

<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)**

**Option 7:** Responsibility for publication;

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?</b> It will be reviewed. <b>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
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: \_\_\_\_\_ Tom McNally \_\_\_\_\_ Date: \_\_\_\_\_ 29/03/2012 \_\_\_\_\_

# 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

# 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 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.

## Background & Current Law

### *Responsibility for Publication*

- 1.5 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.
- 1.6 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).
- 1.7 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.

## Problem under consideration

### *Publication on the Internet*

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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>

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

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

- 1.8 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.
- 1.9 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 Facebook and Twitter, to smaller scale discussion boards and local forums on specific issues of local interest. The Government considers that the law should be updated and strengthened in order to offer greater protection to all of these types of organisations and the online services that they provide.
- 1.10 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.
- 1.11 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.

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

- 1.12 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.

### ***Responsibility for publication***

- 1.13 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.
- 1.14 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.
- 1.15 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.
- 1.16 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 whilst providing a new overarching framework and terminology to govern the circumstances in which different types of publisher (both online and offline) would be liable either as primary publishers or as intermediaries, and situations where no liability arises. Among other things, this

envisaged renaming people concerned only with the transmission or storage of material without any other influence or control over it as “facilitators”.

- 1.17 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.
- 1.18 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.
- 1.19 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.
- 1.20 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.

### **Economic rationale for intervention**

- 1.21 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 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**

- 1.22 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 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.
- 2.5 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 claimants will pursue their challenge. The main expected effects are therefore an increase in the amount of potentially defamatory material that remains available and also an increase in the number of defamation disputes.
- 2.6 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***

- 2.7 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 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.

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

- 2.8 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.
- 2.9 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.
- 2.10 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.

### **Option 0: Base case (do nothing)**

#### **Description**

- 2.11 Under the “do-nothing” scenario intermediaries would still remain at threat of libel proceedings for material published.
- 2.12 Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).<sup>5</sup>

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

#### **Description**

- 2.13 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
- 2.14 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 do not remove it. Therefore in order to protect themselves from liability, in most cases, they will simply remove the material complained of. This is considered to be having a detrimental effect on freedom of expression, given the material may in fact be defensible.

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<sup>5</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.

2.15 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.

2.16 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.

2.17 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**

2.18 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**

2.19 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 remove the material shortly after receiving a complaint (which we believe to be the case), whereas under the new system, the material is likely to remain posted for some time. The amount of time will depend on whether the intermediary has contact details for the author, and if so whether and how quickly the author responds.



2.20 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.

2.21 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*

2.22 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.

2.23 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*

2.24 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.

2.25 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*

2.26 There may be an increased workload for a transitional period of cases which establish and interpret the new legislation.

2.27 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).

2.28 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*

2.29 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*

2.30 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.

2.31 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*

2.32 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*

2.33 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.

2.34 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.

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

### *Defendants*

2.36 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*

2.37 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.

2.38 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*

2.39 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*

2.40 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*

2.41 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*

2.42 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.

2.43 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.

2.44 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.

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

2.45 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-Commerce 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.

2.46 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.

2.47 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.

## **One In One Out Position.**

- 2.48 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.
- 2.49 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.
- 2.50 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**

- 2.51 Online intermediaries which are micro businesses would benefit from the greater degree of protection offered against the risk of being sued for defamation.

\*\*\* Enforcement and Implementation information and the results of Specific Impact Tests relating to the Defamation Bill were included in the full Impact Assessment produced for the Bill's introduction. This is available at the following link: <http://www.parliament.uk/documents/impact-assessments/IA12-009.pdf>