

**A CRITICAL REVIEW OF THE
DEFAMATION BILL**

A Critical Review of the Defamation Bill, 2006

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Media Foundation for West Africa

The Media Foundation for West Africa is a regional independent, non-profit, non-governmental organization based in Accra, Ghana. It was established in 1997 to defend and promote the rights and freedoms of the media, and generally, to help expand the boundaries of freedom of speech and expression in West Africa.

Objectives

The objectives of the *MFWA* are to:

1. Promote the Freedom, Independence and Responsibility of the mass Media;
2. Monitor, publicise and alert public opinion to oppose and resist violations and attacks on Media Rights and Freedom of Expression;
3. Advocate Defence of and support for victims of arbitrariness and repression;
4. Research into policy issues and regulations affecting Media Rights, Freedom of Speech and Expression;
5. Make interventions to reform media legislation that may be inimical to freedom of expression and media freedom;
6. Serve as a documentation centre and resource base to provide research results, data and information to Mass Media, professional organisations, NGOs, governments and inter-governmental agencies;
7. Provide training and other support to strengthen the professional capacity, independence and social responsibility of the mass media;
8. Provide a platform to stimulate discussion and education for the advancement of ideas on Media Rights and Freedom of Expression;
9. Support Mass Media in projects for the promotion of Human Rights, Peace and Democratic institutions;
10. Support the development, growth and strengthening of independent mass media.

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INTRODUCTION

In the repression of the media's critical function to keep public officials accountable and responsive to citizens' demands and interests, an important instrument for the state has always been legislation that seeks to criminalise media expression and speech generally.

Thus, though governments in most African countries in the 1990s acceded to demands for ending state monopoly of media to usher in private and independent ownership, they held fast to (and many also added new) legislation that criminalised media expression of various sorts. Such legislation — and they are legion — has been the bane of critical journalism throughout colonial and most of post-colonial Africa. Therefore, the demand for the repeal or abolition of such legislation has always been central to demands for press freedom and freedom of expression specifically and democracy generally.

In Ghana, as elsewhere, next to arbitrary arrests and detention, criminal legislation on speech is always the first and most important critical instrument employed by intolerant and authoritarian governments to silence citizens.

The rampant use of these legal instruments can be said to have been the source of much of the public's hostility to, and fear of, the governments of the Provisional National Defence Council (1982–1991) and its mutation successor, the National Democratic Congress (1992–2000).

Similarly, the election promise to repeal, and the actual repeal, of the Criminal Libel and Seditious Libel laws¹ by the New Patriotic Party (NPP) and its government in 2001 can be said to have been a major source of the party's public support and goodwill.

The highly open space for free expression in Ghana is unarguably the country's most important gain in the people's struggle for democratic public life, space, culture and governance. And the repeal of criminal libel and seditious libel laws has certainly been one of the most important legal instruments, enhancing the open space formally guaranteed by the relevant provisions of the 1992 Constitution.

In Africa, however, it still remains generally the case that one of the strongest and commonest tendencies among governments of all political coloration is the propensity to silence the media and citizens. In a sense,

¹ Criminal Code (Repeal of Criminal Libel and Seditious Libel Laws) (Amendment) Act, 2001 (Act 602).

this is a tendency that finds ready consensus among African governments. It is within this logic that one observes across the continent a flurry of efforts in recent years to introduce new criminal or other legislation with the intent to restrict and constrain media freedom, or to reverse gains made.

Thus, though the NPP government took the bold step of repealing many of the laws criminalising free expression by the passage of Act 602, there have, since the repeal of these laws, been calls by Ministers of that very government and other leading public officials for the reintroduction of these repressive laws. Indeed, following the repeal of the criminal and seditious libel laws, these forces, including very powerfully a former Chief Justice, made open their opposition to the new Act.

The NPP government's Defamation Bill, which is critically reviewed here by the Media Foundation for West Africa (MFWA), can be seen within this African context of the state's reflexive tendency to mute or silence free expression.

As the critique here points out, the Defamation Bill seeks to take away from the people with the left hand what the NPP government gave with the right. The tendency of self-proclaimed democratic states taking back rights the people have won and enjoy is not new. It simply shows that the social political forces originally opposed to those rights within the state may now have ascendancy. Or it may be that the government has found the boldness of the media in Ghana, which sometimes borders on recklessness, too much to stomach and therefore finds the need to limit free expression through the mechanism of a restrictive civil defamation law.

Added to all these, however, is the state's need to limit public scrutiny of its deeds. Combined with the NPP government's lack of enthusiasm to pass a transparent and democratic Right to Information law, it is tempting enough to conclude that, in its efforts to consolidate power and with the much-touted expansion of private business interests, the NPP government finds it necessary to introduce legislation that obstructs the media's inquisitiveness about, and restrains the citizens' right to question, officialdom.

We publish this critique, not as the last word on this very critical legislative issue, but to open up a vigorous and widespread public debate, and to launch a campaign to stop the passage of this dangerous bill.

Media Foundation for West Africa
Accra

September 30, 2008

A CRITICAL REVIEW OF THE DEFAMATION BILL, 2006

We have been requested by the Media Foundation for West Africa (MFWA) for our written legal opinion on, and critical review of, the Defamation Bill 2006, which has been drafted by the Attorney-General's Office for consideration by Cabinet and eventual presentation before Parliament and passage into law. The Bill is the product of recommendations from the Law Reform Commission first made as far back as 1984, when the country was under military rule.

EXECUTIVE SUMMARY

1. The policy objectives of the Bill are twofold. First, to provide a unified law of defamation applicable to all parties regardless of nationality and to combine the respective elements of common law and customary law defamation considered compatible with the needs of the country. Secondly, the Bill, in its own words, seeks to '*augment (sic!) the civil rights of the individual in so far as they relate to defamation*'.
2. The need for legislation on defamation that regulates the fundamental right of freedom of expression and of the media is undoubted. And to the extent that the Bill seeks to establish a unified law that combines elements of customary law defamation and common law defamation it is to be welcome.
3. There are of course some positive and forward looking provisions in the Bill, such as the new defence of fair report in section 7 and the provisions on unintentional defamation and offer of amends, in sections 32 and 33. Even here, section 33, in our view, could be better formulated and we recommend such reformulation. The abolition of the distinction between slander (spoken or oral defamatory words) and libel (written or more permanent defamatory expressions) is also welcome, especially in this era of burgeoning radio and television stations, where the spoken word can have even more devastating effect than print matter.

4. The Bill however fails to take in consideration as its guiding principle the radically new legal framework governing freedom of expression, introduced into our municipal law with the coming into force of the Constitution, 1992, especially the constitutional guarantee of the fundamental human right to freedom of expression in Article 21(1) (a) and the whole of Chapter Twelve of the Constitution of the Republic on the freedom and independence of the media. This fundamental defect, in our view, renders the Bill incompatible with the aspirations and quest of our people for liberty and with the needs of the country.
5. What is more, the Bill is defective in many other respects.
6. Its provisions are in some respects poorly formulated, self-contradictory and tend to conflate different subjects and issues. The result is that the Bill suffers from ambiguity, lack of clarity of expression and differentiation of issues.
7. While one would have expected that the Bill would give greater ambit for the enjoyment of freedom of expression and of the media than pertains at common law, the sad reality is that the Bill, in many respects, falls far short of even the standards of the English common law and existing legislation on freedom of expression, not to mention the more libertarian and progressive developments in the judicial pronouncements of North American, South African, Indian and even Australian variants of the common law. Some of the limitations on free expression in the Bill are a throw back to the medieval times of the Star Chamber. Thus, the defence of justification may not avail a person who publishes defamatory matter if he is unable to show that the publication was for the public benefit. Again by virtue of sections 10 and 11 of the Bill a party or witness in judicial proceedings may be sued for defamation in respect of what he/she says in court in the course of judicial proceedings. Even a judge in making statements in the course of judicial proceedings is by virtue of section 12 of the Bill liable to a defamation suit if there are “*distortions of facts or malice*”. This particular provision not only departs from the well-established common law principle protecting judges from liability to civil or criminal action in the exercise of their judicial functions. It is

clearly inconsistent with, and in contravention of, Article 127 of the Constitution which prescribes the independence of the judiciary as a fundamental pillar of our democracy. Furthermore, *official reports* of proceedings of Parliament, the Cabinet, District Assemblies or commissions of enquiry are open to defamation suits, if there are distortions as Section 15 (a) and (c) prescribe. This is inconsistent with well-established principles providing absolute privilege for such reports. It is our respectful view that the remedy against distortions and falsehood in official reports is the correction of such reports upon due application and not an action in defamation. Again, the Bill provides in section 26 excessively intrusive remedies and wide powers of enforcement in favour of a successful plaintiff against the assets of directors or officers of a defendant publisher who is a corporate body, where the assets of the corporate body do not satisfy the damages awarded. Such remedies are not ordinarily available at common law or in company law.

8. In the result, it is indeed difficult to avoid the conclusion that the Bill has been crafted as a response to the repeal of the much criticised and discredited criminal and seditious libel laws and further that it constitutes a means of re-introducing through the backdoor of civil defamation some of the strictures of these laws that criminalised free expression and which were repealed in 2001 by the Criminal Code (Repeal of Criminal Libel and Seditious Libel Laws) (Amendment) Act 2001 (Act 602). This was, in fact, explicitly admitted in an earlier memorandum to the Bill that cited the repeal of the criminal libel and seditious libel laws as one of the policy reasons for such a defamation bill. Even though that admission is deleted in the final memorandum, the Bill may well be viewed as an appeasement of those in government and other politicians and public figures who have been clamouring for the re-introduction of these repressive laws following their repeal. The wording of paragraph (d) (i) of section 2(2) is the exact reproduction of the offence of seditious libel, the erstwhile section 185 of the Criminal Code which was repealed by Act 602 in a bid to promote a more libertarian political culture. Its re-introduction, even though as a civil wrong, is thus a major step backwards. Furthermore, the idea of the Government, through the Attorney General, instituting a defamation

suit to vindicate the “*reputation of the people of Ghana or the Government*” recalls some of the sinister systems of a closed and repressive political system and can hardly be justified in a republican democracy. In particular, the idea of Government instituting a civil action for damages against a citizen for defamatory matter is simply to stand our whole system of representative government and the constitutional sovereignty of the people on its head. What is more, it can easily become a cynical instrument in the hands of the government of the day to stifle freedom of expression, dissent and criticism. It is certainly not reasonably necessary for the protection of the rights and freedoms of individuals or the public interest. It is clearly inconsistent with, and in contravention of, the constitutional provisions on freedom of expression and the requirements of probity and accountability in public affairs. As the memorandum to the law repealing the criminal and seditious libel laws stated: ‘*The dangers implicit in the retention of these laws for an open, free society are now plain for all to see. The laws are unworthy of any society seeking to develop on democratic principles, on the basis of transparency and accountability*’ This is still valid.

