

**National Security (Legislative Provisions) Bill :
Seditious Publications – Definition of “Publish”**

The administration was asked to consider adopting a definition along the lines of “publisher” in section 1 of the UK Defamation Act 1996 for the word “publishes” in the proposed section 9C of the Crimes Ordinance relating to handling seditious publications.

The defence in section 1 of the UK Defamation Act

2. The section in the UK Act (see Annex) provides a statutory defence to the tort of defamation. The general rule in defamation, which protects personal reputation, is that no one shall publish a false and defamatory statement concerning another person without lawful justification. The tort provides a means whereby the individual can vindicate his reputation by claiming a civil remedy through the courts. The state of mind of someone who publishes a libel is generally immaterial in determining liability, because malice is implied from mere publication of defamatory matter.

3. However, at common law, the courts took a more lenient attitude towards those who played only a subordinate part in the dissemination of a libel e.g. a newspaper distributor or librarian. Such a person may be held not to have published the work if he did not know, and could not reasonably have been expected to know, that it contained a libel.

4. The statutory defence clarifies the rather uncertain common law position. It is not available to “authors”, “editors” or “publishers” (in the commercial sense) of defamatory material. It is available to others whose work may in some way contribute to the publication of material which someone else has chosen to publish, who are excluded from the definitions of “author”, “editor” and “publisher”. However, the defence does not apply if they knowingly took part in producing a defamatory publication or had reason to believe that they were doing so. The onus is on defendant to show that the defence applies to him.

The definition of “publisher” in the Act

5. The UK Act defines “publisher” as meaning 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 complained of in the course of business.

Handling seditious publication

6. The offence proposed in the Bill as the new section 9C incorporates the mental element of deliberate intent to incite. The onus is placed on the prosecution to prove that intention beyond a reasonable doubt if a conviction is to be secured. It is therefore not possible that someone could be convicted of the offence if “he did not know, and had no reason to believe, that what he did caused or contributed to the publication” of a seditious publication (cf the UK statutory defence).

Conclusion

7. It is neither necessary nor appropriate to adopt the definition provided in the Act into the new section 9C in the Bill.

8. The intention of the new section 9C is not to limit the offence to commercial publication. It is irrelevant whether a seditious publication is produced by someone whose business is publishing as opposed to an amateur with a print facility. Using the definition in the UK Act would be contrary to this policy intention. Publish is meant to include all means of dissemination to the public and “publishes” is only one of a list of acts referred to. There is nothing to be gained by defining “publishes”.

9. As drafted, the new section 9C includes a mental element which excludes innocent dissemination and those who are unaware of the nature of the contents of the publication.

Department of Justice
May 2003

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.