

《國家安全(立法條文)條例草案》：
煽動性刊物 — “發表”的定義

有議員要求當局考慮參照英國《1996 年誹謗法令》第 1 條內的“發行人”(“publisher”)的定義，為建議的《刑事罪行條例》第 9C 條(有關處理煽動性刊物)中的“發表”一詞下定義。

英國誹謗法令第 1 條內的免責辯護

2. 該英國法令的條文(見附件)為誹謗的侵權行為訂立一項法定免責辯護。誹謗法保障個人聲譽，其一般原則是任何人在沒有合法理由的情況下，不得發表有關他人的虛假和具誹謗性的陳述。侵權法為有關人士提供途徑，讓其透過向法院申索民事補救，以平反聲譽。一般而言，發表永久形式誹謗的人的思想狀況並不影響其應負的法律責任，因為發表誹謗性資料這一行為本身已隱含惡意。

3. 然而，根據普通法，法院對於那些在傳布某永久形式誹謗的事件上只擔當次要角色的人，例如報刊分銷商或圖書館管理員，採取較為寬大的態度。若該人不知道，以及在合理情況下不可能預期他會知道，某作品含有永久形式誹謗，則法庭可能會裁定他沒有發表該作品。

4. 上述法定免責辯護把普通法這種頗為含糊的情況予以釐清。對於誹謗性資料的“作者”、“編輯”或“發行人”(指商業上的發行人)而言，該法定免責辯護並不適用。該法定免責辯護適用於一些在“作者”、“編輯”及“發行人”定義之外，而其工作是以某種形式協助其他人發表資料的人。然而，若他們知情地參與製作某誹謗性刊物，或有理由相信他們正參與製作該刊物，則他們不能引用該免責辯護。被告人有舉證責任證明該免責辯護對其適用。

法令中的“發行人”的定義

5. 該英國法令把“發行人”定義為商業性的發行人，即指某個以向公眾人士或部分公眾人士發表資料為其業務，並在其業務過程中發表了載有被投訴陳述的材料的人士。

處理煽動性刊物

6. 條例草案所建議的罪行（即新的第 9C 條），收納了蓄意煽惑他人這項思想元素。若要將有關人士定罪，控方有舉證責任，即須在無合理疑點的情況下，證明該人懷有這種意圖。因此，若某人“不知道並且沒有理由相信他的作為導致或促成發表”某煽動性刊物，他不可能會被定罪（試比較英國的法定免責辯護）。

結論

7. 把英國法令所訂的定義引入條例草案內新的第 9C 條內，既無需要，也不恰當。

8. 新的第 9C 條的目的，並非把有關罪行的適用範圍，局限於商業性質的發表。某煽動性刊物不論是由以發行刊物為業務的人製作，還是由擁有印刷設施的業餘者製作，都無關宏旨。採用英國法令的定義，將有違有關政策的原意。“發表”一詞，包括了所有向公眾人士傳布的途徑，而“發表”只是第 9C 條提述的多個作為之一而已。給“發表”一詞下定義，並沒有什麼益處。

9. 新增的第 9C 條，已收納了一項思想元素，把無意的傳布和不知悉刊物內容的性質的人豁除。

律政司
二零零三年五月

#66988v2

Defamation Act 1996

1996 Chapter 31 - continued

An Act to amend the law of defamation and to amend the law of limitation with respect to actions for defamation or malicious falsehood.

[4th July 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Responsibility for publication

Responsibility for publication.

1. - (1) In defamation proceedings a person has a defence if he shows that-

- (a) he was not the author, editor or publisher of the statement complained of,
- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose "author", "editor" and "publisher" have the following meanings, which are further explained in subsection (3)-

"author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

"editor" means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

"publisher" means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved-

- (a) in printing, producing, distributing or selling printed material containing the statement;
- (b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;
- (c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
- (d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;
- (e) as the operator of or provider of access to a communications system by

means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to-

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

(6) This section does not apply to any cause of action which arose before the section came into force.

Offer to make amends

Offer to make
amends.

2. - (1) A person who has published a statement alleged to be defamatory of another may offer to make amends under this section.

(2) The offer may be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys ("a qualified offer").

(3) An offer to make amends-

(a) must be in writing,

(b) must be expressed to be an offer to make amends under section 2 of the Defamation Act 1996, and

(c) must state whether it is a qualified offer and, if so, set out the defamatory meaning in relation to which it is made.

(4) An offer to make amends under this section is an offer-

(a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party,

(b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and

(c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable.

The fact that the offer is accompanied by an offer to take specific steps does not affect the fact that an offer to make amends under this section is an offer to do all the things mentioned in paragraphs (a) to (c).

(5) An offer to make amends under this section may not be made by a person after serving a defence in defamation proceedings brought against him by the aggrieved party in respect of the publication in question.

(6) An offer to make amends under this section may be withdrawn before it is accepted; and a renewal of an offer which has been withdrawn shall be treated as a new offer.

Accepting an offer to make amends.

3. - (1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.

(2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.

(3) If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.

(4) If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular-

(a) make the correction and apology by a statement in open court in terms approved by the court, and

(b) give an undertaking to the court as to the manner of their publication.

(5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings.

The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

(6) If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings.

(7) The acceptance of an offer by one person to make amends does not affect any cause of action against another person in respect of the same publication, subject as follows.

(8) In England and Wales or Northern Ireland, for the purposes of the Civil Liability (Contribution) Act 1978-

(a) the amount of compensation paid under the offer shall be treated as paid in bona fide settlement or compromise of the claim; and

(b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 1 of that Act a greater amount than the amount of the compensation payable in pursuance of the offer.

(9) In Scotland-

(a) subsection (2) of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies; and

(b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 3(2) of that Act a greater amount than the amount of compensation payable in pursuance of the offer.

(10) Proceedings under this section shall be heard and determined without a jury.

Failure to accept
offer to make
amends.

4. - (1) If an offer to make amends under section 2, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply.

(2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against the person making the offer.

A qualified offer is only a defence in respect of the meaning to which the offer related.

(3) There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of-

(a) referred to the aggrieved party or was likely to be understood as referring to him, and

(b) was both false and defamatory of that party;

but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case.

(4) The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence.

If the offer was a qualified offer, this applies only in respect of the meaning to which the offer related.

(5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.