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Dr Hywel Francis MP
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House of Commons
7 Millbank
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15 November 2012

Dear Dr. Francis,

DEFAMATION BILL

Thank you for your letter of 18 October. I am sorry that it was not possible to reply sooner, as your letter was not received by my department until 9 November.

The Government's response to the questions raised by the Committee is as follows.

Questions 1 to 5, Question 9 (Clause 4)

The Committee seeks the Government's views on a number of ways in which clause 4 of the Bill could be amended. In the course of debate on the Bill at Third Reading in the House of Commons, the Secretary of State indicated our intention to reflect further on the contents of clause 4 in the light of the views that had been expressed about the measure from differing perspectives. I reiterated that commitment at Second Reading in the House of Lords.

We are currently in the process of considering these issues with a view to tabling amendments at Committee Stage in the House of Lords if it is considered appropriate to do so. I am not in a position to comment on the specific points raised in these questions at this stage. However, I can reassure the Committee that these are issues which are being looked at in the course of our considerations.

Questions 6 to 8 (Clause 4)

These questions all relate to the issue of whether an explicit reference to professional codes of conduct should be included in clause 4.

As noted above, our considerations regarding clause 4 include the question of whether the list of factors in clause 4(2) should be retained, and this may affect the question of whether any reference to codes of conduct is appropriate. We will of course also wish

to take account of any recommendations which may emerge from the Leveson Inquiry which have implications for clause 4 or the Bill more generally.

Question 10 (Clause 5)

The Committee asks whether Clause 5(4) (now Clause 5(6)) should require the complainant to explain why the statement concerned is unlawful and not just defamatory, in order to be consistent with Regulation 19 of the E-Commerce Directive.

Clause 5 and the E-Commerce Directive serve different purposes. In introducing the new process under clause 5 we were responding to concerns from internet organisations that the current law puts website operators in a position where they have to consider the merits of a complaint (which they are seldom in a position to do) and decide whether they should remove the posting concerned or risk being sued for defamation. Instead, Clause 5 gives website operators a defence provided they pass a complaint on to the author of the material within a fixed period, and then take appropriate follow-up action in the light of the author's response (or lack of it).

The interaction between the complainant and the author of the material will be akin to the pre-action process, whereby a claimant provides details of his or her claim, and the defendant has an opportunity to consider whether any defences are available and respond, before formal proceedings are begun. The website operator will simply fulfil the role of a middle man in this process, and there is no need for it to consider the merits of the complaint in order to protect itself against liability. This is different from the position under the E-Commerce Directive, where an intermediary hosting material is potentially liable once notified that a statement is unlawful. As the two operate on different principles we do not believe that there is any need for the provisions to work in the same way.

In addition, we are concerned that the clause 5 process should be as simple and easy to operate as possible, and should be fair to all parties. Requiring complainants to provide details of why they consider the posting to be unlawful, rather than just defamatory, would make it more difficult for a layman to make a complaint without first having sought legal advice, and would add to the cost and difficulty involved. We can reassure the Committee that the draft regulations will cover in detail the information that a complainant has to provide in a notice of complaint, and that we envisage this including details such as the meaning attributed to the words complained of and why they are defamatory, including any factual inaccuracies or unsupportable comment..

Questions 11 and 12 (Clause 5)

The Committee asks whether the Government will consider making the regulations under Clause 5 subject to the affirmative resolution procedure in Parliament, and whether the regulations will be published in draft.

Clause 5 currently provides for the regulations to be subject to the negative resolution procedure. We are aware of the views that have been expressed that use of the affirmative procedure may be more appropriate, and are giving consideration to this issue. We can confirm that we intend to consult stakeholders on the contents of the draft regulations, and hope to be in a position to do this by the end of the year.

Questions 13 and 14 (Conditional Fee Agreements and Access to Justice)

These questions relate to whether defamation actions should be exempt from the provisions on CFAs (sections 44-46) in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and how issues relating to access to justice in these cases will be addressed. The Government has made it clear - including during the passage of the Bill itself - that it does not support amending the LASPO Act in respect of defamation actions. The reforms were drawn up by Lord Justice Jackson, and implemented by the Government, on the basis that they should apply across all proceedings in civil litigation. We believe that the provisions in the Act - and the accompanying rules and regulations - will restore balance to the system and result in a reduction in legal costs.

