

Response to the Ministry of Justice's consultation on the Draft Defamation Bill

June 2011

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Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

This publication is also available from our website at: www.oft.gov.uk.

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1 INTRODUCTION

- 1.1 This is the response from the Office of Fair Trading (OFT) to the Ministry of Justice's (MoJ) consultation on the Draft Defamation Bill.
- 1.2 The OFT is the lead public body in the UK responsible for competition and consumer policy and enforcement, and our mission is to make markets work well for consumers. Our goal is for competitive, efficient, innovative markets where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with consumer and competition law but are not overburdened by regulation.
- 1.3 The OFT is in favour of supporting free speech, and empowering consumers to make legitimate and honest comments on goods and services they consume.
- 1.4 We appreciate that this is a difficult area requiring balancing of competing interests: the individual's right to express his opinion; the right of other individuals to hear honest feedback about other products; the right of internet sites to publish genuine opinions without fear of legal action; and also the right of companies and individuals to defend themselves and their reputations from unmerited, malicious and otherwise unsuitable comments or views.
- 1.5 The OFT's Internet Shopping market study in 2007¹ discussed, amongst other things, the importance of consumers making effective use of online comparison and shopping tools.
- 1.6 On 14 March 2011 we held an evidence-gathering roundtable, in conjunction with the Cabinet Office, on issues surrounding choice tools - tools that help consumers choose between providers of public services. Increasingly, user-generated online content is used to aid choice. Consumers often trust the views of other consumers more than those of

¹ www.offt.gov.uk/shared_offt/reports/consumer_protection/oft921.pdf

firms or even the government, and the use of qualitative consumer experience can make complex decisions and comparisons easier. A summary of the key competition and consumer protection issues raised at the event was published in April 2011.²

1.7 The OFT's recently published annual plan identified the tackling of online trading practices that pose a threat to consumer confidence in online markets as a key theme for OFT's priorities over the 2011-12 period. Consumers can help each other make informed choices (which drive confidence, competition and growth) through the provision of information by, for example, providing feedback about their shopping experiences on:

- a business' website
- blog websites
- web fora and other information-sharing media.

1.8 Recognising the impact of user-generated content on whether consumers make (or do not make) purchases,³ companies are increasingly seeking to manage their online reputations. The OFT is concerned that this does not happen at the expense of legitimate online user-generated content.

1.9 The OFT believes that there should be a legitimate space for online debate in relation to goods and services. Such space might be characterised by the participants being 'ordinary' consumers (rather than experts); transitory; possessing a right to reply by businesses who believe comments are inappropriate and that the impression of the comment is balanced by both positive and negative feedback.

² www.offt.gov.uk/shared_offt/reports/consumer_protection/oft1321.pdf

³ See Impact of User-Generated Content on Media, Market Intelligence, Mintel, November 2010.

- 1.10 Illegitimate threats of legal action can have a seriously chilling effect on freedom of speech, as well as legitimate sources of information such as web fora. Where used in an aggressive or misleading way by traders, they can stifle useful and accurate information that may benefit other consumers, so there is a potentially much wider negative impact of such interventions. Threats of defamation action against consumers expressing their honest views on a product or service can potentially distort market dynamics at the expense of consumers and fair trading businesses committed to maintaining their reputation. It is possible that illegitimate threats of legal action may constitute breaches of the Consumer Protection from Unfair Trading Regulations 2008.⁴
- 1.11 The OFT is, therefore, supportive of the MoJ's plans to simplify the law in order to reduce the inherent inequality of arms that may exist in some of these situations, and particularly in order to enable non-expert consumers and website owners to not be intimidated by unfair and illegitimate threats of legal action under defamation law.
- 1.12 The OFT is particularly interested in the development of proposals related to material published on the internet. We welcome the MoJ's exploration of possible changes in this area and would like to discuss this with the Bill team as developments continue after the consultation.
- 1.13 The OFT's response to the consultation is limited to areas where it is able to offer a view based on its experience as an enforcer of competition and consumer law. Our response is therefore limited to a selection of questions under the following headings:
- Issues in draft Bill - Clause 1 to Clause 5
 - Responsibility for publication on the Internet
 - A new procedure for defamation cases

⁴ Guidance on the Regulations can be found at www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

- Power of court to order publication of its judgment and
- Ability of corporations to bring a defamation action.

1.14 The OFT would welcome discussion with the MoJ on issues surrounding 'Responsibility for publication on the Internet.' This is an area that is of particular interest to the OFT. For example, persistence of such information continuing to be accessible on the Internet has the potential to cause confusion and distress. We would like to continue a dialogue on this subject as proposals develop following this consultation.

2 THE PROPOSALS

Issues in the Draft Bill

Clause 1: a requirement to show substantial harm

Q1. Do you agree with the inclusion of a substantial harm test in the Bill?

Q2. Do you have any views on the substance of the clause?

- 2.1 The OFT supports the inclusion of a substantial harm test in the Bill. This should reduce the possibility of trivial or unfounded actions, thus helping to ensure that freedom of speech and of expression are not stifled by actual or potential legal threats.
- 2.2 The effect of the threshold in the test of substantial harm should be proportionate. It should not be easier for larger or wealthier organisations or individuals to show substantial harm. Therefore it may be worth exploring making this test of substantial harm relative rather than absolute. For example, a worldwide brand leader should not be able to extrapolate the level of any perceived harm at the local level to the entirety of its portfolio of products or services.

