

## Policy objective

- 1.95 The Government's overall aim is to ensure that responsible journalism, academic and scientific debate, and the valuable work of non-governmental organisations are properly protected and that a fair balance is struck between freedom of expression and the protection of reputation. In addition to this general aim, there are also some specific objectives as set out below.
- 1.96 The proposals to introduce a statutory test of serious harm, to extend the circumstances covered by absolute and qualified privilege, to introduce a single publication rule, provisions on libel tourism and on responsibility for publication on the internet are all intended to shift the balance of the law slightly in favour of freedom of expression in a manner the Government believes will better match the preferences of society.
- 1.97 The objective of the proposals relating to defences of responsible publication in the public interest, truth and honest opinion is to simplify and increase the clarity and certainty of the defamation law for both potential defendants and potential claimants. By reducing uncertainty, it is intended that people will be less discouraged in future either from writing and speaking freely where they are justified in doing so, or from bringing a claim where their reputation has been damaged unjustifiably.
- 1.98 In relation to the proposal to reverse the presumption of trial by jury in defamation cases, and to provide the court with the power to order the publication of a summary of its judgement, the objective is to achieve quicker and more efficient case resolution for defamation cases. Judicial discretion currently exists and will continue to determine whether a jury trial is appropriate on a case by case basis. The proposal should therefore reduce costs for all court users and deliver a more efficient use of court and judicial resources, without having any effect on case outcomes.

## Economic rationale for intervention

- 1.99 The conventional economic approach to Government intervention is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate, e.g. monopolies overcharging consumers, or if there are strong enough failures in existing government interventions, e.g. outdated regulations generating inefficiencies. In all cases the proposed intervention should avoid generating a further set of disproportionate costs and distortions. The Government may also intervene for reasons of equity or fairness and for distributional reasons (e.g. reallocating resources from one group in society to another).
- 1.100 The proposals in this Impact Assessment are expected to improve both efficiency and fairness. A number of the proposals considered relate to reducing the complexity and uncertainty of defamation law. The effect of doing this would be to reduce the amount of legal advice publishers (and potential claimants) need in order to make decisions about whether to publish an article, whether to make a defamation claim, and whether to defend claims, agree a settlement, or proceed to trial. It should also reduce the number of unfounded and trivial cases brought, and reduce the length and complexity of those court cases that do proceed. This should reduce the need for legal resources when cases do arise, and reduce the amount of court and judicial resources needed to resolve cases. All these resources could then be used for other activities, improving overall efficiency in the economy.
- 1.101 The proposals should also improve efficiency by promoting free speech, in particular scientific and academic debate and investigative journalism. This may improve the quality of information publicly available, and as a result may improve decision making in a general sense. The Government believes that the uncertainty and complexity of the current law may be preventing articles and other statements being published that should be. Proposals to clarify the law (clauses 2 – 4) are expected to make it easier for individuals to understand and enforce their rights under the law.
- 1.102 The proposal to remove the presumption of trial by jury should also generate efficiency benefits, and reduce costs for court users, on the assumption that there would be no change in case outcomes given the same level of judicial discretion will continue to apply. The proposal to extend the power of the court to order a summary of its judgement to be published would also be justified primarily on efficiency grounds.

1.103 In terms of equity (fairness) and distributional considerations, the Government believes that at present some aspects of the law do not provide sufficient protection for freedom of expression. Proposals for a statutory serious harm test, to extend the areas protected by absolute and qualified privilege, to replace the multiple publication rule with a single publication rule and to introduce a system to protect internet intermediaries from liability are all intended to shift the balance of the law and therefore promote freedom of expression. This would generate equity (fairness) and distributional benefits if the resulting balance better matches the preferences of society, e.g. if a shift in favour of publishers at the expense of those who are the subject of publication is preferred by society.

### **Main Affected Groups**

1.104 The following groups are expected to be affected by the proposals:

- Claimants or potential claimants in defamation cases;
- Defendants or potential defendants i.e. primary publishers and authors including journalists, NGOs, academics and scientists;
- HM Courts and Tribunals Service (HMCTS) and the judiciary;
- Legal service providers and After the Event insurers; and
- Intermediaries including website operators and the media in instances where such parties are not themselves primary publishers or authors (defendants or potential defendants).

## **2. Costs and Benefits**

2.1 This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are often important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

### **Quantification issues**

2.2 The majority of the impacts on different parties identified in this Impact Assessment cannot be sensibly monetised, in part due to a lack of robust baseline data. We also do not have the necessary data and evidence to make quantitative predictions of how relevant variables would change compared to the baseline in future.

2.3 This section first outlines the main impacts that we expect from the different proposals. We set out the information we would need to create a robust baseline and to monetise the impacts of the proposals. We note the information that is available, and assess where appropriate whether we consider if further data gathering would be cost effective. The limited available information all relates to the baseline.

### ***Brief outline of expected impacts***

2.4 Clauses 2 – 4 will codify and simplify the law in areas that are currently governed by common law. We expect this to reduce legal uncertainty. This reduction in uncertainty will tend to reduce the scope for defendants and claimants to misjudge whether statements made are lawful, and the scope for them to disagree about the legality of publications. As a result we expect:

- defendants will be more likely to publish defensible material;
- non-defensible material will be less likely to be published;
- claimants will be less likely to challenge defensible material that is published; and
- claimants will be more likely to challenge non-defensible material that is published.

- 2.5 We do not expect the proposals to completely eliminate uncertainty, so there will still be defamation claims issued. However, by clarifying the law the proposals may also reduce the length and complexity of legal arguments. This would:
- reduce average legal costs, court and judicial resources involved in settling a defamation dispute; and
  - as a result, potentially affect decisions by claimants and defendants to publish and challenge material.
- 2.6 The magnitude of the resulting impact on the volume of published material and on the volume of disputes over published material is unclear, and will be determined by the behavioural responses of claimants, defendants and legal service providers to all these expected impacts, which are inter-related. These responses are complex and uncertain. For the purposes of this analysis, we have assumed that reducing legal uncertainty would on average be expected to lead to no net change in the volume of published material, but would result in fewer disputes and court cases relating to the material that is published.
- 2.7 Clauses 1 and 5 – 7 will increase protection for defendants compared to the current law. We expect that, regardless of the position of the law, there will be some material that is “borderline” i.e. there will always be some material for which there is uncertainty about whether or not it is defensible. We expect these proposals will make material that might currently be considered borderline clearly defensible. At the same time, we expect that some material that is currently clearly not defensible will become borderline.
- 2.8 As a result we expect:
- defendants will publish more material (which follows as a consequence of being afforded greater protection from defamation challenges under the new law);
  - claimants will make fewer challenges against material that is currently published (because material that is considered “borderline” with respect to the current law will become clearly defensible under the new law);
  - claimants will make at least some challenges against newly published material (as some of this is likely to be “borderline” with respect to the new law).
- 2.9 For the purposes of this analysis, we have assumed that providing greater protection to defendants would on average be expected to lead to an increase in the volume of published material, but would have no net impact on the volume of disputes and court cases compared to current levels.
- 2.10 Clause 8 removes the presumption of trial by jury in defamation cases. The discretion for the judge to order a jury trial will remain. The number of jury trials is already very small, indeed our analysis of a sample of case files from claims issued in 2009 and 2010 failed to find any evidence of cases that had proceeded to jury trial, so we do not expect the proposal to have a significant impact on the number of jury trials. However, the current presumption in favour of trial by jury prevents a judge from making a determination on key issues at an early stage as some issues are reserved for the jury should it be decided that a jury trial is required. One of these key issues is the meaning of the words complained. Often once a determination on meaning has been made, one party or the other will settle the case. We therefore expect that the main effect of the proposal will be to shorten the length of court proceedings.
- 2.11 The proposal relating to responsibility for publication introduces a system where if potentially defamatory material is posted on the internet, the intermediary acts as a liaison point between the defamed person and the primary publisher (i.e. the poster of the material) if their identity and contact details are not known to the defamed person, so that the former can bring an action against the latter if they wish and the internet body cannot be sued. A similar level of protection would apply to offline intermediaries (where it is much more likely that the identity and contact details of the primary publisher will be known). At present, internet intermediaries typically respond to such complaints by immediately removing the material complained of, as they do not know whether it is defamatory or not.
- 2.12 We expect the proposal to reduce the extent to which intermediaries simply remove any potentially defamatory material that is complained of. As a result, we expect some authors will choose to defend material complained of rather than agree to it being removed. In some of these cases

2.13 The proposal relating to responsibility for publication is also expected to reduce legal costs for intermediaries when cases arise. The effect on administrative costs for intermediaries is unclear – it depends on whether for the average intermediary the requirement to respond within a fixed period is more or less costly than current arrangements for responding to complaints. It is also possible that the proposals might affect the amount of moderation activity internet intermediaries undertake. The direction of any impact is unclear - it could be to increase or to decrease moderation activity (in our qualitative assessment below we assume no effect).

### ***Establishing a baseline***

2.14 To monetise the impacts of each of the proposals considered we would ideally have information on the baseline (i.e. the situation if the proposals were not implemented). To construct a comprehensive baseline for each individual proposal, and / or for the package as a whole, we would need to know the following:

- The amount of material that is defensible but not published (or necessarily even produced) due to uncertainty about the law. How profitable this material would be to publishers if it were published, and what reputational cost it would cause to claimants (i.e. the value of this material to the relevant affected groups).
- The amount of defensible material that internet intermediaries take down following receipt of a complaint in order to minimise their risk of legal challenge. The length of time material typically remains online before being removed when a complaint is made, and what reputational cost it causes to claimants, or would cause if it were left online.
- The amount of material that is not defensible but is published. How profitable this material is to defendants and what reputational cost it causes to claimants.
- Details of defamation challenges brought against defensible material. This would need to include the number of challenges that settle before a claim is issued in court, the number of cases resolved before trial, and the number of trials. The information would ideally also need to cover the defence(s) used in each case, and the outcomes of cases including the quantum of damages paid and whether corrections or apologies are published. (If a case against material with a valid defence reaches trial it will be decided in the defendant's favour – but cases that settle before this point need not be.)
- Details of defamation challenges brought against non-defensible material (including the same information as for challenges against defensible material).
- The legal expenditure by defendants and claimants relating to defamation, including spending on advice for making decisions relating to whether or not to publish or challenge material, as well as legal advice and representation for an actual challenge and any court fees.
- The cost in staff time and any legal costs incurred by internet intermediaries in responding to complaints about potentially defamatory material.
- The cost of legal service provider, court and judicial resources taken up by defamation disputes.
- The number of cases and cost involved regarding when a claimant wins a defamation case and wishes for a summary of the courts judgement to be published. Ideally this information would include whether agreements were reached between defendants and claimants, and how long this took (and at what legal cost to both sides).

2.15 We have comprehensive (or reliably representative) data available for very few of these factors. Our ability to establish a baseline is also constrained by the forthcoming Jackson reforms<sup>9</sup> to civil litigation costs, and quantitative predictions of the impacts of the Jackson reforms are not available. Even if we had complete current information on the factors listed above, it would therefore be unlikely to correspond to the correct baseline i.e. the future situation if the proposals in this Impact Assessment were not implemented and in which the Jackson reforms apply.

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<sup>9</sup> <http://www.justice.gov.uk/consultations/jackson-review>

- 2.16 In relation to the volume of publications and disputes, one area of available information is the number of defamation claims issued in the Royal Courts of Justice (RCJ) each year. Claims can also be issued in the District Registries of the High Court, but it is thought that the majority of claims are issued at the RCJ.
- 2.17 There is no official collection of figures relating to the number of defamation cases that reach full trial or on the number of pre-trial hearings in defamation cases. This data is available for all claims issued in the Queen's Bench Division of the RCJ. Defamation claims only make up a relatively small proportion of these claims, but it nevertheless provides indicative evidence of the court and judicial resources taken up by defamation proceedings at present. We have also collected a sample of 145 case files from claims issued in 2009 and 2010 (including 7 ongoing cases, one of which has been listed for full trial). For this sample we have information on the number of pre-trial hearings that occurred, as well as whether the case proceeded to trial.
- 2.18 Data are not collated centrally on the outcomes of defamation claims issued in court. In many cases the costs and damages paid in cases are kept private. Reports of some cases are available, but these do not cover all cases, and do not all provide information on any financial settlement. We therefore cannot be sure they provide representative information. Information relating to whether a summary of the courts judgement was published is typically not recorded.
- 2.19 We have no reliable data on the number or outcome of cases that do not reach court, including any damages and costs paid. Nor have we been able to find information on material that has been produced, but is subsequently not published because of concerns about defamation proceedings. We also have no information about the quantity or likely value of material that is never produced because of concerns about potential defamation proceedings (e.g. investigative journalism that is not undertaken). Neither have we been able to find out the number of defamation claims that are not brought because, even though someone's reputation has been damaged by material that is not defensible, the potential claimant is not certain enough about the law to bring a case. We have no way of identifying these individuals.
- 2.20 Lastly, we have also not been able to obtain information on the amount spent by media organisations and others on legal advice to help them make decisions about whether to publish, challenge or defend a challenge.
- 2.21 In summary, we have been unable to quantify a baseline against which to sensibly quantify the impact of the proposals. This results from the fact that there are no central databases which collate the necessary information, much of which is likely to be sensitive to the claimants and defendants concerned. Much of the necessary information also relates to activity that does not currently happen, which cannot sensibly be estimated.
- 2.22 In light of these data issues, we attempted to obtain further information relating to the financial and resource costs to those involved of defamation actions and information to give us a clearer idea of exactly how many defamation actions are commenced and how many times action is threatened but not commenced (particularly in relation to the internet). However, despite formally requesting this information as part of our public consultation exercise, and then subsequently requesting the information informally in discussions with interested parties, the relevant information was unfortunately not forthcoming.
- 2.23 A number of those from whom we requested information explained that they were reluctant to provide information due to commercial sensitivities and/or commercial confidentiality. In light of this we did not feel that commissioning a survey would assist in providing the required information, as the commercial sensitivities that prevented parties from releasing the information to us in response to consultation would still apply.