9. In the circumstance, we would strongly urge that the whole Bill be withdrawn.
10. In its place a new defamation bill which takes account of the constitutional guarantee of freedom of expression and of the media should be drafted in active consultation with all key stakeholders and the general public.
11. Such a new Bill should be more expansive in its protection of the right to free expression and media freedom than the common law. In particular, it is strongly recommended that we take a cue from the experiences of the US, South Africa, India and Australia to mention a few common law jurisdictions where special principles governing restrictions on political expression and expression on governmental and state affairs at the very least are recognised. We would in this vein propose that there ought to be a defence of qualified constitutional privilege in such situations and that the burden of proof be shifted onto the political or public figure that sues for defamation. This is

especially the case where account is taken of the preamble of the Constitution which emphasises probity and accountability in public affairs and Article 162(5) that places on the mass media the onerous responsibility of holding government accountable to the people of Ghana. We believe that ordinary principles of fairness and reciprocity should require that in the discharge of their constitutional responsibility the media and political expression generally ought to be given protection beyond what is available at common law. There is thus a legitimate case for the defence of *qualified constitutional privilege*, which ought to be captured in any defamation legislation of our times. This way we would be coming full circle to meet the spirit and letter of the Constitution.

12. Finally, we would urge that the more egregious provisions we have noted in the Bill should not be part of any new Bill so as to ensure that whatever defamation legislation our Parliament may eventually enact is in conformity with the provisions of the Constitution on freedom of expression and of the media.

DETAILED REVIEW

Introduction

The memorandum to the Bill

According to the memorandum to the Bill, the main objects of the Bill are to provide a unified law of defamation applicable to all parties regardless of nationality and to combine the respective elements of the common law and customary law defamation considered compatible with the needs of the country. The memorandum also states (and here is the catch) that the Bill is to ‘*augment (sic!) the civil rights if the individual in so far as they relate to defamation*’.

There can be no doubt of the need for legislation on defamation which unifies the legal regime regardless of nationalities and personal laws and combines elements of common law and customary law defamation. It would, however, seem to us that an essential and necessary consideration for reform of our defamation law ought to be the radical change in the legal scheme of things introduced by the entrenched constitutional provisions on freedom of expression and of the media.

Lack of a perspective of the implications of the Constitution, 1992

We have accordingly reviewed the Defamation Bill 2006 from the perspectives of the constitutional guarantees of freedom of expression and the independence and freedom of the media as enshrined in Article 21(1) (a) and the whole of Chapter Twelve of the Constitution of the Republic. For, with the coming into force of the Constitution 1992, the fundamental principles governing freedom of expression and media freedom have undergone radical change in favour of freedom of expression. The right to freedom of expression was constructed as a key and entrenched foundation in the constitutional scheme of things. This is because of the central role that, in the view of the framers of the Constitution, free expression and media freedom were expected to play in our democracy and quest for liberty. Unfortunately, the Bill fails to take account of this fundamental change in our law, and accordingly is, in our view, not compatible with the substantive needs of the country.

What is even more surprising is the fact that the Bill falls far short of even English common law standards of free expression, not to mention the more progressive developments in the judicial pronouncements of North American, South African, Indian and even Australian variants of the common law. The current Bill even makes judges, parties and witnesses who make defamatory statements in the course of judicial proceedings liable if they contain distortions of fact. Even *official reports* of proceedings of Parliament, Cabinet, the District Assemblies and commissions of enquiry may ground an action in defamation under the Bill should such reports contain distortions of facts. The assets of directors of corporate bodies, found liable, may be attached in execution of award of damages. Even the truth of the publication may not be a defence if the publication is not in the public interest or for the public benefit. In the result, the Bill hankers back to the medieval views of the Star Chamber on free expression calculated to protect 'the great men of the realm', government and the Church from criticism, positions that have even partially been abandoned by English common law. It even includes such archaic provisions, as those on blasphemous publications!

It is indeed difficult to avoid the conclusion that the Bill has been crafted as a response to the repeal of the much criticised and discredited criminal and seditious libel laws and further that it constitutes a means of re-introducing through the backdoor of civil defamation some of the strictures of these laws that criminalised free expression and which were repealed in 2001 by the Criminal Code (Repeal of Criminal Libel and Seditious Libel Laws) (Amendment) Act 2001 (Act 602). This was explicitly admitted in an earlier memorandum to the Bill that cites the repeal of the criminal libel and seditious libel laws as one of the policy reasons for such a defamation bill. In that sense, the law may well be viewed as an appeasement of those in government and other politicians and public figures who have been clamouring for the re-introduction of these repressive laws following their repeal.

There are, of course, some positive and forward looking provisions in the Bill, such as the new defence of fair report at section 7, the provisions on unintentional defamation and offer of amends, in sections 32 and 33. Even here, section 33, in our view, could be better formulated and we recommend such reformulation. The abolition of the distinction between slander (spoken or oral defamatory words) and libel (written or more permanent defamatory expressions) is also welcome, especially in this

era of burgeoning radio and television stations, where the spoken word can have even more devastating effect than print matter.

The Challenges Posed by the Bill

We are thus compelled respectfully to observe that the Defamation Bill 2006 is, in many respects, a huge step backwards for the people of Ghana and their quest for democracy and ought not to be allowed to be passed into law in its current form and content. It is even debatable whether or not many of the provisions in the Bill could stand the test of constitutionality if they became law. But need we wait till a bad Bill becomes law before we mount a constitutional challenge to it? We think not. This critique is therefore aimed at generating public discussion and contributing to a critical and informed understanding of the current provisions of the Bill against the background of the common law and the provisions of our Constitution. The ultimate objective is to influence the final outcome of the Bill so that it is consistent with the Constitution of the Republic.

Common Law and Customary Law Defamation

Historically, it is to be noted that defamation in Ghana has been governed by a system of duality: customary law defamation and English common law defamation. To the extent therefore that the Bill seeks to unify these two strands of defamation in our jurisprudence it is to be welcome, provided the reform is consistent with the provisions of the Constitution and promote free expression. Customary law defamation is in respect of *spoken* defamatory words that cause injury to the reputation of another. If false, they are actionable. Unlike common law slander that, as a general rule, requires proof of special damage or injury to be actionable, customary law defamation is actionable *per se*, that is, without proof of any specific damage, provided the words injure the reputation of the person in society. There is, in addition, a twist to customary law defamation, namely that mere vituperative words spoken in the heat of anger or a quarrel which are insulting and injure the feelings of the other party are actionable. The fact that the words are spoken in the heat of a quarrel may only go to the quantum of damages awarded.

English common law defamation, that is libel (written or other more permanent expressions that are defamatory), on the one hand, and slander

(that is oral or spoken defamatory words), on the other hand, became an integral part of the laws of the Gold Coast Colony when English common law was imposed on the colony as received law and subsequently continued in force in the Gold Coast by legislation and the various Constitutions we have adopted as a people.

What is to be noted of English common law defamation is that it had its roots in medieval times. It was censorial law. With the invention of the printing press both criminal and civil defamation laws were developed and applied with a vengeance to silence otherwise legitimate political criticism and the irreverent emerging press that did not consider any hitherto sacred topic any longer hallowed. English common law defamation has largely continued to maintain these essential characteristics of its origins to date. Thus, under English common law, where a person makes a defamatory statement of, and concerning, another, the scales of justice are tilted heavily against that person in favour of the aggrieved party. All that the aggrieved person has to do is to show:

- (1) that the words are capable of a defamatory meaning;
- (2) that the statement was indeed made by the party sued (the defendant) to some person other than the person defamed;
- (3) that the statement was about the aggrieved party (the plaintiff); and
- (4) finally that the statement had the effect of lowering the reputation and good name of the aggrieved party “*in the estimation of right thinking members of the society generally*” or exposing the person to public scorn or ridicule.

Once these essential ingredients were demonstrated, the common law makes a fundamental presumption that the statement complained of is false. A person who therefore publishes defamatory matter of, and concerning, another is liable to an expensive legal suit and prohibitive damages, as we have been witnesses to, unless he or she can persuade the court by *admissible evidence* that what he/she published is protected under one of the limited defences recognised by the common law. A heavy burden is accordingly placed on the defendant to demonstrate that he or she is protected by the very limited defences available in common law to a defamation suit. It is in this sense that English common law defamation

is considered censorial, as it tends to place an undue premium on the protection of the reputation of persons at the expense of unduly inhibiting free speech, *the oxygen of democracy*. Even here, English common law has made some interesting developments, including the English House of Lords decisions in *Derbyshire County Council v. New Times*, which we shall presently discuss, and in *Reynolds v. Times Newspaper*. In the *Reynolds* case even though the House of Lords held that the common law would not develop a new subject matter category of qualified privilege in respect of publication to the public at large on political matters, it nonetheless held that “*qualified privilege would be available in respect of political information upon the application of the common law test of whether there had been a duty to publish the material to intended recipients and whether they had an interest in receiving it, taking into account all the circumstances of the publication, including its nature, status, and source*”, in short if the journalist had acted ‘responsibly’ in making the publication. Unfortunately, the category of responsible publication/journalism appears to be so narrowly drawn as not to afford much of a defence.

These limitations of English common law defamation on free expression have, for example, prompted the launch of a new bill in the US by two US senators, Arlen Spencer and Joe Lieberman called ‘the Free Speech Protection Act’ to protect US citizens against English libel laws.

