Submissions to the Joint Committee

on the

Draft Defamation Bill

on behalf of

The Booksellers Association of the United

Kingdom & Ireland Limited

Thrings LLP
Kinnaird House
1 Pall Mall East
London SW1Y 5AU

Tel: 020 7766 5600

Ref: MN(3)/01607645/19.5.11

INDEX

Sections

Appendices.

Submissions to the Joint Committee on the Draft Defamation Bill

on behalf of

The Booksellers Association of the United Kingdom & Ireland Limited

---

1. Summary

1.1 We act for The Booksellers Association of the United Kingdom & Ireland Limited ("Booksellers Association") which represents some 3,700 bookshops in the United Kingdom and the Republic of Ireland and is the largest trade association in the world representing booksellers. Amongst the outlets in membership there are large chains with mixed business such as WH Smith, large specialist chains such as Waterstones, large academic businesses such as Blackwells, wholesalers, library suppliers, small independents and supermarkets.

1.2 Considerable concern exists within the book trade as to certain provisions of the Defamation Act 1996 ("1996 Act") and in particular section 1 which has, we believe, inadvertently weakened the common law defence of innocent dissemination and which, senior defamation counsel have advised, section 1 sets out to replace. Booksellers now find themselves in an invidious position: the sale of a book may be stopped simply by the issue of threats – usually contained in a so-called "gagging letter" from the claimant's solicitors - against particular booksellers not to sell that book to the public where no action is at the time being taken against the primary publisher or author.

1.3 In paragraphs 101 to 119 of the consultation paper published in March 2011 ("Consultation Paper") at the same time as the Defamation Bill, the issue upon which we now focus our submissions is raised although directed in large part to another type of secondary publisher, the internet service provider ("ISP"). In broad terms the position of booksellers is similar to that of the ISPs in that neither can – unlike the author and his publisher - be said to create or have editorial responsibility for the passages that offend. Each facilitates the dissemination of the work which contains those words and as such is often referred to as a secondary publisher. There are however some significant differences between the range and subject matter dealt with by ISPs and booksellers respectively and these make it necessary for them to be dealt with differently in certain respects in the law of defamation. We consider this further in section 4 below.

1.4 Freedom of speech and (indirectly) the right to disseminate literature freely is of course dealt with in Article 10 of the European Convention on Human Rights. The

Booksellers Association is of the view that there is a danger that such rights have been and will continue to be eroded unless section 1 of the 1996 Act is amended.

1.5 Since 1997 representations have been made by the Booksellers Association to the (then) Lord Chancellor's Department and various committees appointed by the Government to review the law of defamation, including the Head of Law Reform and Tribunal Policy at the Lord Chancellor's Department, the Law Commission and more recently to Lord Lester. The Booksellers Association has during this time consulted expert defamation counsel: Mr Edward Garnier QC MP and Mr Gordon Bishop.

1.6 In this submission we concentrate upon the problem that has been created by s.1 of the 1996 Act rather than the many other issues upon which comment has been invited by the Joint Committee. We will also comment briefly on clause 9 of Lord Lester's Defamation Bill 2010 which is referred to in the Consultation Paper and upon which comment has been invited.

2. Section 1 of the 1996 Act: the Problem

2.1 Section 1 of the 1996 Act was intended to provide a statutory defence equivalent to the previous common law defence of innocent dissemination to booksellers, newsagents, distributors and other secondary publishers. The protection that the Act was intended to provide in this respect has however proved to be somewhat illusory and – by dint, we believe, of poor drafting - provides less protection to booksellers than that previously afforded by the common law defence of innocent dissemination. Indeed, the provisions of the section have encouraged prospective claimants (often with dubious claims) - who are unwilling for reasons of expediency to commence proceedings against the author or publisher of the allegedly defamatory publications - to take or threaten action against booksellers alone in an attempt to force them to remove such publications from their shelves. As those claimants and their legal advisers clearly realise, booksellers are not in a position to put forward a substantive defence of justification or any of the other defences to libel proceedings because they have no direct knowledge of the subject-matter of the alleged libel. Further, the majority of independent booksellers do not have the means to fight a libel action even if they were to have access to the facts that would enable them to put up the usual defences.