### ***Monetising the impacts of the proposals***

- 2.24 In order to monetise the aggregate impacts, in addition to establishing a baseline we would need to understand and quantify how all the factors in the baseline would change in future in the light of the package of reforms. This will depend heavily on behavioural responses of the affected groups.
- 2.25 To monetise the impacts of clauses 2 – 4 (i.e. proposals to codify and simplify the law), we would need to know:

- how much (and what) additional defensible material publishers would choose to publish following the proposed changes;
  - how much (and what) non-defensible material publishers would not publish following the proposed changes;
  - how many challenges against defensible material claimants would bring following the changes; and
  - how many challenges against non-defensible material claimants would bring following the changes.
- 2.26 To know this we would need information on how responsive defendants' and claimants' decisions are to uncertainty and how much the specific proposals would reduce uncertainty. However, the actual effect of the proposals is likely to be more complex than this for two reasons.
- 2.27 First, the responses of the parties' are likely to interact. Their decisions will depend on how they expect the other party to behave, as well as their own attitudes to uncertainty. For example, if defendants believe that claimants will be less likely to bring challenges against material that is likely to be defensible, defendants could be more likely to be willing to publish such material. The beliefs of the relevant parties are unknown, and such complex behavioural responses could in principle lead to a range of outcomes in terms of publication volumes, disputes, and outcomes in defamation proceedings.
- 2.28 Second, the proposals may reduce the likely cost of bringing or defending a challenge. All else equal, this may make defendants more willing to publish and to defend material, and claimants more willing to challenge material. However, we would again expect the response of each party to be influenced by the expected response of the opposing party (to the changes in uncertainty as well as costs). This too will be governed by complex behavioural responses that cannot be estimated.
- 2.29 In addition these assessments would need to be made in a world where the Jackson reforms are in place, yet the (quantitative) impact of these is unknown.
- 2.30 To monetise the impacts of clauses 1, 5 – 7 (i.e. proposals to increase protection for defendants) we would need to know:
- how much (and what) additional material publishers would choose to publish following the proposed changes, including how much of this material would be defensible under the new law;
  - how many challenges claimants would bring against material defensible under the proposed new law; and
  - how many challenges claimants would bring against material that was not defensible even under the proposed new law.
- 2.31 As with the codification proposals, as a first step toward knowing this, we would need to know how much the specific proposals would increase protection (i.e. how much material would become defensible) and the responsiveness of parties' decisions to the amount of protection afforded to defendants.
- 2.32 There are a number of possible reasons why parties might not respond to a shift in the position of the law in a straightforward way. In particular, we might expect the way they respond to 'borderline material' (material over which there is some uncertainty regarding whether it is defensible under the relevant defamation law) to change.
- 2.33 One reason for this is that material that is borderline under the new law may be more likely to cause more serious reputational harm than material that is borderline under the current law. A successful challenge may therefore result in higher damages. This might make claimants more willing to bring a challenge – and defendants less likely to publish.
- 2.34 As with the proposals to codify the law, we would expect the behavioural responses of the parties to interact: the willingness of a defendant to publish will depend on how likely they think they are to be challenged; and the willingness of a claimant to challenge is likely to be affected by whether they think defendants commonly publish things with a high chance of being non-defensible.

- 2.35 A second reason is that if the increase in certainty reduced legal costs, the behaviour of the parties is also likely to respond to this – and as above the response of defendants will further influence the response of claimants and vice versa. A range of outcomes are possible, but we are unable to predict which is more likely, given this will be the result of complex behavioural responses as outlined above.
- 2.36 In addition these assessments would need to be made in a world where the Jackson reforms are in place, yet the (quantitative) impact of these is unknown.
- 2.37 To monetise the impacts of clause 8 (i.e. the proposal to reverse the presumption of trial by jury in defamation cases) we would need to know:
- the number of hearings per claim issued in court (on average) that could be avoided if the judge could settle more issues, including in relation to meaning, at an early stage;
  - the court fees and legal costs associated with these hearings (noting that legal costs are affected by the Jackson reforms); and
  - whether claimants and defendants respond to any reduction in the cost of court proceedings by publishing more material, or bringing or defending more challenges – and if so the magnitude of these responses.
- 2.38 Data is not collected on the number of hearings per claim issued in court, and no information is available on the issues discussed at individual hearings. We are therefore not able to make precise predictions of the number of hearings that would be saved. However, looking at both official statistics on all claims issued in the Queen’s Bench Division of the RCJ and at the sample of case files we have collected, it seems that at most a typical case might have around 2 preliminary hearings, which allows us to estimate an upper bound on the number of hearings that might be avoided.
- 2.39 While we have information about court fees, very little information about legal costs in defamation cases is available, as these are typically negotiated between legal service providers and their clients. As set out above, to assess the likely size of any behavioural response, we would need to know how responsive parties’ decisions are to expected legal costs – as well as the likely impact of the proposals on the cost of a typical case.
- 2.40 In addition these assessments would need to be made in a world where the Jackson reforms are in place, yet the (quantitative) impact of these is unknown.
- 2.41 To monetise the impacts of the proposal relating to responsibility for publication (i.e. the proposal to introduce a system where the intermediary acts as a liaison point between the defamed person and the primary publisher so that the former can bring an action against the latter if they wish and the intermediary cannot be sued) we would need to know:
- how often intermediaries have contact details for the authors of potentially defamatory material that is complained of, and whether the proposal could affect how likely they are to collect this information in future;
  - what, if any, changes intermediaries would need to make in order to be able to comply with the procedure proposed for responding to complaints – and how much any changes would cost;
  - in how many cases a defendant will not agree to have material that is complained of removed, and how socially valuable this information is;
  - in how many of these cases the claimant will take further legal action, plus any associated legal costs and court fees; and
  - the extent to which intermediaries will change the amount of moderation activity they undertake as a result of the proposal.
- 2.42 We were unable to collect any numerical evidence relating to the number of complaints received by intermediaries about alleged defamatory material on their sites, or the extent to which intermediaries currently remove this material.
- 2.43 In addition these assessments would need to be made in a world where the Jackson reforms are in place, yet the (quantitative) impact of these is unknown.

- 2.44 To monetise the impact of the proposal to provide the court with the power to order a summary of its judgement to be published we would need to know the number of cases in which this would be requested in future, and the length of time taken and resources required in order to achieve an agreement between claimants and defendants in future. As set out above, there is no central database where this information is currently recorded, meaning we have no baseline against which to assess any changes quantitatively. For this reason, the impacts for this proposal are presented qualitatively.
- 2.45 In addition these assessments would need to be made in a world where the Jackson reforms are in place, yet the (quantitative) impact of these is unknown.

### ***Potential sources of information on behavioural responses***

- 2.46 We do not have information to help us to predict the behavioural responses set out above. In principle, there would be two ways that we could try to get information. First, we could consider behavioural changes arising from similar policy reforms if any had occurred elsewhere in the world (or in the past in the UK). We are not aware of any suitably similar, clean natural experiments, so did not consider this is a viable option.<sup>10</sup>
- 2.47 Second, we could ask those who are, or might be, parties with defamation disputes how they think they will respond to the changes. We did not think this would be reliable for the following reasons:
- In general, we would not expect people to be able to reliably predict their responses to what is a complex, inter-related set of proposals. Changes to the baseline due to the Jackson reforms would make this harder.
  - Expert evidence given to the Committee indicated that we should expect an initial period of litigation while the new legislation is tested and established in the court. Anyone asked at this stage to predict the steady-state impacts of the proposals would also have to implicitly (or explicitly) estimate the outcome of this litigation in order to make the relevant judgement.
  - Some of the material we are interested in does not exist at present. For example, it seems unlikely that even if we could identify relevant potential publishers they would be able to predict the volume or value of the outcome of possible future investigative journalism that would not be pursued under the current law.

### ***Summary of quantification issues***

- 2.48 Data on the number of defamation claims issued in the Royal Courts of Justice is available. We also have partial, illustrative information on some other aspects of current defamation proceedings. However, there are very significant data gaps both in relation to the baseline and, importantly, in relation to the likely behavioural responses of claimants and defendants to the proposed changes. We do not think it would be possible to gather enough information to quantify the likely impacts robustly in a proportionate manner.
- 2.49 In the absence of much of the relevant data, we have made a qualitative assessment of the likely effects of the proposals on the main affected groups. For the most part it is not possible to support these with quantitative evidence, and exercises to gather data upon which to base quantification, including the Government consultation, have not been successful in this regard. However, importantly the identified impacts are consistent with the views expressed in general terms by a range of stakeholders in response to the Government consultation, and also with the views of the Joint Committee and many of their expert witnesses.
- 2.50 As we are only able to identify the impacts of the proposals qualitatively, for the discussion of costs and benefits below we group together clauses 2-4 of the Bill, which all seek to provide clearer and simpler defences to defendants in defamation cases. Though the specific material affected by each proposal will be different, in qualitative terms the impacts on the affected groups will be essentially the same. All other proposals are assessed independently in turn. The intention is to implement all the proposals considered, and though there may be some interaction between proposals that codify or change the law relating to defences, and proposals relating to court procedures, in

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<sup>10</sup> Even if there were broadly similar examples available, the qualitative nature of the proposals means it would be hard to argue convincingly that reduction in uncertainty, or increase in protection for defendants, from our proposals would be equivalent in "size" to that caused by a change in wording or creation of a statute elsewhere.

practice the magnitude of the interactions are not expected to be significant, so the cumulative impact is not expected to be significantly different from the sum of the individual impacts identified. In any case, a cumulative assessment is provided.

## Option 0: Base case (do nothing)

### Description

- 2.51 Under the “do-nothing” scenario, the defamation laws would remain as they are at present. The current defamation laws are covered in detail in the background section above. In summary, claimants would continue to be able to bring cases without proving ‘serious harm’, and the current range of defences would be available to defendants when cases were brought forward. The existing uncertainties associated with the common law principles of defamation law would continue to apply, as would the multiple publication rule. There would remain a presumption of trial by jury for defamation cases, the current rules relating to ‘libel tourism’ would remain in effect, intermediaries would still remain at threat of libel proceedings for material published, and the court would not have the power to order a summary of its judgement to be published.
- 2.52 Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).<sup>11</sup>
- 2.53 **The base case relates to a world where the Jackson reforms are in place. These reforms affect legal costs and may have a significant impact on behaviours. The Jackson reforms are about to be implemented. The following evidence relates to the pre-Jackson world and is therefore included for illustrative purposes only. It is not a description of the do nothing scenario.**

### Information on defamation claims currently issued

- 2.54 As discussed in the Quantification Issues section above, the main concerns that these proposals seek to address relate to effects of the current defamation law that are unobservable (such as material that is never published), or very hard to observe (due to commercial confidentiality). Nevertheless, as background we present the available data on the number and nature of defamation claims issued at present.
- 2.55 Table 1 shows the number of defamation claims issued in the Royal Courts of Justice (RCJ) over the period 2007 – 2010. Note that defamation claims can also be issued in the District Registries of the High Court, but data is not collected on these. It is expected that the vast majority of defamation claims are issued in the RCJ, meaning Table 1 is expected to provide a good approximation of the defamation cases issued over the period.

Year claim issued	Value of claim			Total
	£25,000-£50,000	Over £50,000	Unspecified	
2007	43	45	145	233
2008	43	77	139	259
2009	52	62	184	298
2010	27	47	84	158

**Table 1:** Defamation claims issued in the Royal Courts of Justice. Source: Judicial and Court Statistics (2007, 2008, 2009, 2010), Ministry of Justice

- 2.56 Detailed statistics on the court processes followed by defamation claims are not collected. However, data is available covering all claims in the Queen’s Bench Division of the High Court at the Royal Courts of Justice. In order to reach indicative estimates of some of the potential impacts of the proposals on the justice system we assume that the profile of defamation cases will be

<sup>11</sup> The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

similar to that of all claims. The evidence collected from our analysis of a sample of case files would seem to support these assumptions, particularly on the number of trials concluded. Note, though, that defamation claims make up a small proportion of all claims,<sup>12</sup> and therefore these estimates should be treated as approximate.

	Volume in 2010				
	Claims issued	Judgement by default <sup>13</sup>	Summary judgement <sup>14</sup>	Trials concluded	Interlocutory applications for Masters
All claims in RCJ	4,864	1,190	269	182	8,113
Defamation claims <b><u>if similar to all claims</u></b>	158	39	9	6	264

**Table 2:** Claims issued in the Queen’s Bench Division of the High Court at the Royal Courts of Justice. Source: Judicial and Court Statistics (2010), Ministry of Justice

2.57 Note that the number of judgements by default, summary judgements and trials does not add up to the number of claims issued. This is because the parties may reach an agreement out of court after the claim is issued.

2.58 We have also collected information from a sample of 145 case files issued during 2009 and 2010. As not all case files are completed consistently, these data should be treated as approximate only.

Status	Number of files	Number of pre-trial hearings					
		1	2	3	4	5	6
Ended before trial	133	123	8	2	-	-	-
Full trial	5	-	2	1	2	-	-
Listed for trial (ongoing)	1	-	-	-	-	-	1
Ongoing (number of hearings so far)	6	1	3	1	1		

**Table 3:** information from a sample of 145 case files issued in the RCJ in 2009 and 2010.

2.59 Information has also been collected on the identities of the parties in all the defamation cases identified as having been issued at the RCJ over the period 01/10/09 – 07/11/11. In total 331 issued cases are identified.<sup>15</sup> This information provides some evidence on the types of participants in cases. However, it is not possible to categorise the participants in all cases robustly. Most obviously, in some cases (6 out of the 331 cases), one or both of the parties is anonymous.

2.60 The proportion of claims issued that involved businesses is potentially of interest in understanding the impact of the proposals on business. We have counted as businesses those parties that are clearly businesses (for example because they have “Ltd”, “Plc”, “LLP” or similar in their name). However, it is possible that this is an understatement of the true number of businesses involved as a significant proportion of the remaining cases involve individuals who might be considered “celebrities”. It is likely that some of these are self-employed and further that in some cases the defamation in question might have affected their earning potential (i.e. the financial value of their reputation) as well as causing emotional distress to them as individuals. However, we do not have sufficiently detailed information on the facts of claims to identify such cases at all reliably. We therefore do not count any named individuals as businesses in Table 4 below.<sup>16</sup>

<sup>12</sup> Defamation claims made up 3% of all claims issued in the Queen’s Bench Division of the High Court at the RCJ in 2010. The 4 largest groups of claims were: 25% for debt, 21% for personal injury, 15% for clinical negligence and 14% for breach of contract.