Scheme of the Critique

We propose to examine the provisions of the current Bill against the backdrop of English common law defamation and customary law defamation as well as existing law in order to identify the departures therefrom, if any. We shall examine whether such departures contribute to the promotion of freedom of expression and the general good of society. We shall then relate the provisions of the Bill to defamation law in some countries of the common law tradition that enjoy constitutional guarantees for freedom of expression and see how the provisions of the Bill measure up to those guarantees as elaborated by judge-made law. Finally we shall look at the Bill from the perspective of the constitutional guarantee of freedom of expression and of the media as enshrined in the Constitution of the Republic.

Defamation under the Bill

The Bill provides in section 1 thereof that a person is liable for defamation where he publishes defamatory matter “without lawful justification”. The introduction of the phrase *lawful justification* is rather infelicitous in view of the fact that the defence of “justification” has a specific and well-established meaning in our jurisprudence. The use of that phrase in the definition section thus tends to create ambiguity. We would thus suggest that that phrase is replaced with the phrase “without lawful defence”.

In section 2 (2) the Bill defines what is meant by defamation or defamatory or insulting matter thus:

2(1) for purposes of this Act, “defamation” means

- (a) *the intentional false communication, . . . [Italics added]*
which directly or by insinuation or irony . . . etc.

The definition includes what would normally be considered defamatory, that is matter or publication, whether oral and written, that injures the reputation of another, lowers his esteem, or that is intended to excite adverse or derogatory or unpleasant opinions against another, or to hold the person in ridicule, scorn or contempt. These do not constitute any departure from existing law. The wording of the definition, however, tends to conflate defamatory matter with its falsehood or intentional or malicious publication. This does not allow for clarity of expression. The introduction of ‘*intentional*’ may tend to complicate matters, for, what the publisher intended his words to mean is immaterial. Even though the use of the word ‘*intentional*’ may have been aimed at dealing with the problem of unintended reference to a party who was not the object of the publication, it is our view that the introduction of the word ‘*intentional*’ may confound the problem rather than provide illumination. For, the defendant who publishes the defamatory matter may not have intended to injure the plaintiff’s reputation at all and yet his words may have that objective effect in the eyes of right-thinking members of society.

Again, though some formulations of the meaning of defamatory matter incorporate the element of falsity, what is decisive is whether the publication tends to lower the reputation of the plaintiff in the estimation of right thinking members of society or whether it tends to cause the person to be

shunned or avoided by others or to expose him/her to ridicule, contempt or hatred. It is our respectful view that the falsity of the publication is technically not a necessary part of its defamatory nature. Indeed, the falsity of the publication is presumed at common law in favour of the plaintiff. To formulate the matter in terms of falsity may therefore tend to shift the burden of proof of the falsity of the publication onto the aggrieved party. This clearly does not seem to be the intention of the draftsman. It is accordingly our respectful view that in defining what is defamatory, we should only be concerned with whether or not the matter is calculated or tends to injure or damage the reputation of another or to hold the person to ridicule scorn etc. in the estimation of right-thinking members of the society generally. The falsehood of the publication or the intentional/unintentional reference to the aggrieved party ought to go to the existence of possible defences or otherwise. Equally, the malicious character of the publication goes to the defeat of the possible defences of qualified privilege or fair comment. The issues should therefore not be conflated.

In other words, a publication may be defamatory in the technical legal sense and yet may be true or not published with malice. In addition, the definition section does not qualify what is defamatory from the perspective of '*right-thinking members of the society*'. We would accordingly suggest that the phrase 'intentional false' be deleted from the definition and that the element of '*right-thinking members of the society generally*' be inserted in it. Indeed, the definitional problems of what constitutes defamatory matter have been such that most common law judges have avoided attempting laying down hard and fast rules or exhaustive definitions and have rather tended to confine themselves to stating principles that assist in determining whether a matter is defamatory or not.

What is however more disturbing in section 2 are the provisions of section 2(2) (d) which make defamatory the publication to any person whether publicly spoken or by other means of a statement which:

- “(i) injures or damages the reputation or is likely to injure or damage the reputation of the people of Ghana or the Government;
- (ii) encourages or is likely to encourage disrespect for the nationhood of Ghana, the national symbols or the emblems of the Republic”

An action for defamation under paragraph (d) of section 2(2) shall be brought by the Attorney-General against the offending party. There are a number of difficulties with this paragraph.

First, it can be seen that the wording of paragraph (d) (i) is the exact reproduction of the offence of seditious libel, the erstwhile section 185 of the Criminal Code which was repealed by Act 602 in a bid to promote a more libertarian political culture. Its re-introduction, even though as a civil wrong, is thus a major step backwards. It involves an attempt to take back with one hand what was given with the other. What is more important however is that the idea of the Government, through the Attorney General, instituting a defamation suit to vindicate the “reputation of the people of Ghana or the Government” recalls some of the sinister systems of closed and repressive political systems and can hardly be justified in a republican democracy. It is certainly not reasonably necessary for the protection of the rights and freedoms of individuals or the public interest.

The idea of the Attorney-General initiating a civil action to vindicate the reputation of the people of Ghana is at best ridiculous and wholly uncalled for. What, may we ask, is the reputation of the people of Ghana? Such an illusory and ephemeral category should not be the basis of a positive law limiting free expression in a democracy. On the other hand, the idea of the Government instituting a civil action for damages against a citizen for defamatory matter is simply to stand our whole system of representative government and the constitutional sovereignty of the people on its head. What is more, it can easily become a cynical instrument in the hands of the government in power to stifle freedom of expression, dissent and criticism. Even English common law defamation principles, which can hardly boast of their libertarian ethos, do not permit a public or governmental authority or body to sue a citizen for defamation. Thus, the English House of Lords in the seminal case of *Derbyshire County Council v. New Times Newspaper* held in 1990 that a governmental body or authority had no locus standing to sue for defamation, as the government was the agent and servant of the people it served and represented. **The Law Lords held that since the threat of a civil action for defamation would place an undesirable fetter on freedom to express criticism of a democratically elected government body, it was contrary to the public interest for institutions of central or local government to have any right at common law to maintain an action for defamation.**

Paragraph d (ii) of Section 2(1), on the other hand, appears at first sight to be simply a reproduction of clause 4 (e) of Article 21 of the Constitution. A closer examination of the paragraph however shows that there is a material and significant departure from the wording of clause (4) (e) of Article 21. For that sub-clause makes provision for laws reasonably required for safeguarding Ghanaians against “*the teaching or propagation of a doctrine that exhibits or encourages* disrespect for the nation hood of Ghana, the national symbols and emblems”. [Italics added]. In other words, the constitutional provision from which paragraph (d) (ii) purports to be derived refers to “**the teaching or propagation of a doctrine**”, not just a statement published or publicly spoken. Again the provisions of the Constitution are precise. They refer to a doctrine that in fact “**exhibits or encourages**”. Nothing is said about statements that are “likely to encourage. . . .”

In view of the foregoing, it is our respectful view that the wording of section 2(2) (d)(ii) of the Bill is inconsistent with, and in contravention of, Article 24(4)(e) of the Constitution. It should therefore be reformulated to bring it into conformity with the provisions of the Constitution.

Available Defences

We propose at this stage to look at the defences available in the Bill to a defamation action and to relate them to the position at English common law.

In general, the defences available to an action in defamation at common law are:

- (i) the defence of absolute privilege;
- (ii) the defence of justification, that is, the defence that the statement or all the material allegations in the statement are indeed true;
- (iii) the defence of qualified privilege, that is the statement was honestly made believing it to be true on an occasion of qualified privilege, even if it turns out to be false; or
- (iv) the defence of fair comment.

Absolute Privilege

Common Law

At English common law or in existing law, the defence of absolute privilege

is a complete and unassailable defence where applicable even if circumscribed to a very limited set of occasions. These are:

- (a) statements made in the course of judicial proceedings; (thus for example no action will lie against a witness, judge, lawyer or party who makes defamatory statements of another in the course of giving evidence even though the statement is irrelevant, spoken maliciously and without reasonable or probable cause — the policy reason for this is to keep the streams of justice open and enable witnesses to speak their mind in court without continually calculating whether or not what they say would be the subsequent subject of a prohibitive defamation action);
- (b) statements contained in documents in judicial or quasi-judicial proceedings;
- (c) statements made by members of parliament in the course of parliamentary proceedings, even if they are untrue and known by the member of parliament to be untrue.
- (d) statements made by an officer of the state to another officer in the course of his official duty;
- (e) statements contained in official reports of parliamentary proceedings;
- (f) fair and accurate reports in a newspaper/media of proceedings of a court of law which is open to the public.

It is for the person claiming any of these heads of absolute privilege to prove the facts that will bring the statement within the privilege.

Provisions under the Bill

Under the Bill however, these occasions of absolute privilege at common law no longer enjoy the status of absolute privilege. Rather, the Bill introduces the inelegant and self-contradictory term of *qualified absolute privilege*. For example, under section 10 of the Bill, a defamatory matter published by a party to judicial proceedings in the course of the judicial proceedings and as part of such proceedings is only privileged “*if it relates specifically to the subject matter of the judicial proceeding and there is no distortion of facts*”. Similar provisions can be found in section 11 of

the Bill in respect of a witness giving evidence in judicial proceedings. Thus, under the proposed Bill, a party or witness in judicial proceedings may be sued for defamation in respect of what he/she says in court in the course of judicial proceedings. Even a judge in making statements in the course of judicial proceedings is by virtue of section 12 of the Bill liable to a defamation suit if there are “*distortions of facts or malice*”. This particular provision not only departs from the well-established common law principle protecting judges from liability to civil or criminal action in the exercise of their judicial functions. It is clearly inconsistent with, and in contravention of, Article 127 which prescribes the independence of the judiciary, as a fundamental pillar of our democracy. Specifically, it constitutes a blatant violation of Article 127 (3) which provides as follows:

“A Justice of a Superior Court or any person exercising judicial power shall not be liable to any action or suit for any act or omission by him in the exercise of his judicial functions”

In sharp contrast to this, the Bill in section 8(1) simply endorses Article 116 of the Constitution that provides for absolute parliamentary privilege for Members of Parliament in respect of statements made during parliamentary proceedings. Of course, this is as it should be. For parliamentarians should be free to express themselves without any inhibitions, just as parties, witnesses and lawyers should not be inhibited in what they say in the course of judicial proceedings for fear that what they say may become the object of a crippling defamation action. What ought to be noted here is that the court has the power to commit for contempt of court any party, lawyer or witness who launches outrageous and irrelevant attacks on others in the course of judicial proceedings. There is also the possibility of a party or witness being charged with the offence of perjury.