2.2 Under the provisions of section 1 a secondary publisher loses his protection if (inter alia) he knows or has reason to believe that the publication contains any defamatory statement. Under the pre-1996 common law defence of innocent dissemination a reasonable belief on the part of the bookseller that the allegedly defamatory material was not libellous – because, for example, he had been assured by his lawyers or those representing the author or publisher that it could be justified – constituted a

defence for the bookseller. Since 1996, however, because of the way section 1 of the 1996 Act is worded this defence is no longer available. As a result, the claimant can effectively prevent the sale or distribution of the book by simply having a letter written to the bookseller alleging a defamatory passage and threatening legal proceedings against the bookseller unless the book in question is withdrawn. The bookseller cannot now simply claim as a defence that he has a reasonable belief that the defamatory passage is not libellous and continue to sell the book in question.

2.3 Although there are undoubtedly some cases where a claimant may have good reason to sue a bookseller or other secondary publisher, as for example, where the author and publisher are out of the jurisdiction or can no longer be traced or are penniless, in the vast majority of cases where a secondary publisher - and not the primary publisher - is sued it is for the purpose of obtaining an advantage which could not be obtained if the action were taken against the primary publishers themselves. This tactic, in our submission, seeks to exploit an unintended weakness in the drafting of section 1 of the 1996 Act and tilts the balance in a way never contemplated by Parliament against secondary publishers: the need for any of proceedings to be issued is removed and a defence that had often pre-1996 been relied upon by booksellers demolished. This has in our submission weakened the right of free speech and is contrary to the spirit of Article 10 of the European Convention on Human Rights.

2.4 On receiving a letter alleging a defamatory passage in a stocked publication, the bookseller will in the normal course contact the publisher. The publisher will then consider whether or not to give the bookseller an indemnity but may in any event be reluctant to accept back the books unless they have been supplied to the bookseller on a sale or return basis. Whilst the large well-resourced booksellers may be more inclined to ignore threats and accept the risk of litigation, others are unlikely to do so.

2.5 Nor is a publisher's indemnity necessarily an adequate solution to this problem: the publisher may not be willing to give an indemnity; the terms of the indemnity need to be sufficiently wide; the indemnity needs to be backed by substantial financial resources in view of the cost of litigation and possible multiplicity of legal actions; the fact that the publisher is unlikely ever to be able to disclose the amount or scope of any insurance cover that backs the indemnity and the bookseller therefore be in a position to assess the worth of the indemnity.

2.6 The present position is that booksellers who defy a gagging letter may now be put to the expense and under the administrative burden of having to establish one of the formal libel defences. This many will not have the resources to do. We were assured at an earlier meeting with the Lord Chancellor's Department that it had not been contemplated that this would be the effect of the new Act. Nor, had there been any intention to undermine the defence of innocent dissemination.

2.7 In response therefore to the specific question posed in Q.23 of the Consultation Paper we would submit that it is indeed appropriate for the law to be changed to provide greater protection to secondary publishers although within that category a distinction needs to be drawn between booksellers and ISPs and this we comment upon more fully in section 4 below.

3 Some Examples of the Problem

3.1 The Booksellers Association is aware of a number of examples of the problem which has arisen since the coming into force of the Act on the 5th September 1996. In one case David Irving sued individual branch managers of Waterstones for stocking the book "Denying the Holocaust: The Growing Assault on Truth and Memory". In another Neil Hamilton's solicitors threatened a number of booksellers with proceedings for libel if they stocked the book "Sleaze: The Corruption of Parliament". In neither case was action taken or at the time being pursued against either the author or publisher of the book.

3.2 Another example, which occurred at around the time the 1996 Act came into force, relates to the left-wing magazine "Searchlight". The booksellers Housmans and Bookmarks were sued by political opponents of the magazine in an attempt to persuade them not to sell it. Other small bookshops were also threatened with proceedings. In an article in The Bookseller (the booksellers' trade magazine) entitled "BA to fight gagging laws" further instances of gagging are described (see Appendix 1).