<sup>13</sup> A judgement is made by default in cases where a defendant fails to respond to a claim.

<sup>14</sup> The court will give a summary judgement if the court decides that the defendant has no real defence

<sup>15</sup> This is intended to be a complete list of cases issued at the RCJ. However, it is possible that some cases may have been missed, and as noted above cases can also be issued at District Registries of the High Court.

<sup>16</sup> Where several parties are named as claimants (or defendants), if the parties include one or more businesses **and** a number of named individuals, it is counted as a case involving business.

2.61 The proportion of cases involving the media is also potentially of interest. However, there are two caveats. First, the fact that a defendant in a case is a media organisation does not guarantee that the case relates to a “typical” publication. It may instead relate to, for instance, a dispute between the organisation and an employee or supplier.<sup>17</sup> As the full facts of many cases are not publicly available, we do not attempt to sub-divide cases involving the media on the basis of the identity of the claimant or nature of the potentially defamatory material. Second, we only count cases involving media organisations. There may also be cases involving individual journalists or broadcasters in their professional capacity, but again without detailed information on the facts of each case, we cannot confidently identify these.

	Cases involving at least one claimant of this type	Cases involving at least one defendant of this type
Businesses (excluding media organisations)	43	49
Media organisations (newspapers, magazines, broadcasters, publishing houses)	1	118

**Table 4:** *identity of claimants and defendants in the 331 cases identified over the period 01/10/09 – 07/11/11*

2.62 Subject to the caveats above, these data suggest that non-media businesses are involved in issuing and defending defamation cases in broadly similar numbers.

2.63 They also indicate that a large proportion of those disputes that reach the stage of a claim being issued in court involve claims against the media. Many, but not all, media defendants are businesses.

#### **Court Fees associated with defamation claims**

2.64 The primary remedy in defamation claims is damages. The fee to start proceedings for financial damages depends on the size of the claim. For claims of £5,000 - £15,000 it is currently £225, and the maximum fee, which applies to claims exceeding £300,000, is £1,670.

2.65 The claimant also has to pay a fee when submitting an allocation questionnaire<sup>18</sup> and a pre-trial checklist.<sup>19</sup> These are currently £220 and £110 respectively. Finally, there is a fee per hearing. For defamation cases this is £1,090.

#### **Information on costs and damages resulting from defamation challenges (not just claims issued in court)**

2.66 In general, information on costs and settlements awarded are typically not made public. However, the Media Lawyers Association (MLA) provided some anonymised data to the Jackson Review of Civil Litigation Costs. This covered publication claims against MLA’s members which were disposed of in 2008. It includes 137 libel claims as well as two cases involving both libel and privacy (and 15 privacy cases). In 11 of the 139 cases involving libel, only estimated costs are available. We omit these because the costs decided at the assessment hearing can be substantially lower than the amount requested by the claimant.

2.67 The data does not provide information on claims against non-media organisations. It also provides no information on the issues under dispute, the complexity of the case, or (for all but one of the cases, which went to trial) the point at which it settled. However, subject to these caveats it provides some additional context to the proposals in this Impact Assessment.

2.68 Table 5 below provides some summary information on the costs and damages recorded for the cases in the dataset. In over half of the cases no defendant costs are recorded at all. The Jackson Review notes that these are likely to be cases handled by media defendants’ in-house lawyers and

<sup>17</sup> For instance, one case (reported in the press) involving the BBC related to comments made by BBC employees about the quality of another employee’s work, rather than broadcast comments about a third party.

<sup>18</sup> The allocation questionnaire covers matters such as the amount the claim is for, any witnesses or experts to be called, an estimate of costs and trial length.

<sup>19</sup> The pre-trial checklist largely updates information in the allocation questionnaire, such as further details on witnesses, experts, estimated costs and trial length, as well as details of legal representation.

settled quickly. This might be because they were claims where the defendant saw immediately that it made an error and admitted liability. In some cases either no damages are specified or damages are explicitly rolled in with costs in a single payment.<sup>20</sup>

	Number of cases	Variable	Min (to nearest £100) - Max (to nearest £100)	Average (to nearest £100)
<b>All cases</b>	126 (124)	Total paid to claimant ( <i>excl cases with claimant costs &gt;£1m</i> )	£200 - £17,105,000 (£200 - £305,000)	£213,100 (£23,800)
<b>Cases with £0 defendant costs and costs and damages specified separately</b>	35	Claimant costs	£0 - £25,000	£5,200
		Damages	£300 - £32,000	£8,500
<b>Cases with defendant costs and costs and damages specified separately</b>	39 (37)	Claimant costs ( <i>excl cases with claimant costs &gt;£1m</i> )	£0 - £17,000,000 (£0 - £215,000)	£641,200 (£35,300)
		Damages ( <i>excl cases with claimant costs &gt;£1m</i> )	£1,500 - £105,000 (£1,500 - £105,000)	£24,000 (£20,200)
		Defendant costs ( <i>excl cases with claimant costs &gt;£1m</i> )	£200 - £1,439,000 (£200 - £79,500)	£68,200 (£14,400)

**Table 5:** information on costs and damages in cases involving Media Lawyers Association (MLA) members disposed of in 2008. This information was provided by the MLA to the Jackson review was published as appendix 17 of the Civil Litigation Costs Review preliminary report, available at <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>

## Option 1: Require claimants to prove that they have suffered serious harm to their reputation in order to bring a defamation action

### Description

- 2.69 Under this proposal, claimants would need to prove that a statement has caused or is likely to cause ‘serious harm’ to the reputation of the claimant. This would apply to situations where publication is likely to cause serious harm where the harm has not yet occurred at the time the action is commenced.
- 2.70 Currently, a claimant would have to satisfy the common law tests set out in *Thornton v Telegraph Media Group Ltd*<sup>21</sup> that the statement complained of met the required “threshold of seriousness” in what is defamatory; and in the case of *Jameel v Dow Jones & Co*<sup>22</sup> where it was established that there needs to be a real and substantial wrong. As such, the proposal is intended to increase the threshold that needs to be met in order to bring forward a defamation case, and thereby raise the protection afforded to potential defendants.
- 2.71 In addition, in future both claimants and defendants would benefit from being able to refer to the statutory provision in the Bill requiring the claimant to demonstrate “serious harm” caused to their reputation by the alleged defamatory comment. The proposal is therefore also intended to provide greater certainty compared to the current law.
- 2.72 The decision to include a clause providing for a “serious harm” test was taken following the public consultation responses and the pre-legislative scrutiny report on the draft Bill, which included within it a “substantial” harm test. Consultees and the committee report both indicated that they believed the threshold should be higher than “substantial harm” and the committee proposed that a “serious

<sup>20</sup> The data also distinguishes between claims where the claimant had a Conditional Fee Agreement and those where it didn’t. We would expect CFAs typically to increase cost awards due to the success fee. However, in fact in this sample the differences are relatively small. We therefore don’t provide information separately, as the purpose of the table is only to give a sense of the amounts involved in defamation cases.

<sup>21</sup> [2010] EWHC 1414 (QB)

<sup>22</sup> [2005] EWCA Civ 75

and substantial harm” threshold would raise the bar in relation to the evidence that a claimant must provide. The Government believes that there could be confusion caused by the use of the two terms, but that a “serious harm” threshold would indeed meet the objective of raising the threshold.

## Costs

2.73 There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. This may involve a period of litigation as the new law is established in practice, and as such these costs may be significant. There may also be adjustment costs for all affected parties associated with interpreting the new law.

### *Claimants*

2.74 Given the evidence requirements that must be met in order to bring forward a claim are being raised, claimants are likely to find it more difficult to bring defamation cases in future. As a result, it is expected that fewer disputes and court cases would be brought in future in relation to material that is currently published. This would generate financial or reputational costs for the relevant claimants in those cases.

2.75 The proposal is also expected to increase the volume of material that is published overall, as some material may be currently withheld due to the risks of litigation (which will fall as a result of the proposal). Publishing additional material would generate financial or reputational costs for claimants (or potential claimants) affected by the additional material.

2.76 Further, an additional preliminary hearing may be required to establish whether sufficient harm has been caused in all cases. This may require additional time and cost, to the extent that this represents additional work that would not otherwise have taken place under the current system. This may result in additional legal and court costs, which the losing party would be liable for. This could therefore represent a financial and time cost for claimants when pursuing defamation cases.

### *Defendants*

2.77 As set out above, under the proposal additional preliminary hearings may be required to establish whether sufficient harm has been caused. This may generate additional time and cost, to the extent that this represents additional work that would not otherwise have taken place. This may result in additional legal and court costs, which defendants may be liable for when cases against them are pursued to court. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### *HM Courts and Tribunals Service (HMCTS) and the judiciary*

2.78 Overall we would expect greater legal certainty to result in a lower volume of disputes and court cases, which would lower the demand for court resources and lower HMCTS court fee income collected in defamation cases.

2.79 As set out above, there may be an increase in court workload per case where an additional preliminary hearing is held to establish whether serious harm has been caused, to the extent that this represents additional work that would not otherwise take place, however, given the very small volume of cases we would expect these costs to be negligible. In addition, in the short term there may be an increase in the demand for court resources if there is a greater volume of cases to establish and interpret the new legislation. However, both these effects are not expected to change the overall position of reduced demand for court resources in future. A reduced demand for court resources would be associated with a reduction in the fee income received by HMCTS.

2.80 However, the net financial impact on HMCTS is expected to be neutral as HMCTS operates on a cost recovery basis. Overall, HMCTS civil court fees are set to recover the costs associated with civil cases, and therefore any reduction in total fee income due to reduced workload would be associated with an equivalent reduction in total costs (and vice versa). We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS as a result of this proposal (see section on risks and assumptions for further discussion).

### *Legal service providers*

- 2.81 On an ongoing basis, there may be a reduction in the demand for legal advice and representation in defamation cases in line with a wider reduction in disputes and court volumes. Demand may also fall due to increased certainty if disputes are easier to investigate and resolve, and if cases that are pursued are quicker and simpler to settle or resolve through judicial processes. This reduction in demand would represent a cost for legal service providers through reduced income.
- 2.82 This impact on legal service providers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.
- 2.83 In addition we assume that legal service providers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so legal service providers may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term..

### *After The Event (ATE) insurers*

- 2.84 If the proposal results in a net reduction in the volume of cases being pursued overall, this would represent a reduction in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.
- 2.85 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by this proposal.
- 2.86 This impact on ATE insurers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.
- 2.87 In any case, using the same logic as applied to legal service providers, we would expect the proposal to have a broadly neutral impact on ATE insurers in the long term, as they are assumed to adjust to any reductions in business levels here by engaging in other business elsewhere, incurring adjustment costs but not being significantly worse off in the longer term.

### *Wider social and economic costs*

- 2.88 The proposal is expected to lead to greater legal certainty, but this may reduce the legal flexibility provided as a result of the current law. If flexibility was reduced in future this could be associated with wider costs.
- 2.89 The proposal is expected to result in a defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Benefits**

### *Claimants*

- 2.90 As discussed in detail in the cost section, we expect the proposal to deliver increased legal certainty. Increased clarity due to the law being placed in statute may mean that all claimants or potential claimants need less legal advice to decide whether to make a claim, that fewer unsuccessful claims are pursued, and that cases that are going to be dismissed due to not involving sufficiently serious harm are dismissed earlier. All these effects will save both time and the cost of legal services, which would benefit claimants.
- 2.91 It has not been possible to quantify these benefits, in part as the cost of legal services is privately held information, and fees will be negotiated on a case by case basis between individuals and their solicitors.

## *Defendants*

- 2.92 Increasing the threshold from substantial to serious harm will mean that defendants can publish more material without putting themselves at risk of successful defamation proceedings. This will benefit defendants, whether via increased profits, or an increase in other forms of economic benefit from putting information in the public domain. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.
- 2.93 As discussed in detail in the costs section, we expect increased clarity and certainty may mean that defendants need less legal advice to decide whether to publish a statement and whether to defend a claim if one is made. It may also mean that fewer claims are brought, and that cases that are going to be dismissed due to not involving sufficiently serious harm are dismissed earlier. All these effects will save both time and the cost of legal services, which would benefit defendants.
- 2.94 Increased certainty may also mean that defendants settle fewer trivial or unfounded claims and instead defend them successfully, making a financial saving.

## *HMCTS and the judiciary*

- 2.95 As set out in detail in the costs section, the net impact of the proposal is expected to be a reduction in the demand for court resources. This represents a benefit for HMCTS, as the cost of service provision should fall in future in line with the reduced workload.
- 2.96 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

## *Wider social and economic benefits*

- 2.97 More statements that previously were, or might have been thought to be, defamatory are likely to be published as a result of the proposal. If these statements contain useful information, or are part of a useful debate, this would generate a benefit for society. In principle, this benefit could be associated with increased economic efficiency from the perspective of society, depending on the nature and content of the published material.
- 2.98 Further, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed through publication, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.
- 2.99 Another possibility is that if society thinks that free speech is more important than protecting reputation from trivial damage, then the proposal would provide a further societal benefit given the resulting legal position would better match the preferences of society.
- 2.100 As set out above, the proposal is expected to result in a redistribution from claimants to defendants. No assumption has been made about whether society would view this redistribution as positive or negative.
- 2.101 Finally, the proposal is expected to generate efficiency benefits by increasing legal certainty. Benefits in this case would stem from the fact that information was easier to access, and that in effect it was easier to achieve the same outcomes compared to the current law. Efficiency benefits would then arise as resources would be freed up for productive use elsewhere in the economy.

## **Option 2: Reforms to defences**

- 2.102 Clauses 2-4 of the Bill relate to reforming the defences that are available in defamation cases. These are described separately below, but have been assessed together as their impacts are expected to be similar: ensuring defamation law is subject to less uncertainty in future. It is not anticipated that the reforms to defences will change the level of protection afforded to defendants by the law, but will clarify and simplify the law and make it more easily and widely applicable.