In subsection 2 of section 8, the Bill once more betrays its general censorial spirit in the following self contradictory manner:

“8(2) An *accurate live broadcast* by a broadcaster of the proceedings in Parliament is protected by privilege, *where there is no distortion in presentation*”. [Italics added]

Part of the difficulty is that where the live broadcast is accurate,

there can be no question of there being distortions in presentation. In other words, where the live broadcast is presented with distortions, it is not accurate.

We would respectfully propose that the clause be deleted as not adding any value to the provision but rather promoting ambiguity.

Section 15 of the Bill equally suffers from lack of clarity in expression, as it places under one section *official reports* of proceedings of Parliament, Cabinet and commissions of enquiry, on the one hand, and accurate reports by the media of judicial proceedings in public, on the other. The treatment of official reports of such bodies in our view ought to belong to a category quite different from reports by the media of judicial proceedings held in public.

In the first place, there are compelling public policy reasons why official reports of such bodies should not be subject to defamation suits. Indeed, it goes against well-established principles for official reports of proceedings of Parliament, the Cabinet, District Assemblies or commissions of enquiry to be open to defamation suits, if there are distortions as Section 15 (b) and (c) prescribe. In our view, where there are distortions, the proper remedy should be to seek redress by way of correction and not by an action for defamation.

Again section 15 (a) also suffers from inherent contradiction in expression, similar to what we have observed in respect of section 8(2) in so far as it refers to “a fair and accurate report which is not blasphemous or indecent”. A fair and accurate report of judicial proceedings held in public cannot by its very nature be said to be ‘blasphemous or indecent’, unless the court specifically prohibits its publication. The whole of section 15, we would suggest, should accordingly be reformulated.

Justification

Position at Common Law

Under the defence of justification, the defendant must prove the truth of all material facts or allegations in the defamatory statement. Thus, where the defendant proves some of the material allegations to be true, but fails to prove others or even one material allegation, he/she would be liable in damages for defamation. On the other hand, the defendant need not prove each and every allegation, if it does not add to the sting of the libel or is

inconsequential, provided he is able to prove the truth of the main thrust of the defamatory statement. Once, however, the defendant is able to prove the truth of the publication, he has a complete defence and it is irrelevant why he published the defamatory statement. It becomes immaterial whether or not he published it for the public benefit.

Position Under the Bill

The Bill recognises these elements of the common law defence of justification or truth of the statement complained of in section 5 (a) and (b). There is, however, a curious provision in section 5 (c) of the Bill. This subsection conflates the tort of invasion of privacy with that of defamation. The subsection provides as follows:

- “5. In an action for defamation, proof of truth of the defamatory matter is a defence only if:
- (c) the publication of the defamatory matter does not constitute an invasion of privacy and the publication is on a matter of public interest and is in the public interest”.

Ordinarily, the truth of a publication is a complete defence in common law defamation. This is so because the cause of action in a defamation suit is that a person has published a defamatory matter of, and concerning, another which is false. Where there is an unjustified invasion of privacy of another, the proper cause of action sounds in the tort of invasion of privacy and not in defamation.

Quite apart from the problem of conflation of defamation with the tort of invasion of privacy, the subsection suggests that even where the publication of a defamatory matter is true and is not an invasion of privacy, it may sound in an action for defamation where the publication is not ‘*on a matter of public interest*’ or is not ‘*in the public interest*’. This provision is clearly akin to the repealed section 117(1) (h) on criminal libel which made truth a defence only “*if it is found that it was for the public benefit that the matter should be published*”. We are of the respectful view that subsection (c) of section 5 is unnecessary and, in addition, tends wrongly to conflate the tort of defamation with that of invasion of privacy. It should accordingly be completely deleted.

Qualified Privilege

At Common Law

The defence of qualified privilege provides greater leeway to erring journalists and individuals. The defence is available on certain occasions, referred to as occasions of qualified privilege, where the law has adjudged that a person may make defamatory statements of another which are false without incurring legal liability. The defendant must however show that he/she made the statement honestly believing it to be true and without malice. The defence is however limited to defined situations and relationships for the common convenience and welfare of society, that is to say, where the law considers that it is reasonable to make allowance for the publication of statements that turn out to be untrue. Although, the occasions of qualified privilege are not closed for all times and may be expanded with changing times and new situations, the following may be regarded as well settled occasions of qualified privilege at English common law:

- (a) statements made by a person in discharge of some public or private duty whether legal or moral;
- (b) statements made by a person in the conduct of his own affairs in matters where his interest is concerned;
- (c) statements made by an aggrieved person to seek redress;
- (d) statements made by one person to another in respect of matter in which they have legitimate common interest;
- (e) statement made by the defendant in reply to inquiries by the aggrieved party or at his invitation
- (f) reports of parliamentary and legal proceedings.

The common law however does not recognise a general privilege of the media to publish matters of interest to the public. Where however it is in the interest of the public that publication be made and the publisher can demonstrate a duty to publish to the public, a defence of qualified privilege may be upheld.

Under the Bill

Sections 16 to 25 of the Bill deal with the defence of qualified privilege.

Part of the problem with these sections is connected with the problematic raised by the definition of defamation in section 2(1) of the Bill. As we have previously observed, this definition makes the falsehood of the matter complained of an essential ingredient of its defamatory character. This tends to confuse the use of the word “defamatory” with its falsity. In these sections, it is not obvious whether, where the phrase ‘defamatory matter’ is used, it means *false* and *defamatory* matter. What is clear however is that nowhere in the defences in these sections is it explicitly stated that even where the defamatory matter is false the defence of qualified privilege is available provided there is no malice and it was made in good faith. Furthermore the definition of qualified privilege omits the requirement that the person making the defamatory statement should honestly believe in the truth of the statement (though it may however be argued that this is addressed by the requirement that the statement be made without malice). This view of the section is reinforced by paragraph (b) of section 25(1). This paragraph states that the fact that “there is distortion of facts” in the presentation by the mass media of communication that is privileged vitiates the privilege.

We would propose that the provisions on qualified privilege make it clear that the defence applies in respect of statements even if they are false but made in good faith, with the honest belief that they are true and without malice.

Fair Comment

At Common Law

Finally, there is the common law defence of fair comment. This defence is quite limited and relates only to comments, and not facts. For a comment is a statement of opinion based on facts. The person who claims this defence must therefore show that the facts upon which the comments are made are true. If the facts are not shown to be true by admissible evidence, the defence of fair comment is not available. The words complained of must indeed be comments and not allegations of fact. Again, the comment must not make imputations of corrupt or dishonourable motives on the person criticised. Finally, the comment must be the honest expression of the person’s real opinion.

Under the Bill

The provisions of the Bill on fair comment can be found in section 6 of the Bill. They restate the common law position.

Customary Law Defamation

The Bill incorporates the customary law grievance of injury to feelings arising out of insults and vituperative words uttered in the heat of a quarrel. This is ordinarily not available at common law. While it may be argued that this satisfies a felt need in the culture of large sections of Ghanaian society, we are not that sure that it is a matter that public policy should encourage in the form of legislation. It is likely to encourage frivolous suits directed at protecting injured feelings caused by insults in the course of neighbourhood quarrels. We are sure that our courts have more than enough serious matter to deal with without this addition. What is more, this may excite long-harboured resentment or feuds among members of communities.

The above then briefly and schematically cover the relationship of the Bill to English common law defamation and customary law defamation, which, at least, until the coming into force of the Constitution 1992, were the applicable defamation law in Ghana.

The Constitutional Guarantee of Freedom of Expression and of the Media

As we have noted the Constitution in Article 21(1)(a) guarantees freedom of expression and of the press and other media. Under Article 21, the only restrictions on this fundamental human right are to be found in clause 4(e) which provides for the constitutionality of any law or thing done under a law:

“that is reasonably required for the purpose of safeguarding the people of Ghana against **the teaching or propagation of a doctrine** which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems or incites hatred against other members of the community” [Emphasis added].

There is also of course the general limitation on fundamental human rights and freedoms provided for in Article 12(2) which reads as follows:

“Every person in Ghana, whatever his race, place or origin, political opinion, colour, religion, creed or gender all shall be entitled to the fundamental human rights and freedoms of individual contained in this Chapter but **subject to respect for the rights and freedoms of others and for the public interest**”. [Emphasis added]

The Constitution in Article 162(1) also guarantees the freedom and independence of the media. In addition, the Constitution prohibits censorship outright in Article 162(2). Article 162(5) places a specific responsibility on all agencies of the mass media to uphold the principles, provisions and objectives of the Constitution and to uphold the responsibility and accountability of the Government to the people of Ghana.

The specific limitations to these constitutional guarantees in Article 162 are to be found in Article 164, which provides for laws that “*are reasonably required in the interest of national security, public order, public morality and for the protection of the rights and freedoms of other persons*”.

It can thus be seen that the constitutional guarantees of freedom of expression and of the media are broader and more expansive than the common law recognition of freedom of expression. They also stand on more secure footing. First, in the sense that, unlike the freedom of expression recognised by the common law and customary law, these freedoms are entrenched and cannot be derogated from or taken away by any legislation. Secondly, any legislative restriction to be valid and lawful must meet the limited conditions where the Constitution permits restrictions, namely where the restrictions are reasonably necessary for the protection of the rights or freedoms of others, or in the public interest, which translates as where they are reasonably required for the protection of national security, public order or public morality. A derivative of this second point is that it is the person who seeks to justify the restriction on freedom of expression and of the media who bears the burden of proof, of demonstrating that indeed, the restriction is reasonably required for the protection of the values set out in Articles 12 (2), 21 (4)(e) or 164.

Indeed, the Committee of Experts appointed to make proposals for the Constitution of the Fourth Republic, this Republic, placed a very high

premium on freedom of expression in delivering the social goods of liberty, democracy, freedom from want and social progress. In the inimitable words of the Committee of Experts:

“The Experience of modern states has demonstrated convincingly that with absence of freedom of the press and thought, and enlightened and vigilant public opinion, a safe future for democracy and its success cannot be insured anywhere.