Clause 2: responsible publication on matter of public interest

Q4. Do you agree with the inclusion of a new public interest defence in the Bill? Do you consider that this is an improvement on the existing common law defence?

- 2.3 The OFT welcomes the proposed changes so that if the Defendant can show that he or she acted responsibly, that is in the public interest, then the Claimant's action is unlikely to succeed. The proposed inclusion might also make it somewhat easier for individuals to assess the likely relevance of a defence without recourse to expert advice thus minimising legal costs and the prospect of defendants being pressurised into withdrawing the publication in question when the putative legal

claim would be unlikely to succeed in court due to the availability of the public interest defence.

- 2.4 The OFT believes that 'responsible publication' should be able to cover initially unvetted consumer feedback online, particularly where this is subject to retrospective moderation and removal of clearly inappropriate comments on request. Where a web forum is interactive, such that businesses can post their own comments in response, this needs to be borne in mind as part of the context and nature of publication element of the defence.

Clause 3: a statutory defence of truth

Q6. Do you agree that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth?

- 2.5 Yes. Please see answer to Q4.

Q8. Do you have any views on the substance of the draft clause?

- 2.6 Individuals need to be able to make honest and factual statements about their own experiences of using products and services, especially by making narrative statements.

Clause 4: a statutory defence of honest opinion

Q12. Do you have any views on the substance of the draft clause? In particular:

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

2.7 Yes, provided that public 'interest' is widely interpreted. We would not want the interaction of consumers with traders through contracts (and other relationships) to be outside the scope of any public interest test. We think that the fair operation of business to consumer transactions is very much in the public interest.

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

2.8 Yes.

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

2.9 Yes. The opinions balanced with the 'honest opinion' defences would provide sufficient protection for consumers to be able to share their views.

f) do you agree that an objective test of whether an honest person could have held the opinion should apply? If not, would

a subjective test of whether the defendant believed that his or her opinion was justified be appropriate?

- 2.10 No, we think the subjective test of individual justification would be better. Whatever decision is made, we recommend that there is flexibility in the test such that reasonable opinions made by genuinely distressed consumers are not excluded from consideration under this provision.

Clause 5: absolute and qualified privilege

Q13. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular:

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

- 2.11 Yes.

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

- 2.12 The OFT believes that individuals and organisations ought to be able to share the details of genuine scientific and other academic research without fear of defamatory action. Research, evidence and the communication of such is vital for consumers and businesses to reach their own informed decisions about the suitability of products.

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

2.13 Yes, particularly in the context of the international nature of commerce and information exchange. This will also be important given the increasing cross-border nature of our economy and consumer purchases. Information about legal decisions may be critical in enabling genuine consumer empowerment.

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

2.14 See other answers to Q13 above.

Responsibility for publication on the Internet

Q23 Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?

2.15 The OFT believes that it may be appropriate to raise the protection against defamatory liability for internet service providers, in the interests of promoting free speech and debate online. However, this needs to be carefully balanced and targeted as it is vital that enforcement agencies are able to engage with internet service providers to remove material that is harmful in a wider sense.

Q24 If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who were defamed on the internet be protected? Do you have any alternative suggestions?

- 2.16 It would seem reasonable that service providers should have a control system that allows them to consider and respond to reasonable requests to remove unsuitable material. We would welcome further discussions on this subject.

Q25 Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?

- 2.17 It is important to clarify how legislation in this area interacts with the E-Commerce Regulations, particularly because of concerns over the application of the Regulations to legislation implemented after it. It may also be helpful to consider how new provisions relating to defamation would interact with public enforcement, perhaps by making provision in the Bill for amending the E-Commerce Regulations.

Q29 Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?

- 2.18 Yes. It may be useful to consider the following issues when deciding if notice and takedown procedures might be appropriately used:
- illegality – in particular whether there is an infringement of criminal law
 - proportionality (does the level of harm justify takedown, what will be the impact on the site in question?)

- necessity (the necessity of the use of the take down to deal with the problem)
- status of the party making the request (for example a public body may be more accountable than another natural or legal person, and where they are acting in the public interest it may be more essential to remove content than where there is an infringement of private rights only).

2.19 It is likely to be important that enforcers can quickly access court procedures if this process is not followed voluntarily, where the conditions above have been met.

A new procedure for defamation cases

Q30. Do you consider that a new court procedure to resolve key preliminary issues at an early stage would be helpful?

2.20 The OFT believes this would be a welcome step. Early resolution of key preliminary issues would save time and costs in the longer run and be of benefit to the parties concerned. However it is likely that it would be a better use of court resources to provide for earlier resolution of infringements where the public interest is being impacted – for example where there is harm to the collective interests of consumers.

Power of court to order publication of its judgment

Q37. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?

2.21 Yes, in the interests of transparency. We believe the wider benefits of this approach would promote free speech and also empower consumers by removing the possibility of claimants intimidating consumers by threats of specious legal actions. Communication of court outcomes should act as deterrent to other potential claimants who lack a credible case.

Ability of corporations to bring a defamation action

Q38. Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases brought by corporations or more generally)? If so, what provisions would be appropriate?

- 2.22 Yes, this is an area worth considering carefully. Where substantial inequality of arms exists, would it be possible to have additional pre-court scrutiny to make sure that unmeritorious cases are not heard?