## **Option 2a: Responsible publication on matter of public interest (Clause 2)**

### **Description**

- 2.103 This proposal will create a new statutory defence of ‘responsible publication on a matter of public interest’. Currently, there is a relevant common law defence established in *Reynolds v Times Newspapers*, which broadly sets out that there is a defence where it is possible, by reference to a number of factors, for the defendant to show that there is a clear public interest in material being published, even if it turns out not to be entirely correct.
- 2.104 In future, the statutory defence will enable the defence to be available in circumstances where the defendant can show that their statement is, or forms part of, a statement on a matter of public interest and that he or she acted responsibly in publishing the statement. The Government Bill sets out a non-exhaustive list of factors to which the court may have regard in determining whether a defendant acted responsibly in publishing a statement. These will be broadly based on the factors established by the House of Lords in *Reynolds* and subsequent case law. The clause is framed so as to be more clearly applicable to forms of publication beyond just mainstream journalism.
- 2.105 The Committee considered a suggestion made by some during the oral evidence to protect any statement made in the public interest provided that the author had not acted recklessly or maliciously. However, they rejected this suggestion and supported of the approach taken by the Government in the draft Bill, subject to certain drafting amendments on points of detail.
- 2.106 In light of this, the proposal is to include provisions in the substantive Defamation Bill broadly along the lines of those included in the draft Bill. We will also accept the Committee’s recommendation to repeal the existing common law and will include provisions aimed at achieving this. This is expected to achieve greater certainty.

## **Option 2b: Defence of Truth (Clause 3)**

### **Description**

- 2.107 Under this proposal the common law defence of justification will be replaced with a new statutory defence of truth. Currently, ‘justification’ can be employed as a defence in cases where the defendant is arguing that the material complained of is substantially true.
- 2.108 Under the proposed ‘truth’ defence, the defendant will need to show that the imputation conveyed by the statement complained of is substantially true. This essentially reflects the current position as it exists in the common law.
- 2.109 In the draft Bill we sought to introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of “justification”. The defence would be renamed “truth”. The Committee recommended that the name of the “truth” defence be changed to “substantial truth”.
- 2.110 The Government proposes to include provisions aimed at renaming the common law defence of justification as a defence of truth, and codifying and clarifying the existing common law. This is expected to achieve greater certainty.

## **Option 2c: Defence of Honest Opinion (Clause 4)**

### **Description**

- 2.111 Under this proposal, the common law defence of fair comment will be replaced with a new statutory defence of honest opinion. Under the current ‘fair comment’ defence, a defendant will need to show that:
- the statement complained of is on a matter of public interest;
  - the statement must be recognisable as one of comment and not an imputation of fact (but an inference of fact from other facts referred to may amount to comment);
  - the statement has a sufficient factual basis (that is, the opinion must be based on facts which are themselves sufficiently true or which are protected by privilege);

- the statement indicates, at least in general terms, the facts on which it is based; or
- the statement must be one which an honest person could have made on the proved facts (however prejudiced they might be and however exaggerated or obstinate their views).

2.112 Under the proposed 'honest opinion' defence the defendant will need to show that:

- the statement complained of is a statement of opinion;
- an honest person could have held the opinion on the basis of a fact or a privileged statement that existed at the time of publication.

2.113 Under both the current law and the Government's proposals the defence will fail if the claimant can show that the opinion was made with malice.

2.114 In the draft Bill we sought to introduce a statutory defence which sets out in clear terms the key elements of the current common law defence of "fair comment" (very recently renamed "honest comment" by the Supreme Court). The defence would be renamed "honest opinion". The Committee supported the Government's proposal, subject to a number of amendments on points of detail.

2.115 The Government will include provisions aimed at renaming the common law defence of fair comment as a defence of honest opinion, and codifying and clarifying the existing common law. This is expected to achieve greater certainty.

### **Costs (all parts of Option 2)**

2.116 There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. This may involve a period of satellite litigation as the new law is established in practice, and as such these costs may be significant. There may also be adjustment costs for all affected parties associated with interpreting the new law.

### ***Claimants***

2.117 There is expected to be no impact on the net volume of material published, as any increase in the volume of defensible material may be offset by a reduction in the volume of non-defensible material. Therefore, while some claimants will now face reputational damage associated with the newly published material, other claimants will benefit from less reputational damage associated with material that is no longer published. The net result of these distributional impacts on claimants is expected to be neutral.

### ***Defendants***

2.118 As set out above, the proposal is not expected to have an impact on the volume of material published, but it is expected that more defensible material and less non-defensible will be published in future. Therefore, while some defendants will now face a cost, financial or otherwise, given some material will no longer be published, other defendants will benefit, financially or otherwise, from being able to publish other material in future. The net result of these distributional impacts on defendants is expected to be neutral. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### ***HMCTS and the judiciary***

2.119 We would expect there to be a lower volume of disputes and court cases, which would lower the demand for court resources and lower HMCTS court fee income collected in defamation cases. There may be an increased workload for a transitional period of cases which establish and interpret the new legislation, which may offset this in the short term.

2.120 The net financial impact on HMCTS is expected to be neutral as HMCTS operates on a cost recovery basis. Overall, HMCTS civil court fees are set to recover the costs associated with civil cases, and therefore any reduction in total fee income due to reduced workload would be associated with an equivalent reduction in total costs (and vice versa). We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS as a result of this proposal (see section on risks and assumptions for further discussion).

### *Legal service providers*

- 2.121 Overall, we expect that clarifying the law will result in a reduction in demand for legal advice and representation in relation to defamation, consistent with a wider reduction in disputes and court volumes. Demand may also fall due to increased certainty if disputes are easier to investigate and resolve, and if cases that are pursued are quicker and simpler to settle or resolve through judicial processes. This reduction in demand would represent a cost for legal service providers through reduced income.
- 2.122 This impact on legal service providers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.
- 2.123 In addition we assume that legal service providers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so legal service providers may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term..

### *After The Event (ATE) insurers*

- 2.124 If the proposal results in a net reduction in the volume of cases being pursued overall, this would represent a reduction in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.
- 2.125 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by these proposals.
- 2.126 This impact on ATE insurers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.
- 2.127 In any case, using the same logic as applied to legal service providers, we would expect the proposal to have a broadly neutral impact on ATE insurers in the long term, as they are assumed to adjust to any reductions in business levels here by engaging in other business elsewhere, incurring adjustment costs but not being significantly worse off in the longer term.

### *Wider social and economic costs*

- 2.128 The proposal is expected to lead to greater legal certainty, but this may reduce the legal flexibility provided as a result of the current law. If flexibility is reduced in future this may be associated with wider costs.
- 2.129 The proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Benefits (all parts of Option 2)**

### *Claimants*

- 2.130 Increased clarity is likely to mean that claimants need less legal advice to decide whether to make a claim. It may also mean that disputes can be resolved more swiftly when they do arise. Both these effects will save claimants time and the cost of legal services. It has not been possible to quantify these benefits, in part as the cost of legal services is privately held information, and fees will be negotiated on a case by case basis between individuals and their solicitors.
- 2.131 As set out in the costs section, some claimants will benefit as less non-defensible material will be published in future as a consequence of increased clarity. However, the net impact on claimants as a whole from changes to material published is expected to be neutral, based on the assumptions adopted.

## *Defendants*

- 2.132 Increased clarity is likely to mean that defendants too need less legal advice to make decisions about whether to publish particular material, and about whether to defend and subsequent challenge. It may also mean that disputes can be resolved more swiftly. Both these effects will save defendants time and the cost of legal services. It has not been possible to quantify these benefits, in part as the cost of legal services is privately held information, and fees will be negotiated on a case by case basis between individuals and their solicitors.
- 2.133 As set out in the costs section, some defendants will benefit, financially or otherwise, as some additional defensible material will be published in future as a consequence of increased clarity. However, the net impact on defendants as a whole from changes to material published is expected to be neutral, based on the assumptions adopted. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

## *HMCTS and the judiciary*

- 2.134 It is likely that overall fewer defamation claims will be issued, and that those that are issued will be resolved more swiftly due to the law being clearer and less uncertain. This would reduce the demand for court and judicial resources. The net reduction in the demand for court resources represents a benefit for HMCTS, as the cost of service provision should fall in future in line with the reduced workload.
- 2.135 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

## *Wider social and economic benefits*

- 2.136 We expect that more material that is defensible (because it was in the public interest for it to be published, or because it is true, or because it is an expression of an honest opinion) will be published as a result of the proposal, while material that causes damage to reputation and is not defensible will be less likely to be published. This is expected to be socially beneficial.
- 2.137 In principle, this benefit could be associated with increased economic efficiency or increased equity (fairness) from the perspective of society, depending on the nature and content of the relevant material.
- 2.138 Further, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed through publication, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.
- 2.139 Finally, these proposals are expected to generate efficiency benefits by increasing legal certainty. Benefits in this case would stem from the fact that information was easier to access, and that in effect it was easier to achieve the same outcomes compared to the current law. Efficiency benefits would then arise..

## **Option 3: Privilege (Clause 5)**

### **Description**

- 2.140 This proposal is to amend the provisions contained in the Defamation Act 1996 relating to the defences of absolute and qualified privilege to extend the circumstances in which these defences can be used.
- 2.141 Currently, the law provides for absolute privilege to apply to fair and accurate reports of proceedings in public before any court in the UK, the European Court of Justice or any court attached to that court, the European Court of Human Rights, and any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the UK is a party. The privilege applies where the report is published contemporaneously with the proceedings, or, where the report has to be postponed because of an order of the court or any statutory provision, if it is published as soon as practicable after publication is permitted.

- 2.142 Under the proposal, the defence of absolute privilege will be extended to the reporting of court proceedings in any court established under the law of a country or territory outside the United Kingdom, and any international court or tribunal established by the Security Council of the United Nations or by an international agreement.
- 2.143 Currently, section 15 of and Schedule 1 to the Defamation Act 1996 provides for qualified privilege to apply to various types of report or statement, provided the report or statement is fair and accurate, on a matter of public concern, and that publication is for the public benefit and made without malice. Part 1 of Schedule 1 sets out categories of publication which attract qualified privilege without explanation or contradiction. These include fair and accurate reports of proceedings in public, anywhere in the world, of legislatures (both national and local), courts, public inquiries, and international organisations or conferences, and documents, notices and other matter published by these bodies.
- 2.144 Part 2 of Schedule 1 sets out categories of publication which have the protection of qualified privilege unless the publisher refuses or neglects to publish, in a suitable manner, a reasonable letter or statement by way of explanation or correction when requested to do so. These include copies of or extracts from information for the public published by government or authorities performing governmental functions (such as the police) or by courts; reports of proceedings at a range of public meetings (e.g. local authority meetings) and general meetings of UK public companies; and reports of findings or decisions by a range of associations formed in the UK or the European Union (such as associations relating to art, science, religion or learning, trade associations, sports associations and charitable associations).
- 2.145 In the draft Bill we sought to update and extend the circumstances in which the defences of qualified privilege and absolute privilege are available in order to improve the protection given to NGOs and others. The Committee supported the Governments extensions, but sought to extend qualified privilege further to include peer reviewed scientific and academic journals.
- 2.146 The Government intends to include provisions to extend privilege in the way proposed in the draft Bill, in order to protect the reporting of academic and scientific discourse. It also intends to extend qualified privilege to peer-reviewed articles in scientific and academic journals. This is expected to strengthen the protection offered to a specific group of defendants, but is not expected to have any impact on the clarity of defamation law.
- 2.147 It is not possible to quantify the likely impacts on the affected groups. The obstacles to quantification are set out in the section on Quantification Issues. In relation to this clause specifically, the volume of scientific and academic discourse each year is clearly very large. As noted by the Committee there are a very large number (tens of thousands) of academic journals in existence. There are also thousands of conferences each year.<sup>23</sup>
- 2.148 Similarly, there are a large number of courts and tribunals potentially affected by the proposed extension. However, we do not know how much relevant material is currently not discussed at academic conferences or published in peer reviewed journals due to the threat of defamation proceedings. Similarly, we do not know to what extent the absence of privilege in England and Wales inhibits reporting of proceedings in international courts.

## Costs

- 2.149 There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. This may involve a period of satellite litigation as the new law is established in practice, and as such these costs may be significant. There may also be adjustment costs for all affected parties associated with interpreting the new law.

## Claimants

- 2.150 A specific group of claimants (or potential claimants) are expected to incur reputational costs because in future more material will be privileged. This may affect some material that is already

<sup>23</sup> For example, looking only at conferences for some sciences listed by major UK-based societies, as at January 2012 the Institute of Physics website listed 120 potentially relevant events for 2012 (conferences, symposia etc), the Royal Society of Chemistry over 450, the Royal Society of Medicine over 150 and the Institute of Electrical and Electronics Engineers over 600. These will not include many smaller scale university events, or many of the events that occur overseas – as well, of course, as events relating to other areas of science, to the social sciences, arts and humanities.

published, and is also likely to result in more material being published. Where the newly privileged material is already published, claimants will have less chance of making successful claims for compensation. Material that is published as a result of the change will cause reputational damage to claimants.

2.151 The net impact of the proposal on the number of challenges brought, and the number of these that are successful, is unclear. The need for reports to be “fair and accurate” to be privileged may mean that some newly published material results in disputes. On the other hand, material that is published at the moment may be less likely to be challenged once it is privileged. For the purposes of this analysis, we have assumed that the net impact would be that more material would be published, but that there would be no significant impact on the volume of disputes, including those reaching court. The reform shifts the boundary, so more material is likely to be published, but the boundary still exists in roughly the same form (it is assumed the proposal would have no impact on the clarity of defamation law) hence the volume of disputes is expected to remain the same. Therefore, we do not expect any additional costs to claimants in relation to legal costs.

### *Defendants*

2.152 The net impact of the proposal on the number of challenges brought and the number of successful challenges is uncertain, but in aggregate we have assumed no significant impact. Therefore, we do not expect any additional costs to defendants in relation to legal costs or to damages. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### *HMCTS and the judiciary*

2.153 As set out above, we have assumed no significant impact on the demand for court and judicial resources as a result of the proposal. Any change to demand would be reflected in changes to the cost of service provision, and to changes in the court fees collected.

2.154 In any case, overall HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### *Legal service providers*

2.155 The net impact of the proposal on the demand for legal advice and representation is unclear. However, in line with the assumption that there will be no significant impact on the volume of defamation disputes or court cases, we assume there is no significant impact on the demand for legal services.