“So vital is the role of the media and the freedom of expression along with that of the press that it has been called the first freedom. Indeed, any successful attack on human rights by governments often starts with a suppression of the press. Once this freedom is denied, governments are free to abuse basic human rights without publicity and frequently with impunity”.

It is our view then that any legislation on defamation ought to provide for more expansive space for freedom of expression than the common law and existing law generally provide, given the importance of freedom of expression and of the media in the constitutional scheme of things, as we have shown. At the very least, whatever defamation law we may pass ought not to be more restrictive than the English common law. Unfortunately, as we have previously demonstrated, the current Bill falls far short of even the common law position.

Other Common Law Jurisdictions with Bill of Rights

Indeed, in the United States of America, where the First Amendment guarantees the right of free speech, the US Supreme Court, elaborating the implications of this guaranteed constitutional right, has rejected the common law principles of defamation to the extent that they apply to public officials or public figures. In the celebrated case of *New York Times v. Sullivan*, where a public official brought a libel suit against a newspaper, the US Supreme Court noted thus:

“Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have

recognised the difficulties of adducing legal proofs that the alleged libel was true in all its particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true, and even though it is in fact true because of the doubt whether it can be proved in court or the fear of the expense of having to do so”

The US Supreme Court accordingly held that where public officials sue for defamation in respect of their conduct in public office the rules of defamation are radically different. The public officer suing, and not the defendant, bears the burden of proving that: (1) the defamatory matter is of, and concerning, the aggrieved party; (2) that it is false; and (3) that the publisher published the offending statement knowing that it was false or with reckless disregard whether or not it was true or false. Subsequent decisions of the US Supreme Court have extended these principles to cover situations where public figures sue for defamation.

Such radical change in the principles of English common law defamation has not been confined only to the United States. Since the coming into force of the Constitution of democratic and non-racial South Africa, the South African Constitutional Court has held that the imposition on the defendant publisher of the burden of proving in a defamation suit any of the defences available under English common law is inconsistent with the constitutional guarantee of free expression.

The Court has accordingly held that in the new constitutional dispensation, a plaintiff that sues for defamation now bears the burden of proving that the defendant’s statement is false, not protected by qualified privilege or fair comment or was not published in the public interest.

Equally, the Supreme Court of India on its part has developed a body of jurisprudence adopting the *New York Times v. Sullivan* principles as being in conformity with the provisions on freedom of expression guaranteed in the Indian Constitution.

Even in Australia that has no explicit constitutional guarantee of free expression, the superior courts have developed a body of principles different from and more expansive than English common law principles of defamation. They have noted that the common law protected the reputations of persons “at the price of significantly inhibiting free expression”. Accordingly, under Australian judge-made law today the courts have held: (1) *that the guarantee of freedom of political discussion implicit in a democracy*

and representative government means that the common law of defamation and any statutory modifications of it must be consistent with that guarantee; (2) that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials; (3) consequently, the common law in Australia recognises a category of publication on “government or political matters” as an occasion of qualified privilege. The New Zealand Court of Appeal has also upheld in the case of *Lange v. Atkinson* the defence of qualified privilege as it applies to political statements which directly concern the functioning of representative and responsible government and that are published to the general public.

Remedies for Defamation

Section 26 of the Bill deals with remedies for defamation. Subsections 1 and 2 of this section repeat the common law principles on damages for defamation, namely its compensatory character as well as the question of award of exemplary damages. The Bill also, in accordance with established common law principles, provides in subsection 3 that the court may take into account the “*malice or other state of mind of the defendant at the time of the publication complained of or at any other time*”. The Bill however provides in subsections 4 (a) (ii), 5, 6, 7, 8, 9 and 10 of section 26 excessively intrusive remedies and wide powers of enforcement in favour of a successful plaintiff against the assets of directors or officers of a defendant publisher that is a corporate body, where the assets of the corporate body do not satisfy the damages awarded. Among the wide and intrusive powers afforded a successful plaintiff is the power to enter premises belonging to or under the control of a director or officer of the corporate body, and to demand and obtain inspection of records of the director or officer. To make matters worse, the definition of a debtor in subsection 11 of section 26 includes not only the actual defendants to the defamation suit, but also, in the case of a corporate body, its directors and officers. The provisions of section 26 go far beyond what is available at common law and in company law, and are indicative of the general anti-libertarian thrust of the Bill. We are of the respectful view that directors of a corporate body that, for example, publishes a newspaper or operates a broadcasting service ought not to be any more liable than directors generally under company law.

Conclusion

The review of comparative law above shows that there have been significant departures from English common law in the US, South Africa, India and other common law jurisdictions and that these departures were largely driven by the provision of an entrenched bill of rights, guaranteeing freedom of expression as a constitutional right or the implication of a system of representative government for free expression. Relating these experiences to our situation, we are of the view that there is a manifest case for expanding the frontiers of freedom of expression beyond the common law limits of defamation given the very expansive provisions of the Constitution of the Republic on freedom of expression and the centrality of this fundamental right in our constitutional scheme of things. Any reform of our common and customary laws of defamation that fails to take account of this is therefore not in tune with the aspirations of our people as captured in the provisions of the Constitution. What is, in any case, certain is that there can be no legitimate justification for a Bill that seeks to establish strictures and restrictions to free expression that are more limiting than can be found under English common law. But this is precisely what the current Bill does.

In the result, we would respectfully urge that the Bill be subjected to radical and comprehensive review. Such a review ought in our opinion to lead to the drafting of a new bill altogether which promotes freedom of expression in a manner consistent with the Constitution of the Republic and the quest of our people for liberty.

In saying so, we are by no means seeking to endorse some of the irresponsible publications in our mass media that go in the name of journalism. Clearly, individuals who suffer sustained false and defamatory attacks from others have the right to seek redress before the law courts and vindicate their reputation. Such attacks ought to be roundly condemned by all who treasure liberty. The law should make clear provisions for this. For, it may well be that an honest person's reputation is of greater value to him/her than all the riches in the world. We are however of the view that we do not need such restrictive laws as those in the Bill to check that type of journalism.

Recommendations

In conclusion, we would like, in the light of the above analysis and the

constitutional guarantee of freedom of expression and media freedom, to make the following recommendations:

1. First, the bill is in need of radical and comprehensive review. The whole Bill therefore ought to be withdrawn. Its provisions are in some respects poorly formulated, self contradictory and tend to conflate different subjects and issues. What is more, some of the provisions are even more restrictive than common law defamation principles and standards.
2. In its place a new defamation bill which takes account of the constitutional guarantees of freedom of expression and of the media should be drafted in active consultation with all key stakeholders and the general public.
3. Thirdly, such a new Bill should be more expansive in its protection of the right to free expression and media freedom than the common law. In particular, it is strongly recommended that we take a cue from the experiences of the US, South Africa, India and Australia, to mention a few common law jurisdictions where special principles governing restrictions on political expression and expression on governmental and state affairs at the very least are recognised. We would in this vein propose that there ought to be a *defence of qualified constitutional privilege* in such situations and that the burden of proof is shifted onto the political or public figure that sues for defamation. This is especially the case where account is taken of the preamble of the Constitution which emphasises probity and accountability in public affairs and Article 162(5) that places on the mass media the onerous responsibility of holding government accountable to the people of Ghana. We believe that ordinary principles of fairness and reciprocity should require that in the discharge of their constitutional responsibility the media and political expression generally ought to be given protection beyond what is available at common law. There is thus, in our view, a legitimate case for the *defence of qualified constitutional privilege* which ought to be captured in any defamation legislation in our times. This way we would be coming full circle to meet the spirit and letter of the Constitution.

4. Finally, we would urge that the more egregious provisions we have noted in the Bill should not be part of any new Bill so as to ensure that whatever defamation legislation our Parliament may eventually enact is in conformity with the provisions of the Constitution on freedom of expression and of the media.

Akoto Ampaw. Accra, 20th July 2008.

Defamation Bill, 2006

MEMORANDUM

The Bill is the outcome of the recommendations submitted by the Law Reform Commission to the Minister for Justice as far back as 1984. The Bill, to a large extent, seeks to make statutory provision for defamation, taking into account the circumstances of our country.

Currently this jurisdiction applies the 1843 Libel Act of the United Kingdom as specified in the Second Schedule to the Courts Act, 1993 (Act 459). The Bill abolishes the distinction between libel and slander as it is considered expedient to consolidate the two in order to create certainty in the law, and codifies the essential provisions of the common law which include elements of the customary law.

Section 54 of the Courts Act, 1993 (Act 459) provides that the Court, when determining the applicable law shall, subject to any other enactment, be guided by the set of rules stated in the section. By those rules, the law applicable to a given situation may depend on the law to which a party is subject which can be the common law as defined in article 11 of the Constitution or a foreign law. This situation gives rise to considerable uncertainty as to which law is applicable in an action for defamation where the action involves a citizen and a non-citizen.

As recommended by the Law Reform Commission, it is necessary to reform and clarify our law of defamation. The Bill provides a unified regime regardless of the nationalities of the parties and seeks to combine the respective elements of the common law on defamation which are considered compatible with the needs of this country.

The Government accepts the Law Reform Commission's recommendation that defamatory imputation should be actionable, irrespective of the form it takes whether it is libelous, slanderous or insulting. It considers that where the matter complained of is insulting, the publication of the insulting matter to the person insulted, or to the hearing of a third person or to a third person should constitute grounds for a cause of action.

Publication of rejoinders by media providers is provided for under article 162 of the Constitution:

“(6) Any medium for dissemination of information to the public which

publishes a statement about or against any person shall be obliged to publish a rejoinder, if any, from the person in respect of whom the publication was made”.

In relation to this constitutional provision, the National Media Commission Act, 1993 (Act 449) in sections 12 to 16 makes extensive provision for the settlement of complaints when read with the National Media Commission (Complaints Settlement Procedure) Regulations, 1994 (L.1. 1587). But these are media specific; and it is equally important to bear in mind the words, “incites hatred against other members of the community”, used in paragraph (e) of clause (4) of article 21 of the Constitution.