4. Booksellers and Internet Service Providers

4.1 The Consultation Paper deals under the heading "Responsibility for Publication on the Internet" (paras. 101 to 119) with the problems faced by secondary publishers and in particular ISPs. Although not made clear from the heading there is also comment directed specifically at or at least relevant to booksellers in their capacity as secondary publishers (see especially paras. 107 and 114). Booksellers and ISPs are bracketed together as secondary publishers where, in our submission and as already mentioned in para.1.3 above, a further important distinction needs to be drawn between these two categories of secondary publisher and the material that each publishes: the distinction exists not only between online and offline as suggested in the last sentence of para. 114 of the Consultation Paper.

4.2 In addition to printed books sold from actual brick and mortar outlets there are a large number of e-books stored and sold online and a significant distinction needs to be drawn between the ISPs and the booksellers in the context of any provision included in the new Defamation Act to amend s.1 of the 1996 Act . In the case of both books

printed off-line and e-books sold online details and the identities of the author and publisher – and in the case of the publisher its place of business – are almost always provided in the book. This is not so however in relation to much other general material – other than e-books - that appears online where neither the identity nor location of the author may be shown.

4.3 The distinction is well illustrated by reports in the national press on 10 May of the leaking of details of so-called super injunctions on Twitter by an anonymous author. The identity of the author and ISP are very difficult to trace.

4.4 The distinction is again highlighted in an article by the sports journalist Gabby Logan which appeared in the Times on 14 May (see Appendix 2). Ms Logan refers to a series of salacious libels against herself published recently on Twitter. In view of the near impossibility of tracing the author without the cooperation of Twitter - not it appears to-date forthcoming – Ms Logan claims that she has no effective recourse. She comments that "If lies tweeted about me had been printed in newspapers then I would have sued". We would suggest that her comments in relation to newspapers applies equally to online books: in both cases the identity of author and publisher could be immediately ascertained.

4.5 Whilst therefore there are similarities there are also differences between these two separate classes of secondary publisher and these differences need to be recognised in the new legislation. It may be that these differences can be dealt with by distinguishing between a secondary publisher who publishes material where the identity of the author and origin of the material can be readily identified – and recourse be readily available against the author and publisher - and a secondary publisher – likely to be an ISP – where it cannot. The distinction is fundamental if the flow of e-literature is to continue unimpeded by any limitations that the new Defamation Bill places upon the ISPs.

5. A Possible Solution

5.1 If indeed it was not the intention of Parliament to undermine the common law defence of innocent dissemination but simply to incorporate it in statue as section 1 of the 1996 Act then some amendment of that section is needed. Only by such amendment can the situation in which the distribution of a book can be prevented simply by a (solicitor's) letter to the bookseller without the need for any proceedings to be issued or the primary publisher/author made party to the measures taken by the claimant. Booksellers neither expect nor seek immunity from liability in respect of the publications they sell, but they should be provided by the new Act with as good a defence as they had under the common law prior to the 1996 Act's coming into effect.

The problem has in our submission been caused by the loose drafting of section 1 and was never intended.

5.2 We would urge that booksellers be free from threats and the risk of proceedings against them unless:

(1) at the time they sold the publication they knew that it was defamatory of the plaintiff and did not reasonably believe that there was a good defence to any action brought upon it; and

(2) the plaintiff has no or no sufficient redress against the author or publisher.

5.3 The wording of (1) above is taken from section 11 of the Defamation Act 1952 which sets out the circumstances in which an agreement for indemnity in respect of civil liability for libel is lawful. There seems to be no reason why such provision should not be introduced in to the new Act by way of a defence for booksellers in relation to both online and printed books. Indeed (2) may be used to deal also with the position of the ISP's.

5.4 Further, to avoid "gagging" letters or writs against secondary publishers the claimant should not be entitled to sue or obtain interlocutory injunctions against them, unless at the same time (or before) he also brings proceedings against the author, editor and publisher unless there are good grounds for not doing so.