### *After The Event (ATE) insurers*

2.156 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by this proposal.

2.157 Consistent with the logic applied to legal service providers, we do not expect the proposal to have a significant impact on the demand for insurance, given we do not anticipate a significant impact on the volume of disputes.

### *Wider social and economic costs*

2.158 The proposal is expected to result in a defendant gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## Benefits

### *Claimants*

2.159 As explained in detail in the costs section, the net impact of the proposal on the number of disputes and legal challenges brought is unclear, and for the purposes of the analysis we assume no significant impact on the volume of disputes and legal challenges. Therefore, there are no expected net benefits for claimants in aggregate in relation to reduced legal costs.

### *Defendants*

2.160 Defendants are expected to benefit because more material will be privileged as a result of the proposal. This may affect some material that is already published, and is also likely to result in more material being put into the public domain. Commercial publishers will benefit, financially or otherwise, from additional material that is published as a result of the proposal.

2.161 The net impact of the proposal on the number of disputes and legal challenges brought is unclear and for the purposes of the analysis we assume no significant impact on this volume. Therefore, there are no expected net benefits for defendants in aggregate in relation to reduced legal costs. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### *HMCTS and the judiciary*

2.162 As set out above, we have assumed no significant impact on the demand for court and judicial resources as a result of the proposal. Any change to demand would be reflected in changes to the cost of service provision, and to changes in the court fees collected.

2.163 In any case, overall HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### *Wider social and economic benefits*

2.164 More statements that previously were, or might have been thought to be, defamatory are likely to be published as a result of the proposal. If these statements contain useful information, or are part of a useful debate, this would generate a benefit for society. In principle, this benefit could be associated with increased economic efficiency from the perspective of society, depending on the nature and content of the published material.

2.165 Further, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed through publication, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

2.166 Another possibility is that if society thinks that free speech is more important than protecting reputation from damage in the cases affected by these reforms, then the proposal would provide a further societal benefit given the resulting legal position would better match the preferences of society.

2.167 As set out above, the proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Option 4: Single Publication Rule (Clause 6)**

### **Description**

2.168 The proposal is to introduce a single publication rule to remove the threat of open-ended liability for defendants. When material is published a claimant will be able to bring forward an action within one year of the publication as is currently the case. However, under the proposal any subsequent publication of the same material by the same publisher will no longer be treated as a separate publication, which itself can currently be subject to a separate cause of action, which would need to be brought within one year of the new publication (the "multiple publication rule").

- 2.169 Under the proposal, any action relating to the published material will need to be brought within one year of the date of the first publication of the material. This is particularly relevant for online publications where legally, a new and separate publication is created each and every time a user accesses the material (loads the relevant webpage or document).
- 2.170 For example, in response to the 2009 consultation on the Multiple Publication Rule one media organisation indicated that it had received 12 complaints relating to material on its website that was over a year old (ranging from 2 to 8 years). It rejected four of these complaints as unmeritorious, and the claimant did not pursue them further. In a further six cases, the claimant and the organisation agreed amendments or annotations to the article. In the final two cases, the claimant did not agree to proposed amendments or annotations. The organisation felt that it was not in a position to collect evidence to defend the case in court, and so the article was removed in its entirety.
- 2.171 There already exists, under section 32A of the Limitation Act 1980, discretion for the courts to allow a defamation action to proceed outside the one year limitation period where it is equitable to do so. This is a broad discretion which requires the court to have regard to all the circumstances of the case. We anticipate that this should provide a safeguard against any injustice in relation to the application of any limitation issue which may arise and should allow adequate protection for claimants where they are seriously defamed outside of the one year limitation period without the need for any additional provision. However, the discretion is strictly applied and we would not envisage it creating a situation where defendants are still faced with the same problems of open ended liability that currently occur under the multiple publication rule.
- 2.172 Where claimants are successful in bringing actions under the current “multiple publication rule” they are also able to seek an injunction to have the offending material removed. The Government’s proposals will not affect this position and claimants will still be able to seek injunctions for the removal of material that has been found to be defamatory.
- 2.173 This proposal matches the proposal set out in the Government’s draft Bill. While the Committee proposed to extend the scope of the rule further to protect any publisher that publishes the material (rather than the same publisher, as proposed), the Government does not consider that this would be appropriate and intends to proceed with the proposal set out in the draft Bill.
- 2.174 It is not possible to quantify the likely impacts on the affected groups. The obstacles to quantification are set out in the section on Quantification Issues. In relation to this specific proposal, an additional issue is that though there are examples of defamation claims brought more than a year after publication and against material that had previously been published in a way that was not materially different, consistent and sufficiently detailed information on such cases is not available to enable us to quantify any direct impact.

## Costs

### *Claimants*

- 2.175 Claimants are likely to be worse off as a result of the proposal, given they will no longer have the ability to take legal action against defamatory material republished (by the same author) or accessed at any time after one year of the original publication. This might relate to being unable to take action to protect their reputation in cases where the material causes them reputational damage but they were unaware of the publication until after the expiration of the limitation period (after one year).
- 2.176 However, this is a specific factor in section 32A for the judge to consider when deciding whether to extend the limitation period and will allow a claim to be brought more than one year from the date of the original publication where it is clearly in the interest of justice to do so.
- 2.177 Another potential cost could arise if as a result of the proposal claimants in defamation cases are required to take out injunctions against republication of the material as part of the original defamation case. This might be the case if the threat of future defamation (which will no longer apply) is currently sufficient to prevent republication of the material.
- 2.178 The costs identified above relate to claimants in cases that are currently published. In addition, as the proposal provides greater legal certainty to web publishers, it may provide greater incentive to

2.179 In addition claimants might focus more on identifying information and taking action within one year of its publication, rather than doing so in relation to subsequent publications over a longer time frame.

### *Legal Service Providers*

2.180 The proposal may reduce the volume of defamation disputes, which would represent a reduction in the demand for legal services. In relation to existing publications, the proposal is expected to reduce the volume of disputes, given it will restrict the ability of claimants to bring forward defamation cases relating to republication. The magnitude of this reduction is unclear, and will depend on the behavioural responses of claimants and defendants to the current law and to the new law. As noted above, we have anecdotal evidence on disputes involving a single media organisation under the current law. It is not clear how representative this is. We are not able to predict responses to the proposed new law.

2.181 The proposal may, though, also result in an increase in the legal work required in defamation cases. For example, a greater number of injunctions may be required in future to prevent republication. There could also be an increase in published material by defendants because the new law provides them with greater protection. This might require a greater amount of legal work, which would offset the reductions outlined above to some extent. The overall impact on demand for legal services in defamation cases is therefore ambiguous.

2.182 There might be some minor one-off transition costs associated with familiarisation and awareness of the new law, plus possible capacity adjustment costs. These are not expected to be significant.

### *After The Event (ATE) insurers*

2.183 If the proposal results in a net reduction in the volume of cases being pursued overall, this would represent a reduction in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.

2.184 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by this proposal.

2.185 This impact on ATE insurers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.

2.186 In any case, we would expect the proposal to have a broadly neutral impact on ATE insurers in the long term, as they are assumed to adjust to any reductions in business levels here by engaging in other business elsewhere, incurring adjustment costs but not being significantly worse off in the longer term.

### *HM Courts and Tribunals Service (HMCTS)*

2.187 There may be an increased court workload during a transitional period in which cases establish and interpret the new legislation. These costs are not expected to be significant.

2.188 The net impact of the proposal on the number of defamation claims issued, or on the number of hearings required to resolve claims, is unclear. The number of claims might fall because claims will not be able to be brought more than a year after publication. However, it is possible that in some cases, the claim may be brought forward. In addition, there may be more applications for

2.189 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

#### *Wider social and economic costs*

2.190 The proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

### **Benefits**

#### *Defendants*

2.191 Defendants are likely to benefit from the single publication rule as in future they should be able to republish material with greater confidence. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists. In future, claimants may be unable to bring forward defamation cases after one year of the initial publication. This may result in defendants having to defend claims in a smaller number of cases compared to currently.

2.192 Further, it is possible that currently some material is not published at all as a result of the multiple publication rule. The proposal may therefore allow some additional material to be published in future. This would directly benefit defendants in these cases. The exact nature of these benefits would depend on the content of the articles in question.

2.193 Publishers may also currently incur costs relating to ensuring the content of their online archives is not defamatory. For example, publishers may currently re-edit articles before placing them in the archive. An additional benefit of the proposal may therefore be to reduce these costs for publishers, given the threat of multiple publication will no longer apply.

#### *HMCTS*

2.194 As set out above, the net impact of the proposal on the number of defamation claims issued, or on the number of hearings required to resolve claim, is unclear. However, any decrease in claims or hearings per claim would represent a decrease in workload for HMCTS and the judiciary.

2.195 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

#### *Wider social and economic benefits*

2.196 The current multiple publication rule may have the unintended consequence of reducing freedom of expression as web publishers consider the expected costs too great to publish certain stories that may make their way inevitably into archives. As the proposal should reduce these expected costs, on balance we expect the volume of published material to increase in future. This may generate wider benefits to society, if society places value on access to this information. In principle, these benefits could be driven by increases in economic efficiency from the perspective of society, depending on the content of the newly published or archived material.

2.197 Further, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed through publication, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

2.198 Another possibility is that if society thinks that free speech is more important than protecting reputation from damage in the cases affected by this proposal, then the proposal would provide a

2.199 As set out above, the proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Option 5: Action against a person not domiciled in the UK or a Member State (Clause 7)**

### **Description**

- 2.200 Under this proposal, in order for a defamation case to fall within the jurisdiction of the England and Wales, a court must be 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. This approach is intended to ensure that in cases where a statement has been published in this jurisdiction and also abroad, the court is required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. The intention is that only cases with a significant connection to England and Wales are heard here.
- 2.201 Currently, in cases where the defendant is not domiciled in a Member State, English courts have under the existing common law a broad inherent discretion to decline a case on the basis that another jurisdiction is available for the trial of the claim and that the other jurisdiction is considered to be a more appropriate forum. The Government's proposal would rebalance this position so that the court would in future decline jurisdiction unless it was content that the United Kingdom was the most appropriate jurisdiction for the claim to be heard, which in practice is expected to mean fewer cases are brought in the jurisdiction of England and Wales in future. This results from the fact the proposal is expected to represent stricter criteria than is currently the case.
- 2.202 This proposal seeks to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to England and Wales are brought in this jurisdiction). The proposal would seek to focus on cases where an action is brought against a person who is not domiciled in the UK, an EU Member State or a state which is a party to the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. This is in order to avoid conflict with European jurisdictional rules.
- 2.203 The Committee broadly supports the Government position but recommended that this section of the Bill should not apply to claimants domiciled in England and Wales who wish to sue in respect of publication abroad and that the clause should be confined to foreign parties using English courts to resolve disputes where the principal damage has not been suffered here.
- 2.204 Claimants domiciled in England and Wales who wish to bring an action here in respect of publication abroad should not be put at a disadvantage as a result of the Bill's provisions. However, legal advice suggests that amending the clause to exclude claimants domiciled in this jurisdiction from the provision could raise difficulties in relation to anti-discrimination principles in European law.
- 2.205 As noted by the Ministry of Justice's Libel Working Group and also in the report of the Joint Committee, only a very small number of cases are actually brought that might be considered to constitute "libel tourism". Therefore any direct impact of the proposal is expected to be negligible.
- 2.206 However, anecdotal evidence suggests that potential claimants threaten potential publishers with defamation proceedings in England and Wales in order to discourage publication. The primary aim of the proposal is to reduce any such activity in future.
- 2.207 It is not possible to quantify the likely impacts on the affected groups. The obstacles to quantification are set out in the section on Quantification Issues.
- 2.208 In line with HM Treasury Green Book investment appraisal guidance, we do not count costs and benefits to non-UK residents and firms as part of the main assessment of the proposal. However, for completeness we include the likely impact on non-residents below, and have clearly indicated where this is the case.

## Costs

### *Claimants*

- 2.209 Some claimants who are not domiciled in the UK will no longer be able to bring claims here. To the extent that they are more likely to be successful in this jurisdiction, or to receive more generous damages when successful in this jurisdiction, or prefer this jurisdiction for other reasons, this will represent a cost. It is unclear whether in future, these cases no longer being heard in the UK would switch to being heard in another jurisdiction, or would not proceed at all. Either outcome would generate costs for claimants, and we may think of the proposal as providing greater protection to defendants in a general sense. As only a very small number of individuals and organisations are expected to be affected, any cost to claimants is expected to be negligible.
- 2.210 One possible result of the proposal is that more potentially defamatory material may be published by people and organisations not domiciled in the UK in future. This would result in greater reputational damage to claimants (though they may still be able to make a claim for damages in an alternative jurisdiction).
- 2.211 In line with HM Treasury Green Book investment appraisal guidance, these would both be costs to non-UK residents and therefore do not form part of the main assessment of impacts.

### *HMCTS and the judiciary*

- 2.212 Given the nature of the proposal, it is not anticipated that there would be any transitional period which would temporarily increase the demand for court and judicial resources. A reduced caseload would be associated with reduced demand for court and judicial resources. This would reduce court fee income, and reduce the cost of service provision.
- 2.213 Due to the negligible number of cases that are likely to be affected, we do not expect the proposal to have a significant impact on HMCTS. In any case as set out in detail previously, HMCTS fees are set to cover costs, meaning the proposal is expected to have a neutral financial impact on HMCTS.

### *Legal service providers*

- 2.214 If the proposal results in a reduction in the volume of cases being pursued, this would represent a reduction in the demand for legal services. Due to the negligible number of cases that are likely to be affected, we do not expect this impact to be significant.
- 2.215 This impact on legal service providers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.
- 2.216 In addition we assume that legal service providers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so legal service providers may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term..

### *After The Event (ATE) insurers*

- 2.217 If the proposal results in a reduction in the volume of cases being pursued, this would represent a reduction in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.
- 2.218 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by this proposal.
- 2.219 Due to the negligible number of cases that are likely to be affected, we do not expect any significant impact.
- 2.220 This impact on ATE insurers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.