Taking a cue from that constitutional provision as well as Article 116 on apology and parliamentary privilege and Article 162 on freedom and responsibility of the media, it is considered desirable that a Defamation Bill should contain provisions for apology, explanatory statements and retraction of the alleged defamatory matter which may help clear a person’s name more effectively and at a relatively lower cost. The Bill also takes account of article 164 on the limitation on rights and freedoms and article 167 on the functions of the National Media Commission.

Damages for defamation are not only compensatory but could include exemplary damages. The Bill also preserves the common law defences to defamation and takes cognizance of the distortion of facts and the incitement to hatred in our body politic.

It is also to be noted that the Bill, among other things, seeks to augment the civil rights of the individual in so far as they relate to defamation.

Clauses 1, 2 and 3 state the essentials of defamation, namely, libel and slander and the ingredients which constitute defamatory matter and what amounts to publication in an action for defamation.

Clause 4 to 25 sets out the defences available to a defendant in an action for defamation. These include consent by the plaintiff to the publication of the defamatory matter. But where the defamatory matter is published in circumstances that exceed the extent of the consent or where the defamatory matter is repeated without the consent, the defendant cannot rely on consent as a defence.

As regards the defence of justification or truth, it is a matter for the defendant to prove that the defamatory matter, the subject of the action, is true or not materially different from the truth. However, where the

publication amounts to an offensive invasion of the privacy of the plaintiff, the defence of truth or justification can only succeed where the publication is in the public interest, and is on a matter of public interest, for example, where by the publication, a substantial benefit ensues to the benefit of the community: *clause 5*.

Fair comment as a defence is available to a defendant in respect of the expression of an opinion. The defence is, however, defeated where there is proof of malice on the part of the defendant. For the defence of fair comment to succeed, the defendant must prove that the comment was made on a matter of public interest, in the public interest, is based on a true statement of the facts or true facts contained in a privileged statement, and is made honestly and without malice or a distortion of the facts: *clause 6*.

Clause 7 deals with the defence of fair reporting. It is available to a defendant who has afforded the plaintiff a full and adequate response to the defamatory or insulting matter. The publication of the response must have been made in a form and manner approved by the plaintiff at the earliest reasonable time.

Clauses 8 to 25 state the circumstances and the matters in respect of which publication of a defamatory matter is privileged or is accorded qualified privilege. The defence of privilege is a measure designed to protect the freedom of communication on the basis that there are occasions when in the interest of society as a whole it is important to protect freedom of communication without fear of action, in so far as there is no malice and there is no distortion.

In the case of absolute privilege, once the occasion which is privileged is proved to exist, the defence will succeed, but it will be defeated by proof of malice on the part of the defendant. In the case of qualified privilege, if the plaintiff is able to prove that the defendant was actuated by malice, the defence of qualified privilege will equally fail.

Clauses 26 to 31 deal with the remedies available to a successful plaintiff in an action for defamation. Damages may be compensatory or exemplary. The primary goal of the law of defamation is to compensate the plaintiff for the injury done to the plaintiff's reputation. Thus *clause 26* provides compensatory damages which is limited to damages for actual harm. But that does not preclude the Court from awarding exemplary damages to indicate the Court's disdain for the action of the defendant. Exemplary damages are anticipated where a defendant makes the

defamatory statement maliciously, or recklessly not caring whether it is true or false. Actual harm is defined as harm suffered by the person defamed or the estate of that person

Clause 26 goes further and provides for the steps to be taken when an order for damages has been made and the order is not obeyed. The person against whom the damages are awarded becomes a debtor for the purposes of the law. And the plaintiff, now the creditor, acquires the right to attach the assets of the debtor, for the satisfaction of the quantum of the damages. In the case of a body corporate, the assets of the directors and officers of the body corporate become liable to be attached in satisfaction of the quantum of the damages, where the assets of the body corporate do not satisfy the quantum of the damages awarded.

Clause 27 states that in proceedings for defamation, damages shall not be increased because of the defendant's words or actions or a report of the proceedings, unless the Court finds that the conduct of the defendant in the course of the proceedings merits an increase in the damages. But *clause 27* does not take away the right of the defendant to plead in mitigation of damages that the plaintiff is a person whose reputation is generally bad with respect to the aspect to which the action relates.

Clause 30 is, in essence, the traditional customary law remedy for defamation: retraction and apology. In addition, the Court is empowered to award damages against the defendant.

The order for correction provided for in *clause 31* is a reflection of the civil law practice where the Court is empowered to order a publisher of statements adjudged to be untrue to publish corrected versions in a manner specified by the Court. In such a case, the Court may specify the content and manner of publication of the correction as well as the award of damages.

Clauses 32 to 44 provide for miscellaneous matters such as defamation of title, offer of amends and an agreement to indemnify against liability for defamation. In the case of defamation of title, damages are awarded to the plaintiff if the defamatory matter is published in a permanent form or is calculated to injure the plaintiff as regards the office, profession, calling, trade or business of the plaintiff. Unintentional defamation can be offset by an offer of amends where the matter was published innocently and without negligence or malice. The form and purpose of an offer of amends is expressed in *clause 34*.

The Bill also provides in *clause 42* for a limitation period of two

years after publication of the defamatory matter or two years after the insulting matter comes to the knowledge of the person defamed, within which to start proceedings for defamation.

JOE GHARTEY, MP
Attorney-General and Minister for Justice

Date:

Defamation Bill

ARRANGEMENT OF SECTIONS

Section

Essentials of defamation

1. Liability for defamation
2. Defamatory or insulting matter
3. Publication of defamatory matter

Defences to defamation

4. Defence of consent
5. Defence of truth or justification
6. Defence of fair comment
7. Defence of fair report
8. Privilege in relation to parliamentary proceedings
9. Legal practitioner and client communication
10. Party to judicial proceedings
11. Witness in judicial proceedings
12. Privilege in relation to judicial proceedings and other matters
13. District Assemblies
14. Communication between spouses
15. Reports
16. Essentials of qualified privilege
17. Principal and agent relationship
18. Liability of members of a trust or committee
19. Confidential reports
20. Publication to seek remedy or redress for some grievance
21. Protection of interest
22. Publication on invitation or challenge

23. Publication to answer or refute defamatory or insulting matter
24. Good faith
25. Qualified privilege of medium of mass communication

Remedies for defamation

26. Damages in general
27. Conduct of proceedings, reports of proceedings
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SCHEDULE

Defamation Bill

A
BILL
ENTITLED
DEFAMATION ACT, 2006

AN ACT to make provision for the taking of legal proceedings for defamation and to provide for related matters.

ENACTED by the President and Parliament.

*Essentials of defamation***Liability for defamation**

1. A person is liable for defamation where by spoken words or any other sounds, writing, printing, effigy, paintings, gestures or any other method signifying meaning, that person publishes defamatory matter concerning another person without lawful justification.

Defamatory or insulting matter

2. (1) For the purposes of this Act, “defamation” means
 - (a) The intentional false communication, published or publicly spoken, which directly or by insinuation or irony
 - (i) injures another person’s reputation or good name, or
 - (ii) diminishes the esteem, respect, goodwill or confidence in which the plaintiff is held, or
 - (iii) is intended to excite adverse, derogatory or unpleasant feelings or opinions against the plaintiff, or
 - (b) holding up a person directly or indirectly by insinuation or irony to ridicule, scorn or contempt, or
 - (c) the malicious publication of a false statement which naturally and proximately results in injury or damage to any other person whether the occasion is privileged or not, or
 - (d) the publication to any other person, whether publicly spoken or by any other means, of a statement or report which
 - (i) injures or damages or is likely to injure or damage the credit or the reputation of the people of Ghana, or
 - (ii) encourages or is likely to encourage disrespect for the nationhood of Ghana, the national symbols or the emblems of the Republic, or
 - (e) any other matter which, in the opinion of the Court, is defamatory of a person.
- (2) An action for defamation under paragraph (d) of subsection (1) shall be brought in accordance with clause (5) of article 88 of the Constitution.

Publication of defamatory matter

3. A person publishes
 - (a) a defamatory matter, where by spoken words or any other sounds, writing, printing, effigy, paintings, gestures or any other method of signifying meaning, that person communicates the defamatory matter to a person other than the person concerning whom the publication is made, or
 - (b) an insulting matter, where by spoken words or any other sounds, writing, reprinting, effigy, paintings, gestures or any other method of signifying meaning, that person communicates the insulting matter
 - (i) to the person insulted,
 - (ii) to the hearing of a third person, or
 - (iii) to a third person.

*Defences to defamation***Defence of consent**

4. (1) It is a defence in an action for defamation if the defendant proves that the plaintiff consented to the publication of the defamatory matter.
- (2) For the purposes of subsection (1), there is no consent where
 - (a) the defamatory matter is published in circumstances that exceed the extent of the consent, or
 - (b) the defendant repeats the defamatory matter as a prelude or a challenge to the institution of legal proceedings.

Defence of justification or truth

5. In an action for defamation, proof of the truth of the defamatory matter is a defence only if
 - (a) the defendant proves that the totality of the defamatory matter as a fact is true or not materially different from the truth, or
 - (b) in respect of words containing two or more distinct allegations published against the plaintiff, the words which are not proved to be true do not materially injure or damage the reputation of the plaintiff considering the truth of the remaining allegations, or

- (c) the publication of the defamatory matter does not constitute an invasion of privacy, and the publication is on a matter of public interest and is in the public interest.

Defence of fair comment

6. (1) In an action for defamation, a defendant may rely on the defence of fair comment only if
 - (a) the comment is made in the public interest and on a matter of public interest,
 - (b) the comment is based on a true statement of facts or contained in a privileged statement, and
 - (c) the comment is made honestly and without malice or a distortion of the facts.
- (2) Where the defamatory matter consists partly of an allegation of fact and an expression of opinion, the defendant shall establish
 - (a) the truth of the fact on which the allegation is based, and
 - (b) that the expression of that opinion is a fair comment.
- (3) In the absence of the proof required under subsection (2) the defendant is liable for defamation.