Part 2 of the LASPO Act introduces a package of reforms, which will change the way 'no win, no fee' conditional fee agreements (CFAs) work. The Act will abolish the recovery of success fees and after the event (ATE) insurance premiums from the losing side. The implementation of the relevant provisions will address the criticism of the current regime found by the European Court of Human Rights in *MGN Ltd. v the UK* [2011] ECHR 66. People will still be able to use CFAs but will have to pay their lawyer's success fee and, if appropriate, any ATE insurance premium themselves.

The Government believes that the reforms should be seen in the context of what they will achieve. We are not removing the access to CFAs of either claimants or defendants; rather we aim to create a stronger balance between the interests of claimants and defendants. The reforms will still provide claimants with a means to bring meritorious cases, but will also ensure that the costs faced by defendants are proportionate, thereby correcting the present anomaly where claimants have little incentive to keep an eye on the costs they incur. Moreover, it is unfair on defendants that they may feel unable to fight cases, even when they know they are in the right, for fear of excessive costs if they lose.

The LASPO reforms, and the procedural changes which we are taking forward alongside the Defamation Bill (e.g. to enable the early resolution of key issues such as meaning) are intended to reduce the complexity and expense of pursuing and defending defamation claims. However, we acknowledge that difficulty may arise in respect of less wealthy claimants and defendants, and how they might be put off from pursuing or defending reasonable cases because of the risk of having to pay the other side's legal costs if their case fails, and we are accordingly considering the issue of costs protection (see Question 15, below).

Question 15 (Commitment to review costs protection for defamation proceedings)

I made a commitment at Second Reading of the Defamation Bill in the House of Lords on 9th October 2012 to ask the Civil Justice Council (CJC) to consider the case for, and possible options to reform, costs protection in defamation and privacy related claims.

The CJC is an advisory body chaired by the Master of the Rolls and has in the past assisted this department in developing a regime of costs protection in personal injury cases (known as qualified one way costs shifting or 'QOCS'),which will be implemented when Part 2 of the LASPO Act comes into effect in April 2013. The CJC will set up a

working group to consider the issue of costs protection in defamation/privacy related claims. The working group will report its recommendations to MoJ by the end of March 2013, allowing the Government time to consider what, if any, changes to the Civil Procedure Rules should be made for when the Defamation Bill comes into effect.

Question 16 - discussions with the judiciary

The Committee asks what discussions the Government has had with the judiciary about changes to the Civil Procedure Rules to make the new Act work.

Officials have discussed the contents of the Bill and related procedural issues with members of the senior judiciary on a number of occasions during the period over which the Bill has developed. Most recently, a meeting has taken place with the new Master of the Rolls, Lord Dyson, to discuss these issues. The Government will put proposals for procedural changes to support the new Act before the Civil Procedure Rule Committee in the new year. Our intention is to ensure that these are in place for when the Act comes into force.

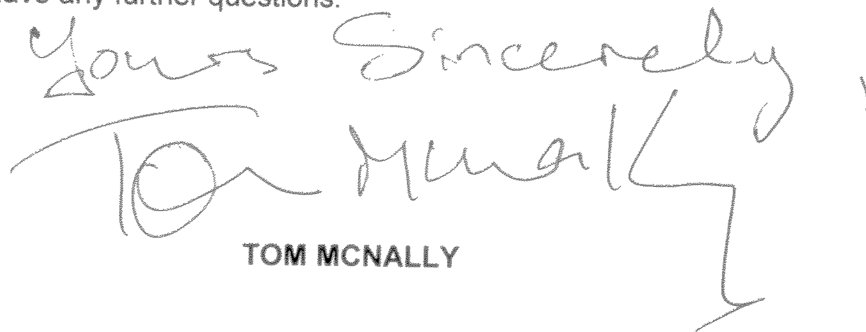
Question 17 – inter-relationship between Articles 8 and 10 and the law of qualified privilege

The Committee asks for the Government's view on the inter-relationship of Articles 8 and 10 ECHR and the law of qualified privilege in light of recent judicial decisions such as *W v Westminster*.

As we have stated from the outset, this Bill is about striking the right balance between a claimant's right to reputation and a defendant's right to freedom of expression. The Bill makes modest but sensible changes to existing forms of statutory privilege. However we think it is right that matters such as the existence of a duty and interest privilege should continue to be for the courts to determine on the facts of the individual case. That will, of course, include consideration of the Convention.

We have noted the conclusion in *W* concerning actions under section 7 of the Human Rights Act 1998, and are content simply to await further consideration of the issue by the courts.

I hope that this reply is helpful. I would of course be happy to respond further should the Committee have any further questions.



TOM MCNALLY