2.221 In any case, we would expect the proposal to have a broadly neutral impact on ATE insurers in the long term, as they are assumed to adjust to any reductions in business levels here by engaging in other business elsewhere, incurring adjustment costs but not being significantly worse off in the longer term.

## Benefits

### *Defendants*

2.222 The result of the proposal would be that defendants who are domiciled outside the UK will face less risk of having claims issued against them by claimants who are also domiciled outside the UK. For example, fewer disputes could reduce the legal costs faced by defendants. As a consequence, defendants may benefit, financially or otherwise, if they are able to publish more material as a result (though they may be subject to defamation claims in other jurisdictions). At present, only a negligible number of such claims are issued in the UK, meaning we do not expect these benefits to be significant in aggregate. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

2.223 In line with HM Treasury Green Book investment appraisal guidance, this would be a benefit to non-UK residents and therefore does not form part of the main assessment of impacts.

### *HMCTS and the judiciary*

2.224 A reduced caseload would be associated with reduced demand for court and judicial resources. This would reduce the cost of service provision, and also reduce court fee income. Due to the negligible number of cases that are likely to be affected, we do not expect any significant impact on HMCTS costs or fees. In any case as set out in detail previously, HMCTS fees are set to cover costs, meaning the proposal is expected to have a neutral financial impact on HMCTS.

### *Wider social and economic benefits*

2.225 The proposals may result in more material being published by organisations and individuals domiciled outside the UK. While the relevant claimants and defendants are domiciled outside the UK (and so fall outside the formal scope of an Impact Assessment), any information published may still be accessed by UK residents, and hence the proposal may still generate a societal benefit.

2.226 For example, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour in the UK which is now being exposed through publication, and this might be beneficial from society's perspective if the behaviour is valued negatively by society.

2.227 Another possibility is that if society thinks that free speech is more important than protecting reputation from damage in the cases affected by this proposal then the proposal would provide a further societal benefit given the resulting legal position would better match the preferences of society.

## **Option 6: Reversing the presumption of trial by jury in defamation cases (Clause 8)**

### **Description**

2.228 Under this proposal, the current presumption in favour of jury trial in defamation cases will be removed so a trial would only be heard by a jury where the judge considers it appropriate. Currently, section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984 provide for a right to trial with a jury in certain civil proceedings (namely malicious prosecution, false imprisonment, fraud, libel and slander) on the application of any party, "unless the court considers that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

2.229 The proposal is to amend the 1981 and 1984 Acts to remove libel and slander from the list of proceedings where a right to jury trial exists. As a result, the expectation should be for defamation cases to be tried without a jury. However, judicial discretion will continue to apply, so jury trials will still be used where appropriate.

- 2.230 Statistics are not collected on the number of trials or jury trials in defamation cases specifically. As discussed under Option 0, if we assume that defamation cases follow a similar profile to all claims issued in the Queen's Bench Division of the High Court at the Royal Courts of Justice (table 2), we would expect fewer than 10 defamation trials a year in total. This is supported by our analysis of a sample of case files from cases issued in 2009 and 2010. These data should be treated as approximate only. However, of 145 cases, 5 had proceeded to full trial, and one more was listed for trial. A further 6 were still open. Though the true number may be higher than ten, with only 158 defamation claims issued in total in 2010 it is considered unlikely to be much higher.
- 2.231 It appears there are very few jury trials at all, and no systematic data is collected. However, the Ministry of Justice's Libel Working Group reported that 8 of the 21 trials between January 2008 and November 2009 were heard by a jury.<sup>24</sup> In evidence to the Joint Committee, Lord Lester noted that there were no jury trials at all in the 18 months to April 2011.<sup>25</sup>
- 2.232 Given that judicial discretion will remain, and that the number of jury trials is already very small, we do not expect the proposal to have a significant impact on the number of jury trials. Indeed, given judicial discretion will continue to apply as it does now, our best estimate is that there will be no change in the number of jury trials.
- 2.233 However, the current presumption in favour of trial by jury prevents a judge from making a determination on key issues at an early stage as they are often matters that are reserved for the jury should it be decided that a jury trial is required. One of these key issues is the meaning of the words complained of which can be a key dispute between the parties. Often once a determination on meaning has been made one party will settle the case, and if this could be achieved earlier in the proceedings it would limit the level of costs that are built up.
- 2.234 The Committee supported the Government's position to remove the presumption of trial by jury, but recommended that the circumstances in which a judge may order a trial by jury should be expressly set out in the Bill, with judicial discretion to be applied on a case-by-case basis.
- 2.235 The Government intends to include provisions in the Bill seeking to remove the presumption for jury trial in defamation cases, but it does not intend to include guidelines on the circumstances under which a judge may order trial by jury on the face of the Bill on the basis that a clear majority of responses to the consultation including from members of the senior judiciary, took the view that it would be unnecessary as the courts are already familiar with dealing with the issue.

## Costs

### HMCTS

- 2.236 As noted above, there are only a small number of defamation trials each year, and an even smaller number of these are heard by a jury. We do not expect either the number of trials or the number of these that are heard by a jury to change significantly as a result of the proposal. Therefore there will be no impact on HMCTS resources required for defamation trials.
- 2.237 The proposal should mean that key issues will be able to be resolved earlier, reducing the number of pre-trial hearings for defamation claims. This would reduce the resources required for defamation claims and at the same time reduce fee income to HMCTS from these hearings.
- 2.238 Statistics on all claims issued in the Queen's Bench Division of the High Court at the Royal Courts of Justice suggest that there are approximately two pre-trial hearings (known as "interlocutory hearings before Masters") per claim issued.<sup>26</sup> If this is also true of defamation claims specifically, there would have been around 300 such hearings for defamation cases. Our sample of case files from 2009 and 2010 included 139 where either the case had closed, or it had been listed for trial. The average number of hearings per claim issued for these 139 files was rather lower than this – around 1.2. In the majority of cases (123 out of 139), there was only one hearing before the case fell away. (These data should be treated as approximate.)

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<sup>24</sup> Ministry of Justice, Report of the Libel Working Group, available at: <http://webarchive.nationalarchives.gov.uk/20110322191207/http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf>

<sup>25</sup> Joint Committee on the Draft Defamation Bill: Oral and associated written evidence Volume II (HL Paper 203 & HC 930-II) (available at [www.parliament.uk](http://www.parliament.uk))

<sup>26</sup> 1.7 per claim issued, or 2.2 per claim excluding claims where the judgement was made by default.

2.239 The court fee for a hearing is currently £1,090. Given the small number of cases involved, we expect the aggregate impact of this to be negligible. We do not know how many fewer hearings might be required if the proposal was implemented. We therefore estimate an indicative impact on HMCTS of an annual reduction in fee income in the range £0m - £0.3m. The upper end of this range is likely to represent a conservative estimate. The number of hearings in defamation cases at present is uncertain, but the evidence from our sample of case files suggests the average number of hearings per case in defamation cases may be lower than the Royal Courts of Justice average. Moreover, it seems quite unlikely that no hearings would be required in the future.

2.240 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### *Claimants and defendants*

2.241 The proposal is not expected to have an impact on whether a defamation case is actually granted a jury trial, given the same judicial discretion currently applies and will continue to apply. Therefore, there are no expected impacts on case outcomes (including any settlements before or after a claim is issued), or on the volume of cases that proceed to trial. On this basis, there are no expected costs resulting from changes in the amount of damages received or paid for by claimants or defendants in defamation cases.

2.242 There is also no expected significant impact on the volume of published material, or the volume of defamation disputes. However, there is a risk that the proposal might result in more publications and more disputes. This would be the case if, as some anecdotal evidence suggests, the potential for a jury trial, with its high associated cost, discourages (potential) defendants from publishing material where they think there is a risk of challenge. Similarly, it is possible that some (potential) claimants do not make challenges due to the risk of high costs. Any reductions in these potential costs may therefore result in a small increase in the number of publications and disputes. We do not have evidence to allow us to quantify the size of this risk, but given the small number of cases involved, and the relatively low costs being removed by the proposal, the impact is not expected to be significant.

### *Legal service providers*

2.243 The proposal should mean that key issues in defamation disputes will be able to be resolved earlier, reducing the number of pre-trial hearings for defamation claims issued in court. This would represent reduced demand for legal advice and representation in defamation cases.

2.244 This impact on legal service providers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.

2.245 In addition we assume that legal service providers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so legal service providers may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term..

### *Wider social and economic costs*

2.246 Wider social and economic costs are not anticipated given the assumptions adopted. We assume that case outcomes would remain the same, and there may be improvements in efficiency.

## **Benefits**

### *HMCTS*

2.247 As noted above, there are only a small number of defamation trials each year, and an even smaller number of these are heard by a jury. We do not expect either the number of trials or the number of these that are heard by a jury to change significantly as a result of the proposal. Therefore there will be no impact on HMCTS resources required for defamation trials.

- 2.248 The proposal should mean that key issues will be able to be resolved earlier, reducing the number of pre-trial hearings for defamation claims. This would reduce the resources required for defamation claims and at the same time reduce fee income to HMCTS from these hearings. As discussed above, the number of hearings might fall by anything up to 300, accompanied by a drop in fee income of £0m - £0.3m – though this estimate is only indicative.
- 2.249 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### *Claimants and defendants*

- 2.250 The Jackson Review notes that jury trials can cost 20% - 30% more than a trial without a jury. However, as noted above there are currently only a small number of defamation trials per year, and an even smaller number of these are heard by a jury - and we do not expect the number of trials nor the number of these that are heard by a jury are expected to change significantly as a result of the proposal. Therefore we do not expect any reduction in legal costs due to a reduction in trials (with or without juries).
- 2.251 The proposal should, though, reduce the time and number of hearings taken to reach case resolution: the judge will be able to rule on more issues earlier so the court process will be more efficient. Claimants and defendants are expected to benefit directly from quicker case resolution. In addition, if there were fewer pre-trial hearings in future, the party who ultimately pays the costs in the case would save the court fee for these hearings. As discussed above, as an indicative estimate the proposals might result in a saving to claimants and defendants in relation to court fees of £0m - £0.3m per year.
- 2.252 In addition, if fewer legal resources are required in future as a result of swifter case resolution, this might be associated with lower legal costs for claimants and defendants. However, given the small number of cases involved, we expect the aggregate impact of this to be negligible.
- 2.253 As set out in detail in the costs section, the proposal is not expected to have an impact on case outcomes including settlement. It is also not expected to have an impact on the volume of material published or disputed, though there is a risk that these might increase due to a reduced likelihood of very high legal costs.

### *Equity (fairness)*

- 2.254 Quicker case resolution might be associated with increased equity (fairness).

### *Wider social and economic benefits*

- 2.255 The proposal is expected to increase resource efficiency. Given the expected magnitude of the impacts of the proposal, we expect this benefit to be small.

## **Option 7: Responsibility for publication**

### **Description**

- 2.256 For the purposes of this Impact Assessment, online intermediaries are defined as websites (or parts of websites) that host and store user-generated content, for example website hosting service providers, intermediary website operators (e.g. Facebook) and online newsgroups and bulletin boards which enable users to post and read messages. A website (or part of a website) that publishes its own material would not be covered by the definition (as they would be primary publishers). Similarly, websites which solely act as “mere conduits” (those that simply transmit information or provide access to a communication network) such as search engines, web browsers and broadband/telecoms providers would not be covered. Offline intermediaries are those involved in distributing the material such as booksellers and newsagents
- 2.257 Currently when an online intermediary receives a complaint from a claimant that there is something defamatory about them on a website owned or run by the intermediary they are in a position of not knowing whether there is any substance to the complaint, and may potentially be held liable if they

2.258 The Government intends to introduce a system where the intermediary acts as a liaison point between the defamed person and the author of the material so that the former can bring an action against the latter if they wish and the intermediary cannot be sued.

2.259 The system that the Government is seeking to introduce is a three stage system and the workings of the system are outlined below. The system will provide for fixed periods for completion of certain actions. These fixed periods are to be established through Regulations in due course, and will be the subject of ongoing discussion.

### **Stage 1**

- Where the claimant knows the contact details of the author, the parties would be expected to resolve the issue between them (this will normally be the case in relation to complaints about material offline).
- Where the claimant does not know the identity/contact details of the author, they serve a notice of their complaint on the intermediary.

### **Stage 2**

- On receipt of the notice the intermediary has a fixed period to either forward the complaint on to the author or remove the material if they have no means of contacting the author.

### **Stage 3**

- On receipt of the complaint the author has a fixed period in which to respond.
- If the author does not reply by the end of the period provided then the intermediary would have a further short period to remove the material complained of and would then be protected from liability.
- If the author replies giving their consent to the material being removed then the intermediary has a further short period to remove the material complained of and would be then protected from liability.
- If the author replies refusing to agree to the removal of the material then the intermediary would be required to release the author's contact details to the claimant unless the author has indicated that they do not want their contact details to be released, in which case the intermediary must inform the claimant of that fact. It would then be a matter for the claimant to consider whether they wished to seek a court order requiring the intermediary to release the details. However, importantly whilst the court order could require the intermediary to release the contact details the intermediary would be protected against liability in relation to the defamation claim.

2.260 Anecdotal evidence suggests that some intermediaries already operate in practice in a similar way to the scheme that the Government is seeking to introduce. We do not expect that the scheme will result in a significant behavioural change from those intermediaries and it may be welcomed by others for whom it will reduce the need to immediately remove material when a complaint is received.

## **Costs**

2.261 There may be transitional costs for all affected parties associated with establishing and interpreting the new legislation. This may involve a period of litigation as the new law is established in practice, and as such these costs may be significant. There may also be adjustment costs for all affected parties associated with interpreting the new law.

## **Claimants**

2.262 A consequence of the proposal is that some material that causes harm to a claimant's reputation is likely to remain available for longer than at present, even if it is ultimately removed (at Stage 2, Stage 3 (ii) or Stage 3(iii)). This will occur if under the current system the intermediary would

- 2.263 To the extent that material remains available for a greater amount of time, in effect we can interpret this as an increase in the volume of material being published. The impact of this would be that claimants would potentially suffer increased reputational damage, for example if as a result the material was accessed by a greater number of individuals.
- 2.264 There may also be a greater volume of disputes associated with the increased volume of published material. If claimants issue a claim against the defendant, this could generate further costs. For example, if the case is unsuccessful, claimants will incur legal costs. If they bring a successful claim, while claimants are likely to receive damages, it may be that claimants would have preferred for the material to be removed immediately, making them worse off overall.