Defence of fair report

7. (1) In an action for defamation, a defendant may rely on the defence of fair report if the defendant proves that
 - (a) the defendant afforded the plaintiff the right of full and adequate reply to the defamatory matter complained of at the earliest reasonable opportunity available, and
 - (b) the plaintiff
 - (i) did not respond to the opportunity that was offered, or
 - (ii) the reply of the plaintiff was published in the form and in the manner approved by the plaintiff.
- (2) The defence of fair report is a complete defence to an action for defamation.

Privilege in relation to parliamentary proceedings

8. (1) In terms of article 116 of the Constitution, the proceedings in Parliament are protected by absolute privilege except as otherwise provided in that article.

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- (2) An accurate live broadcast, by a broadcaster, or the proceedings in Parliament is protected by privilege, where there is no distortion in the presentation.
 - (3) An action does not lie against a person in respect of the publication of
 - (a) the actual text of a report, the papers, minutes, votes and proceedings of Parliament, or an accurate summary without distortion of any of them, or
 - (b) an accurate contemporaneous report of the proceedings of Parliament, which is not distorted in any way.

Legal practitioner and client communication

- 9. (1) A defamatory matter published in a communication between a legal practitioner and the practitioner's client enjoys qualified privilege
 - (a) if the publication is part of the statements made to the legal practitioner in a confidential setting for the purposes of the institution of legal proceedings, or
 - (b) in the course of the institution of the legal proceedings or during the course of, and as part of the judicial proceedings in which the practitioner participates as the legal practitioner, and the defamatory matter relates specifically to the subject matter of the legal or judicial proceedings
- (2) A communication to any other person, not in the course of legal or judicial proceedings, about what has transpired between the client and the legal practitioner is not privileged.

Party to judicial proceedings

- 10. A defamatory matter published by a party to judicial proceedings in the course of the judicial proceedings and as part of the judicial proceeding is absolutely privileged, if the defamatory matter relates specifically to the subject matter of the judicial proceedings, and there is no distortion of the facts or in the presentation of the facts.

Witness in judicial proceedings

- 11. A defamatory matter given in evidence on oath by a witness, and as part of the judicial proceedings in which the witness is testifying, is absolutely privileged, if the defamatory matter relates specifically to

the subject matter of the judicial proceedings, and there is no distortion of the facts or in the manner of the presentation.

Privilege in judicial proceedings and other matters

12. In proceedings before
- (a) a Court, or
 - (b) a body or an authority which is established by or under an enactment and which has legal power to compel the attendance of witnesses, anything said, written or done as part of the proceedings
 - (c) by the Justice, Judge, chairman, magistrate, or a member of the legally established body or authority, or
 - (d) by a party, representative or witness, is protected by absolute privilege only if there is no malice or a distortion of the facts.

District Assemblies

13. Proceedings before a District Assembly or any other local authority or committee established by or under the Local Government Act 1993 (Act 462) enjoy the same privileges as are enjoyed in relation to proceedings in Parliament.

Communication between spouses

14. A defamatory matter published by a husband to the wife or a wife to the husband is absolutely privileged, but the publication by either of them to a third person destroys the privilege.

Reports

15. The defence of absolute privilege, where there is no malice or distortion, also applies to
- (a) a fair and an accurate report, which is not blasphemous or indecent, or a defamatory matter made contemporaneously in a newspaper, radio or television broadcast from a communications station in the country of the judicial proceedings held in public;
 - (b) the official reports of proceedings of Parliament, the Cabinet, the District Assemblies or a committee of any of these; and

- (c) the official reports of commissions or committees of inquiry appointed under the Constitution or by or under an enactment.

Essentials of qualified privilege

16. (1) In an action for defamation, qualified privilege is a defence if
 - (a) the defendant who published the defamatory matter had an interest or duty to publish the defamatory matter to the person to whom it was published,
 - (b) the person to whom it was published had a corresponding interest or duty to receive it, and
 - (c) the defendant was not actuated by malice and there is no distortion of the facts.
- (2) For the purposes of subsection (1), qualified privilege is not a defence if the defamatory matter was published to more persons than was necessary.

Principal and agent relationship

17. A defendant in an action for defamation has the same qualified privilege as the principal if the defendant published the defamatory matter as an agent.

Liability of members of a trust or committee

18. (1) In an action for defamation where the defendant is a member of a trust, committee or a similar body, the defence of qualified privilege fails where one or more members of the trust, committee or other body liable as joint publishers of the defamatory matter was or were actuated by malice.
- (2) Subsection (1) does not apply to a member who acted in good faith.

Confidential reports

19. In an action for defamation, qualified privilege is a defence where
 - (a) a defendant who has lawful authority over the plaintiff publishes in good faith the matter complained of in the course of a censure passed by the defendant on the conduct of the plaintiff, and
 - (b) the plaintiff was given the opportunity to make

representation on the matters to which the lawful authority relates

Publication to seek remedy or redress for some grievance

20. Qualified privilege is a defence in an action for defamation if the defendant proves that the defendant published the matter complained of in good faith in respect of the plaintiff with the view to seeking redress for a private or public wrong or grievance from a person who has, or whom the defendant believes on reasonable grounds to have, authority over the plaintiff with respect to the subject-matter of the wrong or grievance.

Protection of interests

21. Qualified privilege is a defence in an action for defamation if the defendant published in good faith, the defamatory matter for the public good to protect the defendant's interest or the interest of another person.

Publication on invitation or challenge

22. Qualified privilege is a defence in an action for defamation if the defamatory matter was published in good faith by the defendant at the invitation or challenge of the plaintiff.

Publication to answer or refute defamatory or insulting matter

23. In an action for defamation, qualified privilege is a defence if the defamatory matter was published in good faith by the defendant in answer to a defamatory matter published by the plaintiff concerning the defendant.

Good faith

24. For the purposes of this Act, a publication is made in good faith if
- (a) the person who made it was not actuated by malice, ill-will, or any other improper motive towards the person defamed,
 - (b) there is no distortion of the facts, and
 - (c) the manner of the publication is ordinarily and normally used in the case of the defamatory matter.

Qualified privilege of medium of mass communication

25. (1) Subject to this section, the publication in a newspaper or any other medium of mass communication of a report or any other matter mentioned in Part One of the Schedule is privileged, unless
- (a) The publication is proved to have been made with malice, or
 - (b) There is a distortion of the facts or a distortion in the presentation of the facts.
- (2) In an action for defamation in respect of the publication of a report or matter specified in Part Two of the Schedule, subsection (1) does not afford a defence if it is proved that the defendant was requested by the plaintiff to publish in the newspaper or medium through which the original publication was made, a reasonable letter or statement by way of explanation or contradiction and the defendant has refused or neglected to do so, or has done so in a manner not adequate or not reasonable taking into account the circumstances.
- (3) A provision of this section shall not be construed as protecting the publication of a matter, the publication of which
- (a) is prohibited by law,
 - (b) is not of public concern, or
 - (c) is not in the public interest.

*Remedies for defamation***Damages in general**

26. (1) Damages for defamation are compensatory or exemplary
- (2) Compensatory damages are limited to damages for the actual harm, but the award of compensatory damages does not preclude the award of exemplary damages, which indicates the Court's disdain for the action of the defendant.
- (3) Without limiting subsection (1), in awarding damages for defamation, the Court shall take into account the malice or any other state of mind of the defendant at the time of the publication complained of, or at any other time and the fact that malice or the other state of mind affects the actual harm.

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- (4) Where damages are awarded and the order for the payment of the damages is not obeyed,
- (a) In the case of body corporate or other entity,
- (i) The order shall be enforced by the attachment of the assets of the body corporate or the other entity for the satisfaction of the damages, and
- (ii) The assets of each director or officer of the body corporate may be attached for the satisfaction of the damages, where the assets under subparagraph (i) do not satisfy the damages;
- (b) In the case of an individual, the assets of the individual shall be attached for the satisfaction of the damages.
- (5) For the purposes of enforcing subsection (4), the creditor may, for an information that may relate to the payment of the damages,
- (a) enter premises which belong to or premises under the control of the debtor, an agent or an employee of the debtor to search the premises, or
- (b) demand, obtain and inspect the records and books of the debtor.
- (6) A person who willfully obstructs the creditor in the exercise of a power or a right conferred by this section is in contempt of the Court which made the order for the payment of the damages.
- (7) The creditor may, to determine whether assets belong to or are in the possession or control of the debtor, on an application to the Court, obtain an order that
- (a) a document relevant to identifying, locating or quantifying assets or identifying or locating a document necessary for the transfer of assets which belong to or are in the possession or control of the debtor shall be delivered immediately to the creditor, or
- (b) the debtor immediately produce to the Court any information in the possession or control of the debtor relevant to the payment of the damages.
- (8) The creditor may, to assess the value of benefits derived by the debtor, treat as assets of the debtor, assets which
- (a) can be retrieved under a tracing order of the Court, and
- (b) in the opinion of the creditor, are subject to the effective

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- control of the debtor whether or not the debtor
- (i) has a legal or an equitable interest in the assets, or
 - (ii) has a right, power or privilege in connection with the assets.
- (9) In addition to subsection (8), the creditor may consider,
- (a) shareholdings, debentures or directorships in a body corporate which has an interest, whether direct or indirect, in the assets, and for this purpose the creditor may investigate and inspect the books of the body corporate or other entity,
 - (b) a trust that has a relationship to the assets, and
 - (c) a relationship between the persons who have an interest in the property or in companies of the kind referred to in paragraph (a), or trust of the kind referred to in paragraph (b), and with any other person.
- (10) Where the creditor treats a particular asset as the debtor's asset for the purposes of this section, the creditor may presume that the asset is subject to the effective control of the debtor and is available to satisfy the damages.
- (11) For the purposes of this section,
- “actual harm” means
 - (a) harm suffered by the person defamed, or
 - (b) harm suffered by the person defamed by way of injury to an asset or a financial loss;
 - “creditor” means the person in whose favour damages are awarded;
 - “debtor” includes the person against whom the damages are awarded and any other person from whom in the opinion of the Court, assets can be retrieved;
 - “individual”, as regards assets to be attached, includes the spouse, children and the relevant members of the family of the debtor.

Conduct of proceedings, reports of proceedings

27. In an action for defamation, damages shall not be increased because of the publication of a report of the proceedings, or of words or conduct in the course of the proceedings, unless in the opinion of the Court the conduct of the defendant in the course of the proceedings justifies an increase in the damages.