6. Some Suggested Amendments to Section 1 of the 1996 Act

6.1 In response to Question 24 of the Consultation Paper - and in so far as it applies to booksellers – we would submit that the best course would be for section 1 of the 1996 Act to be completely re-written. At the very least sub-section (1) should be amended to read something along the following lines:

"In defamation proceedings a person has a defence if he shows that he was not the author, editor or publisher of the statement complained of, unless at the time of publication:

(a) he knew or had reason to believe that it was defamatory of the plaintiff; and

(b) he had no reasonable grounds for believing that there was a good defence to any action brought upon it.

The burden of proof shall be upon the claimant to prove that such a defendant knew or had reason to believe that the statement was defamatory of him and upon the defendant to prove that he had reasonable grounds for believing that there was a good defence to any action brought upon it. "

6.2 Sub-section (5) should be deleted and a new sub-section (5) introduced to provide something along the following lines:

"No proceedings for defamation shall be commenced against a defendant who is not the author, editor or publisher of the statement complained of unless:

(a) one or more of the author, editor or publisher are made defendants in the proceedings or proceedings have already been commenced against one or more of them; or

(b) the author, editor and publisher are not within the jurisdiction of the court or it is otherwise impractical or unreasonable for the plaintiff to take proceedings against the author, editor and publisher."

6.3 It might also in our submission be desirable for the new Act to include provision that:

(i) in proceedings brought under (a) above against a primary and a secondary publisher the proceedings against the secondary publisher should be stayed until after the action against the primary publisher has been tried and determined or otherwise disposed of;

(ii) a plaintiff should not be entitled to commence proceedings under (b) without the leave of the Court;

(iii) a plaintiff should not be entitled to recover damages or costs against a secondary publisher save in a case falling within (b) above or unless there is another good reason for joining the secondary publisher as a defendant.

6.4 So as to reduce further the risk of vexatious gagging letters or proceedings against booksellers we would suggest that there be introduced provision that a wrongful threat to bring proceedings against booksellers should, as in patent law, be actionable by the person aggrieved by that threat.

7. <u>Lord Lester's Defamation Bill 2010 ("Lester Bill")</u>

7.1 Issues were raised in the Consultation Paper that related to the Lester Bill and accordingly in response to Question 26 it might assist for us to let you have some comment on section 9 of the Lester Bill which covers in part the responsibilities/liabilities of a secondary publisher.

7.2 There should, as we have already commented, be a requirement that the claimant has, before issuing proceedings against a secondary publisher, first or at the same time issued a writ against the author, editor (if any) and publisher with a possible exception if the claimant can establish that the author, editor (if any) and publisher are all outside the jurisdiction or that it is for some other reason impractical or unreasonable to expect the claimant to issue such proceedings.

7.3 The claimant should be required to establish that at the time of publication the secondary publisher knew that the passage was libellous and had no reasonable grounds for believing that there was a good defence to the action.

7.4 The burden of proof in relation to the notification defence in section 9 is upon the claimant (section 9(2)) and this should extend to the defences proposed in para 5.2 above.

7.5 In addition further provisions may be considered: (i) a requirement that before a claimant can bring proceedings under para. 5.2 above the Court's consent be obtained (ii) if proceedings have been/are at the same time commenced against the primary publisher then those against the secondary publisher should be stayed pending the outcome of the primary publisher action.

7.6 It is not entirely clear that the definition of "primary publisher" in section 9(6) clearly excludes a bookseller which of course it should. We assume also that the definition of "facilitator" is not intended to include a bookseller but this too is unclear. Some further minor drafting would need to be made to help achieve clarity.

8. Conclusion

As already mentioned, the Booksellers Association has on a number of occasions since 1997 made representations on behalf of its membership to the (then) Lord Chancellor's Department, the Law Commission et alii in relation to the innocent dissemination defence that is of fundamental importance to the bookselling industry. We hope that with a new Defamation Act under consideration there is now the chance to restore the balance between claimant and bookseller where it has been tilted too far in the favour of the claimant.

If any clarification or further comment is required, please do not hesitate to contact the author of this submission: Mr Michael Nathanson OBE, Consultant at Thrings LLP, Kinnaird House, 1 Pall Mall East, London, SW1Y 5AU, ddi: 020 7766 5659, email: mnathanson@thrings.com.

---

19 May 2011