### *Defendants*

- 2.265 As set out above, we would expect the proposal to lead to a greater volume of disputes. Further, the proposal will create a simpler, statutory process for claimants to obtain the details of the authors of defamatory comments about them. This could increase their opportunities to pursue legal action. Defendants will face costs in all legal cases including time, and may incur legal costs and have to pay damages when they lose legal cases. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.
- 2.266 However, defendants can agree to material being removed, meaning we would only expect them to defend material, and risk incurring these costs, if they think their chance of success is high enough for it to be worthwhile. Also, in line with the assumption that claimants would be worse off in aggregate as a result of increased publication volumes, we would expect defendants to be better off in aggregate, given more material is being published.

### *Intermediaries*

- 2.267 There would be a cost to the intermediary in terms of staff and other resources required to act as the liaison point between the two parties. We do not expect the net cost to be greater than the cost of responding to complaints and removing material under the present law, as an available option for the intermediary will be to remove content or otherwise continue to operate their own practices as they do currently. If intermediaries in future choose to keep content available and act as a liaison point in the manner suggested, it is assumed they would only do so if the benefits from doing so outweighed any additional costs. This is consistent with the fact that consultation responses suggest intermediaries are in favour of the proposal.
- 2.268 In addition to the costs of operating as a liaison point, intermediaries may incur costs from being subject to legal action by claimants. The reforms aim to reduce current levels of exposure to such costs, which are assumed not to rise and may well be reduced.

### *HMCTS and the judiciary*

- 2.269 There may be an increased workload for a transitional period of cases which establish and interpret the new legislation.
- 2.270 On an ongoing basis, we would also expect an increase in the volume of defamation claims issued, in line with the increase in the volume of published material. Intermediaries are less likely to remove material as soon as a complaint is made, so there may be some additional claims where defendants choose to defend their material. This would represent an increase in the demand for court and judicial resources, which would increase the cost of service provision (as well as increase HMCTS fee income).
- 2.271 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any increase in costs due to increased workload would in the long term be associated with an equivalent increase in fees. We assume that full cost recovery occurs in defamation cases. We therefore expect a neutral impact on HMCTS (see section on risks and assumptions for further discussion).

### *Legal service providers*

2.272 The process for a claimant to make a complaint will be clearer under this proposal than at present. The necessary steps for an intermediary to avoid liability will also be clearer. Both of these effects may reduce the demand for legal advice in any given defamation case being pursued. However, as set out above we would expect an increase in the volume of disputes as a result of the proposal, which we would expect to more than offset any reduced demand per case for legal services. Therefore, the impact on legal services is expected to be a net increase in demand.

### *After The Event (ATE) insurers*

2.273 If the proposal results in a net increase in the volume of cases being pursued overall, this would represent an increase in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.

2.274 ATE insurance is insurance relating to one party (typically claimants) being exposed to the other party's (typically defendant's) costs if they lose the case. ATE insurance is taken out privately and we do not collect information on the take-up rate or cost of these products. It is therefore unclear to what extent, if any, ATE insurance is taken out in relation to the cases likely to be affected by this proposal.

### *Wider social and economic costs*

2.275 The proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Benefits**

### *Claimants*

2.276 The process for a claimant to make an initial complaint is likely to be clearer under this proposal than at present. This may reduce the costs for claimants of making an initial complaint, including the need for legal advice.

2.277 There will also be a simpler, statutory process, for claimants to obtain the details of the authors of defamatory comments about them. This could increase their opportunities to pursue legal action and receive damages if appropriate.

2.278 However, as outlined in the costs section we expect claimants to be worse off in aggregate as a result of the proposal.

### *Defendants*

2.279 We believe that at present some material that causes reputational damage but may nevertheless be defensible (e.g. because it is true, or in the public interest) is removed by intermediaries as soon as it is complained of. Under the proposals, intermediaries will be less likely to do this because they can avoid being held liable by following the process instead. Material will therefore remain available for longer and authors will have the opportunity to defend their material if they wish to do so. This should generate benefits, financial or otherwise, for defendants in these cases. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### *Intermediaries*

2.280 There will be a clear process for intermediaries to follow in order to avoid liability. This will be a benefit for intermediaries as they may need less legal advice on how to respond to a complaint. They will also be able to avoid any costs associated with legal proceedings following a complaint given they will no longer be legally liable for their content under the proposal, which anecdotal evidence suggest can currently run to thousands of pounds in some cases. We do not hold information regarding the volume of such complaints, although we understand complaints are regularly received by intermediaries.

2.281 A consequence of the proposal is that there is expected to be an increase in the volume of published material in the future. This would generate further benefits for intermediaries, as in effect this increases the demand for intermediary services.

### *HMCTS and the judiciary*

2.282 As set out in detail in the costs section, the proposal is expected to increase the demand for court and judicial resources, which will increase the fee income collected by HMCTS. However, overall HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any increase in fee income due to increased workload would in the long term be associated with an equivalent increase in costs. We assume that full cost recovery occurs in defamation cases specifically. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### *Legal service providers*

2.283 As set out in detail in the costs section, in aggregate we expect the proposal to increase the volume of legal disputes overall, which would be associated with an increase in the demand for legal advice and representation.

### *After The Event (ATE) insurers*

2.284 If the proposal results in a net increase in the volume of cases being pursued overall, this would represent an increase in the demand for ATE insurance, given defamation cases are often funded through 'no win no fee' arrangements.

### *Wider social and economic benefits*

2.285 We expect that more material that is defensible will be published (or remain published for longer) as a result of the proposal. This is expected to be socially beneficial. In principle, this benefit could be associated with increased economic efficiency from the perspective of society, depending on the nature and content of the relevant material.

2.286 Further, the prospect of increased transparency and freedom of expression may lead to reductions in the level of the underlying behaviour which is now being exposed through publication, and this might also be beneficial from society's perspective if the behaviour is valued negatively by society.

2.287 The proposal is expected to result in defendants gaining at the expense of claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Option 8: Power to order publication of a summary of the court's judgment**

### **Description**

2.288 This proposal would give the court a general power to order publication of a summary of its judgment, which is currently only available under the summary disposal procedure. While claimants can currently request publication of a summary of the court's judgment by the defendant as part of an agreed settlement, the court has no power to enforce publication where claimants and defendants cannot agree on the format or content of the summary. The proposal is therefore intended to offer a mechanism for the court to enforce such requests.

2.289 The analysis assumes that the proposal would benefit claimants in instances when their defamation claim was successful. This is on the basis that as the defamation claim will originate from material published by the defendant, when the defendant wins the case they are likely to have the ability and incentive to publicise the outcome already. The proposal is relevant for instances when the claimant wins the case and would like the defendant to publish a summary, but cannot reach agreement with the defendant over whether or how this will be done.

2.290 In other words it is assumed that the fact there is currently no enforcement of agreements means claimants are settling for volumes and types of publications that benefit defendants relative to the position the court would impose. The court's role in future would be to settle the wording of any proposed published summary, not to draft one from scratch – parties would need to provide drafts for court to consider.

- 2.291 As set out in the Introduction section above, a small majority of responses to consultation supported this measure. Those doing so considered that it would be a positive measure of benefit to claimants and that it is important to ensure that published material which is inaccurate or untrue should be corrected, which this proposal will support. The Joint Committee on the Draft Bill supported the provision on the basis that many people who consider bringing a claim for defamation are far more concerned about putting the record straight than seeking damages, and that where a publisher has got something seriously wrong it is in both the public interest and the interests of the victim for a correction to be made.
- 2.292 Information is not available concerning the instances in which successful claimants wish a summary of the court's judgment to be published in defamation cases currently. Nor do we have information about the time taken to reach agreement with the relevant defendant or the outcome of this agreement i.e. whether an agreement was reached, and if so whether it was acted on. This reflects the fact that while such remedies are currently available, no legal enforcement mechanism is provided by the current law. For this reason, the impacts identified in this option are presented qualitatively.

## Costs

### *Defendants*

- 2.293 The proposal seeks to provide a mechanism through which agreements to publish a summary of the court's judgment can be enforced or ordered where agreement cannot be reached. The publication of a summary is a possible outcome of a defamation case under the current law, but requires the agreement of claimants and defendants. The impact of the proposal is therefore expected to generate a cost to defendants and a benefit to claimants, given more summaries should be published in future, or summaries should be publishable in a more favourable way from the perspective of claimants.
- 2.294 This follows as currently the nature, format and content of any published summary must be agreed by both parties. In a general sense, published summaries are assumed to benefit claimants, but to generate a cost for defendants. Creating a legal power for the court to intervene and enforce publication in a specific way is expected to provide greater power for claimants in these negotiations. (Defendants already have the ability and incentive to publish when they win a case, meaning the proposal is expected only to apply to cases where claimants win.)
- 2.295 The resulting cost to defendants may take a number of forms. For example, the publication may result in a financial cost associated with the publication of the summary itself, and there may be reputational costs for defendants associated with publication. It is assumed that the financial damages awarded by the court would not be affected by the proposal. It is possible that in some cases claimants may be less inclined to seek financial damages if publication of the court judgments is available and can be enforced, and that as a result financial damages received by claimants may fall in future. However, we would still expect defendants to be worse off overall as a result of the proposal. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

### *HMCTS*

- 2.296 On an ongoing basis, the proposal will require HMCTS to intervene in instances where agreement regarding the publication of summary judgments cannot be reached. This may involve an increase in the judicial resources required to help claimants and defendants reach a solution, increasing the resources required per defamation case on average. In addition, now that the court can impose a solution, resources may be required to monitor and enforce any decisions reached by the court. There may also be an increase in the resources required if the court is required to resolve more disagreements between the parties over the terms of summaries of its judgments in the future as a result of the proposal.
- 2.297 It is not expected that the proposal will itself have any significant impact on the volume of defamation disputes overall, or the volume of cases reaching court. Further, any increase in the judicial resources required per defamation case is not expected to be significant. In any case, the net financial impact on HMCTS is expected to be neutral.

2.298 Overall, HMCTS civil court fees are set to recover the costs associated with civil cases, and therefore any increase in workload would in the long term be associated with an equivalent increase in fee income. Full cost recovery is assumed to occur in defamation cases. We therefore expect a neutral impact on HMCTS as a result of this proposal (see section on risks and assumptions for further discussion).

### *Legal service providers*

2.299 The proposal is designed to provide for court intervention where publication of a summary of the court's judgment is ordered by the court and claimants and defendants are unable to reach agreement. Negotiation over publication may require legal resources, for which claimants and defendants will be charged legal fees. If the proposal results in shorter negotiations, or otherwise reduces the amount of legal services required in order to reach an agreement, this would represent a reduction in the demand for legal services. However, the publication of a summary would only be a minor part of a defamation case and so any impact is expected to be small.

2.300 This impact on legal service providers is a secondary impact of the proposals. It is included in this Impact Assessment for the sake of completeness.

2.301 In addition we assume that legal service providers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so legal service providers may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term.

### *Wider social and economic costs*

2.302 The proposal is expected to result in a redistribution from defendants to claimants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Benefits**

### *Claimants*

2.303 As set out in detail in the costs section above, the proposal is expected to benefit claimants by providing them with greater ability to ensure that their reputation is restored when they have brought a successful defamation claim through publication of a summary of the court's judgment. This may result in a greater volume of summaries published, or the outcomes of cases being reported in a more favourable way from the perspective of claimants. The benefits to claimants would primarily be in the form of reputation benefits, given the proposal would affect cases where the claimant has successfully brought a defamation case.

2.304 It is assumed that the financial damages awarded by the court would not change as a result of the proposal. It is possible that in some cases claimants may be less inclined to seek financial damages if publication of the court judgments is available, and that as a result financial damages received by claimants may fall in future. However, the proposal provides claimants with an additional remedy and it is assumed that in such cases they would be better off overall, even if they decided to accept lower damages in conjunction with publication of a summary of the court's judgment.

2.305 Finally, the proposal may reduce the time and legal costs required by claimants and defendants to reach an agreement about how a summary should be published, given both parties would know the court could impose a decision if no agreement was reached. To the extent that this is the case, this should benefit claimants in the form of lower legal fees.

### *Defendants*

2.306 Defendants may also benefit from reduced legal fees if the proposal results in quicker agreement over the publication of summaries. However, as set out in the costs section defendants are expected to be made worse off overall from the proposal. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.

## **HMCTS**

2.307 Overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any increase in costs due to increased workload would in the long term be associated with an equivalent increase in fee income. Full cost recovery occurs in defamation cases. We therefore expect a neutral financial impact on HMCTS (see section on risks and assumptions for further discussion).

### ***Wider social and economic benefits***

2.308 The proposal is expected to have no significant impact on the volume of material that is published, or disputed. However, a greater volume of summaries of court judgments are expected to be published in future and this is expected to be more favourable from the perspective of claimants. Society may benefit if as a result, the falseness of the initial defamatory material is highlighted in a more public manner.

2.309 The proposal may also generate an efficiency gain if in future, claimants and defendants find it easier to reach an agreement about the terms on which cases should be settled, which would require less legal resources. However, given the proposal may increase the amount of court resources required, the scale of any efficiency benefits associated with the proposal is unclear.

2.310 The proposal is expected to result in claimants gaining at the expense of defendants. No assumption has been made about whether society would view this redistribution as positive or negative.

## **Risks and assumptions (for all options considered)**

### ***Impacts on HMCTS and the judiciary***

2.311 We assume throughout that any change in HMCTS workload does not have a net financial impact on HMCTS. This is based on the fact that overall, HMCTS civil court fees are set to recover the costs associated with those cases, and therefore any reduction in costs due to reduced workload would in the long term be associated with an equivalent reduction in fee income. We assume that full cost recovery occurs in defamation cases specifically.

2.312 Some of the proposals in this impact assessment may increase HMCTS's workload, while others are on balance considered more likely to reduce it. The actual impact of any change in workload on HMCTS depends on the relative changes to HMCTS costs and fee income.

2.313 If there is a reduced volume of court cases then if fees per case stay the same there would be reduced total fee income. In order for overall HMCTS costs recovery to remain the same, HMCTS overall costs would need to reduce accordingly. Though most defamation cases are conducted at the Royal Courts of Justice, the small number of defamation cases each year mean it is quite unlikely that any such adjustment would lead to a reduction in fixed costs such as a reduction in HMCTS capacity (e.g. staff numbers and estate). Conversely, any increase in the volume of cases is unlikely to result in a noticeable increase in costs.

2.314 Alternatively, if HMCTS overall costs remained the same, for example if they could not be reduced due to indivisibilities (or did not need to be increased), and if case volumes fell (rose), then in order to maintain the same level of overall cost recovery, the fees charged per case might change. Any change in fees would be met by claimants and defendants (depending upon which party is successful). There are no intentions at to change HMCTS fees per case as a result of these reforms.

2.315 On the other hand, if both HMCTS overall costs and HMCTS fees per case remained the same, then, any change in volume of cases may affect overall cost recovery, depending on changes to the HMCTS case backlog.

2.316 If HMCTS overall costs remained the same, then a reduced (increased) volume of cases may be associated with reduced (increased) backlogs and waiting times or with other changes in service standards. This could also affect fee income from other cases, so maintaining a neutral cash flow impact. If this was not the case then the implication would be that HMCTS productivity would be lower.

- 2.317 Which of these outcomes will emerge is difficult to predict. This would depend upon the direction and extent of any overall change in the volume of cases, which is unknown, and on how this is managed by court managers across the HMCTS estate.
- 2.318 The position might be complicated further if there was a change in case duration, as might occur for example if cases were settled more quickly or if fewer legal resources were devoted to each case, potentially making hearings in court longer.
- 2.319 For the purpose of this Impact Assessment, in the absence of specific evidence to the contrary, it has been assumed that the overall net impact on HMCTS might be broadly neutral, but that there are risks of other outcomes emerging as outlined above. In any case, as highlighted above the number of defamation claims issued in court each year is relatively small (between 150 and 300 in the Royal Courts of Justice in recent years), and the number that reach trial is even smaller. Therefore any overall impact is expected to be small.

#### *Assumptions relating to specific proposals*

- 2.320 We assume that increasing the threshold test for the reputational harm caused by alleged defamatory material from substantial to serious (clause 1) would not in itself reduce the number of mistakes (erroneous decisions to publish or not, or to challenge or not) made by claimants or defendants. Though cases that were borderline with a substantial harm threshold will be clearly defensible if the threshold is raised, there will be new cases that are borderline relative to the new threshold. We assume that there would be roughly the same number of borderline cases under either threshold, leading to no net change in the volume of disputes of legal cases.
- 2.321 We expect proposals that increase legal certainty to have no impact on the volume of published material, on the basis that any reduction in material that would be classed as defamatory would be offset by an increase in publication of non-defamatory material. However, in line with the change in the composition of published material, we would expect there to be fewer disputes and court cases as a result.
- 2.322 We assume that internet intermediaries do not change the amount of moderation activity they do as a result of the proposal relating to responsibility for publication. In principle, by providing a clear process for intermediaries to avoid liability if a complaint is made, the proposals could reduce the incentive to moderate. However, it is also possible that moderation might increase. At present, there are concerns around the position relating to the moderation of third party content, as an intermediary who edits content as part of a responsible moderation process could be seen under the provisions of the 1996 Act and the E-Comments Directive as an editor rather than a host and therefore could lose the protections that the current law provides. This may mean that the current system discourages moderation.
- 2.323 Related to this, we assume the proposed system mirrors closely the practices of some current intermediaries, and that intermediaries will have the option of removing material immediately if a complaint is received as they do currently, which would lead to no impact relative to the base case. However, the analysis assumes that in general intermediaries currently remove material but in future would follow the new process, resulting in the identified impacts. In line with this, we assume that the current threat of liability when a complaint is made encourages intermediaries to remove material, and that this reduces the volume of published material and any resulting disputes and court cases. In future as intermediaries which follow the new process will have no potential liability, meaning the volume of published material and the volume of defamation disputes and court cases between the claimants and the author of the material is expected to increase.
- 2.324 It is also assumed that there would be no significant behavioural response of intermediaries that would lead to a material impact on freedom of expression e.g. reducing the level of author anonymity allowed in their content. Similarly, it is assumed that the proposal would have no impact on the physical location of intermediaries. The intention of the proposal is to provide benefits for intermediaries compared to the current law, not to impose additional burdens which might lead them to consider relocating.
- 2.325 We assume that the proposal to provide the court with the power to order a summary of its judgement to be published would primarily affect cases where claimants win the case. It is assumed that the conditions the court would impose would be likely to favour claimants rather than

## Cumulative impacts

- 2.326 The intention is to implement all the proposals considered in this Impact Assessment. Each proposal has been assessed in isolation. It has not been possible to quantify the majority of the identified impacts, and instead a qualitative assessment has been made.
- 2.327 The proposals can be broadly grouped into those proposals that seek to amend various different aspects of defamation law to clarify it and to provide additional protections to defendants and claimants in certain scenarios, and those proposals that seek to amend court processes that determine how defamation cases are handled by the courts. The cumulative impacts of the former group will for the most part simply be the sum of the individual impacts identified, but there is likely to be some interaction between this group and the remaining proposals.
- 2.328 This follows as the identified impacts of all proposals are driven by changes in the volume of material published, and the volume disputed including at court. In practice, decisions by claimants and defendants to publish material and to dispute and defend defamation claims will take into account all possible costs and benefits, which are affected in different ways by each of the proposals.
- 2.329 In line with the qualitative nature of the assessment presented for the majority of the impacts of each individual proposal, it has not been possible to quantify these interactions. Overall, given the small number of defamation cases that reach the courts, the magnitude of the identified impacts, including any interactions, are expected to be small. For this reason, the cumulative impact of implementing all the options assessed is not expected to be significantly different from the sum of the individual impacts identified for each proposal. We summarise the cumulative impacts of the proposals below.

## Cumulative Costs

- 2.330 Claimants are likely to incur reputational costs, as the defamation law will provide them with less protection.
- 2.331 Defendants may incur reputational or financial costs from having to publish a summary of the court's judgement more often when they lose a case. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.
- 2.332 Legal service providers and ATE insurers are likely to lose business. This is a secondary impact of the proposals and is included in this Impact Assessment for the sake of completeness. In addition we assume providers and insurers may respond to any reduction in business from defamation cases by engaging in other business relating to other types of case. If so they may face some initial adjustment costs as they adjust to new patterns of business but might not be significantly worse off in the longer term.
- 2.333 Intermediaries (e.g. internet hosts) may incur costs from performing a new go-between role in defamation disputes.

## Cumulative Benefits

- 2.334 Defendants are likely to publish more material. This will be financially valuable for commercial publishers, and may also generate non-financial benefits for other defendants. Defendants are expected to include primary publishers and authors including journalists, NGOs, academics and scientists.
- 2.335 Claimants may benefit from defendants publishing a summary of the court's judgement more often when the claimant wins the case.
- 2.336 Claimants and defendants are likely to spend less on legal services and ATE.
- 2.337 Intermediaries will benefit from greater protection against potential liability.

2.338 Wider society is expected to benefit from more information being published, freer public debate and greater transparency. There are also likely to be benefits to society from more efficient dispute resolution.

### Key Assumptions for Cumulative Impacts

2.339 We assume a neutral financial impact on HMCTS, as explained in detail in the Risks and Assumptions section above.

2.340 The proposals are expected to have a redistributive effect overall – defendants will gain at the expense of claimants. We do not make any assumptions about whether society would view a redistribution from claimants to defendants as positive or negative.

2.341 We assume that overall the reforms will reduce the number of defamation disputes. While some reforms (for example in relation to jury trials) are likely to reduce the cost of bringing a case and so increase the number of disputes, we assume this effect is outweighed by the impact of the other reforms which are expected to reduce the level of disputes.

### One In One Out Position.

2.342 The One-in, One-out (OIOO) rule means that no new primary or secondary UK legislation which imposes costs on business or civil society organisations can be brought in without the identification of existing regulations with an equivalent value that can be removed.

2.343 The proposals contained in this Impact Assessment relate to increasing the protection available to defendants in defamation claims (clauses 1 and 5 – 7), codifying the existing defamation law in order to increase clarity (clauses 2 – 4), reversing the presumption in favour of jury trials in defamation cases (clause 8) introducing a new system for handling complaints about potentially defamatory material on the internet, and providing the court with the power to order publication of a summary of its judgement.

2.344 The limited available evidence we have suggests that businesses *excluding* media organisations are roughly equally represented amongst claimants and defendants in defamation claims issued at the Royal Courts of Justice. Media organisations, many (though not all) of which are businesses, make up a substantial proportion of defendants, and are almost never claimants.

2.345 Though we are not able to quantify the impacts of the proposals, we expect that clause 1 and clauses 5 – 7 will benefit defendants relative to claimants and that the proposal to provide the court with a power to order publication of a summary of its judgment will benefit claimants relative to defendants. We have found no evidence to suggest that the clauses that seek to clarify the existing law (clauses 2 – 4) or the proposal to reverse the presumption in favour of jury trials (clause 8) will benefit defendants relative to claimants or vice versa.

2.346 The proposal relating to publication on the internet affects intermediaries in addition to potential claimants and defendants in defamation cases. Intermediaries are likely to be a mix of individuals and businesses, but it has not been possible to determine the proportion of intermediaries that are businesses. Based on the assumptions adopted it is expected that the proposal will benefit intermediaries overall, which is consistent with the support of the proposal received at consultation. This implies a positive impact on businesses, although we have been unable to quantify this.

2.347 We expect that overall the reforms are likely to reduce the number of disputes. In turn this may mean that providers of legal services and ATE insurance face reduced demand. As noted above, we expect that affected businesses will respond to a reduction in demand from defamation cases by engaging in other work related to other types of case. This would mean that the impacts were limited to initial adjustment costs. In any case, these impacts are secondary impacts, and are included in this Impact Assessment for the sake of completeness only.

2.348 On this basis, on balance and acknowledging very significant uncertainty, we believe that the package of proposals overall are more likely to reduce than to impose costs on business. However, due to the very significant uncertainty, for OIOO purposes the proposals have been assessed as a zero in/out in aggregate.

## Micro business moratorium

- 2.349 We intend to apply for a waiver of the micro-business exemption and an exemption from sunset policy. Exempting micro-business would leave a hole in the new legislation which would affect the overall balance of the law of defamation between freedom of expression and the protection of reputation both in relation to the remedies available to claimants and the defences available to defendants. Micro-businesses could potentially fall into either category and their omission would mean that they would not benefit from the clarification and simplifying of the law and the measures aimed at reducing the cost and complexity of proceedings. Online intermediaries which are micro businesses would not benefit from the greater degree of protection offered against the risk of being sued for defamation.
- 2.350 In summary, and consistent with the OIOO assessment above, we believe the proposals should benefit businesses. On this basis, we intend to apply for a waiver of the micro-business exemption to ensure businesses of all sizes are able to benefit from the proposals.
- 2.351 We do not consider that any useful purpose would be served by providing for the legislation to expire, and that to do so would threaten the loss of the overall benefits we believe the proposals will provide. On this basis, we do not intend to include any sunset clause in the legislation.

## 3. Enforcement and Implementation

- 3.1 HMCTS will be responsible for the enforcement of these proposals.
- 3.2 The Ministry of Justice will be responsible for the implementation of these proposals in 2013/14.

## 4. Specific Impact Tests

### *Statutory Equality Duties*

- 4.1 A draft Equality Impact Assessment is attached at Annex 1.

### *Competition assessment*

- 4.2 Does the policy:

1. Directly limit the number or range of suppliers? (e.g. will it award exclusive rights to a supplier or create closed procurement or licensing programmes?) **No**
2. Indirectly limit the number or range of suppliers? (e.g. will it raise costs to smaller entrants relative to larger existing suppliers?) **Unlikely**. There is a risk that demand for legal services might fall, but the magnitude of any change in demand is not expected to be large enough to affect the number of suppliers in the market.
3. Limit the ability of suppliers to compete? (e.g. will it reduce the channels suppliers can use or geographic area they can operate in?) **No**
4. Reduce suppliers' incentives to compete vigorously? (e.g. will it encourage or enable the exchange of information on prices, costs, sales or outputs between supplier?) **No**

### *Small Firms Impact Test*

- 4.3 Some claimants and defendants in defamation disputes are businesses – and some of these are small businesses. The limited available evidence we have suggests that businesses *excluding* media organisations are roughly equally represented amongst claimants and defendants in defamation claims issued at the RCJ. We do not have evidence to indicate whether the pattern is different for small businesses. Media organisations are almost exclusively defendants in defamation claims.
- 4.4 As claimants or defendants, small businesses will be affected by changes to the defamation law in a similar way to other claimants and defendants, as set out in the main body of the Impact

- 4.5 In addition, the proposed changes will affect legal service providers who provide advice and representation in relation to defamation disputes, and ATE insurers. The proposals may reduce demand for legal advice on decisions to publish, or to bring or defend a challenge, and reduce demand for insurance. They may also reduce the amount of legal advice and representation demanded on average for a dispute. We do not expect the proposals to impact disproportionately on small legal service providers and ATE insurers relative to larger ones. However, legal service providers may be more likely to be small compared to businesses in the economy at large.
- 4.6 Finally, a number of intermediaries may be small businesses. We do not expect the proposal relating to responsibility for publication to impact disproportionately on small intermediaries relative to large ones.

#### *Carbon Assessment*

- 4.7 These proposals are not expected to have a significant environmental impact.

#### *Wider Environmental Impacts*

- 4.8 These proposals are not expected to have a significant environmental impact.

#### *Health Impact Assessment*

- 4.9 We do not anticipate any direct health impacts from these proposals.

#### *Human rights*

- 4.10 These proposals are compatible with the Human Rights Act 1998.

#### *Justice Impact Test*

- 4.11 There is no expected impact on the legal aid budget and the impacts on the court system are contained in the main body of this Impact Assessment.

#### *Rural proofing*

- 4.12 There are no expected rural impacts as a result of the proposal.

#### *Sustainable Development*

- 4.13 These proposals are not expected to have a significant impact on sustainable development.