Evidence of other damages recovered by plaintiff

28. The defendant may, in mitigation of damages for defamation, give evidence that the plaintiff
- (a) has recovered damages or has initiated legal proceedings for damages for defamation in respect of the publication of a defamatory matter to the same effect as that on which the proceeding is found, or
 - (b) has received or agreed to receive compensation in respect of the publication

Misconduct of plaintiff in mitigation of damages

29. In an action for defamation, the defendant may prove in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceeding relates.

Retraction and apology

30. (1) In an action for defamation, the Court may order the defendant to retract the matter adjudged to be defamatory and publish an apology to the plaintiff without any reservation
- (2) The Court may give directions as to the form and content of the apology, the place and the medium of publication and any other matter that the Court considers appropriate.
- (3) An order for retraction and apology does not preclude the Court from making any other further orders, including the award of damages, against the defendant.

Order for correction

31. (1) In an action for defamation, the Court may order a defendant to publish a corrected version of the matter adjudged to be untrue.
- (2) The Court may specify the content of the correction, and give directions as to the time, the form, the extent and the manner of publication of the correction.
- (3) An order for correction does not preclude the Court from making any other further orders, including the award of damages, against the defendant.

*Miscellaneous provisions***Unintentional defamation, offer of amends**

32. (1) A person who publishes a matter alleged to be defamatory of another person may make an offer of amends if that person claims that the matter was published by that person innocently and without negligence or malice in relation to the aggrieved person.
- (2) Where the offer is accepted by the aggrieved person and is duly performed, proceedings for defamation shall not be taken or continued by the aggrieved person against the person making the offer of amends.
- (3) Subsection (2) does not limit a cause of action or an action against another person jointly responsible for that publication.
- (4) Where the offer is not accepted by the aggrieved person, the person who made the offer of amends, shall prove in an action subsequent to the offer of amends,
- (a) that the words complained of were published innocently and without negligence or malice in relation to the plaintiff, and
- (b) that the offer of amends was made as soon as practicable after the defendant received notice that the defamatory matter was or might be injurious or damaging to the plaintiff and the offer has not been withdrawn.

Form and purpose of offer of amends

33. (1) An offer of amends
- (a) shall be expressed as being made for the purposes of this Act, and
- (b) shall be accompanied with a statutory declaration specifying the facts relied on by the person making the offer indicating that the defamatory matter was published by that person innocently and without negligence or malice in relation to the aggrieved person.
- (2) For the purposes of subsection (4), evidence other than evidence of the facts stated in the statutory declaration, is admissible on behalf of the declarant to prove that the defamatory matter was published.

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- (3) Where an offer of amends is accepted by the aggrieved person,
- (a) a question as to the steps to be taken in fulfillment of the offer as accepted shall, in default of agreement between the parties, be referred to the High Court for determination, and
 - (b) the power of the High Court to make an order as to costs in proceedings by the person aggrieved against the person making the offer for the publication in question, or in proceedings under paragraph (a) includes a power to order
 - (i) the person making the offer to pay costs on an indemnity basis, and
 - (ii) that person to pay the expenses reasonably incurred by the aggrieved person as a result of the publication.
- (4) A defamatory matter shall be treated as published innocently and without negligence or malice by one person who is the publisher in relation to another person who is the victim of the publication if it is proved that the publisher exercised due diligence and reasonable care taking into account the circumstances of the publication.
- (5) A reference in subsection (4) to the publisher includes a reference to a servant or an agent of the publisher who was concerned with the contents of the publication.

Defamation of title

34. In an action for defamation of title, defamation of goods or any other injurious falsehood, it is not necessary to allege or prove special damage,
- (a) if the words on which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or any other permanent form, or
 - (b) if the words on which the action is founded, are calculated to cause pecuniary damage to the plaintiff in respect of an office, a profession, calling, trade or business held or carried on by the plaintiff at the time of the publication.

Court representation for public officers

35. (1) Where a public officer alleges that a matter published about

the public officer in respect of the public officer's office is defamatory, that officer may request the Attorney-General to institute an action for defamation on that officer's behalf.

- (2) The request shall be made in writing, giving particulars of the alleged defamatory matter.
- (3) The Attorney-General shall investigate or cause to be investigated, the merits of the subject-matter of the request.
- (4) An action for defamation shall be initiated by the Attorney-General after investigations and only where the Attorney-General considers it justifiable.

Single judgement and assessment of damages in a single sum

36. In an action for defamation, the Court may, if it finds for the plaintiff, in more than one cause of action,
- (a) give a single judgment in respect of the causes of action on which the plaintiff relies, and
 - (b) assess damages in a single sum.

Requirement of leave of court for further proceedings

37. Where a plaintiff brings an action for defamation against a defendant in respect of the publication of a defamatory matter, the plaintiff shall not bring further proceedings for defamation against the defendant in respect of the same publication or any other publication of the same matter except with the leave of the Court in which the further proceedings are to be brought.

Agreement to indemnify against liability for defamation

38. (1) An agreement to indemnify a person against a liability for defamation in respect of the publication of a matter is valid.
- (2) Subsection (1) does not apply where at the time of the publication, the person indemnified
- (a) knew that the matter is defamatory, and
 - (b) does not reasonably believe that there is a good defence to an action for defamation.

Rejoinder

39. (1) A medium for the dissemination of information to the public which publishes a statement about or against a person, shall

- publish in significant form a rejoinder from that person in respect of whom the publication was made.
- (2) the publication of a rejoinder does not prejudice the right of a person defamed to seek further redress in a Court.

Proceedings brought by a body corporate

40. An action for defamation brought by a body corporate shall fail unless the body corporate proves that the publication of the matter which is the subject matter of the action has caused or is likely to cause pecuniary loss to that body corporate.

Application of other rule of law on remedies

41. A provision of this Act shall not be construed as limiting any other enactment or rule of law that relates to absolute privilege, qualified privilege or any other defences in law in an action for defamation, in so far as that enactment or rule of law is not inconsistent with a provision of this Act.

Limitation of action

42. The limitation period for the commencement of an action for defamation is two years
- (a) after the publication of the defamatory matter, or
 - (b) after the insulting matter comes to the knowledge of the person defamed.

Interpretation

43. In this Act, unless the context otherwise requires,
- “Court” means a court of competent jurisdiction;
 - “defamatory matter” includes an insulting matter;
 - “District Assembly” includes a Municipal Assembly and a Metropolitan Assembly;
 - “fair comment” means comment which
 - (a) is not actuated by malice, and
 - (b) has the qualities of impartiality and honesty, and
 - (c) is free from prejudice, favouritism or self-interest, and
 - (d) is just, equitable, even-handed and equal as between conflicting interests, and
 - (e) is not based on rumours or suspicion but is based on substantiated facts, and

- (f) does not contain a distortion of facts or fact situations, or imputations of corrupt motives or dishonourable motives; “malice” includes the distortion of facts.

Consequential amendment

44. The Courts Act, Act 459 is amended in the Second Schedule by deleting the expression, “1843 (6 & 7 Vict c. 96) Libel Act sections 1 and 2”.

SCHEDULE
PUBLICATIONS PROTECTED BY QUALIFIED PRIVILEGE
PART ONE
(Section 25(1))

**PUBLICATIONS PRIVILEGED WITHOUT EXPLANATION
OR CONTRADICTION**

1. The publication of a fair and accurate report
 - (a) of any of the public proceedings in Parliament,
 - (b) of an international organisation of which the Republic is a member or of an international conference to which the Government sends a representative
2. The publication of a fair and accurate report of the public proceedings of an international court.
3. The publication of a fair and accurate report of the proceedings before a Court exercising jurisdiction in the country or throughout the Commonwealth or any other country where that judicial system is similar to that of the Republic.
4. The publication of a fair and accurate report of the pleadings of parties in an action before a Court in the Republic.
5. The publication of a fair and accurate report of the proceedings in public or a body or persons appointed to hold a public inquiry by the Government of Parliament or the legislature of any other country.
6. The publication of a fair and accurate copy of or extract from a register kept under the authority of an enactment which is open to inspection by the public, or of any other document which is required by the law of this country to be open for inspection by the public.

7. A notice or an advertisement published by or on the authority of a Court or tribunal or a judge or an officer of the Court or tribunal.

**PART TWO
(SECTION 25(2))**

**PUBLICATIONS PRIVILEGED BUT SUBJECT TO
EXPLANATION OR CONTRADICTION**

1. A fair and accurate report of the findings or decision of any of the following associations, or of a committee or governing body of it, which is a finding or decision relating to a person who is a member of or is subject to the control of the association by virtue of a contract:
 - (a) an association formed in the Republic for the purpose of promoting or encouraging the exercise of or interest in art, science, religion or learning, and empowered by its constitution to exercise control over matters of interest or concern to the association, or the actions or conduct of a person subject to that control;
 - (b) an association formed in the Republic to promote or safeguard the interest of trade, business, industry or of a profession, or of the persons carrying on or engaged in that trade, business, industry or profession and empowered by the constitution of the association to exercise control over matters connected with the trade, business, industry or profession or the actions or conduct of those persons;
 - (c) an association formed in the Republic to promote or safeguard the interests of any game, sports or pastime where members of the public are invited or admitted and empowered by the constitution of the association to exercise control over or adjudicate on persons connected with or taking part in the game, sport or pastime,
2. A fair and accurate report of the proceedings at a public meeting held in the Republic, that is, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern whether admission to the meeting is general or restricted.

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3. A fair and accurate report of the proceedings at a meeting or sitting of
 - (a) a District Assembly or any of its committees,
 - (b) a commission, tribunal, committee or person appointed for the purpose of an inquiry under an enactment or by the Government,
 - (c) a local inquiry by a person appointed by a local authority in pursuance of an enactment,
 - (d) any other tribunal, board, committee or body constituted by or under an enactment.
 4. A fair and accurate report of the proceedings at a general meeting of a company or association constituted, registered or certified by or under an enactment which is not a private company within the meaning of the Companies Act 1963, (Act 179).
 5. A copy or a fair and accurate report or summary of a notice or any other matter issued for the information of the public by or on behalf of the Police Service.

Date of *Gazette* notification:

