

**For CERRIE meeting June 24**

**Advice from the legal departments of DH and DEFRA in response to CERRIE enquiries.  
Subject: CERRIE Legal Liabilities in Publishing a Possible Dissenting Statement**

**(First Departmental Opinion)**

What follows is necessarily general, as the facts are not clear.

As the Committee appears to be, in effect, an agent of the two departments, it is the departments who would be liable for any defamation or other action arising from publication of the dissenting statements. For information, broadly, defamation consists of a publication, either in writing (libel) or orally (slander), that lowers the reputation of a person in the eyes of right thinking people. You are probably better placed than I to assess whether the statements are defamatory, bearing in mind that it is a defence to an allegation of defamation to show that the statement is true. (Are those at pages 1 and 21 [Goldblatt]? However, that at (5) on page 21 looks, at first sight, to give rise to risk.)

Similarly, if the departments publish a negligent misstatement then they may be liable in damages to those affected. Negligent misstatement can arise in various ways and the liability that flows from such a misstatement can take different forms. Disclaimers can only be relied upon in limited circumstances (they are construed against the person who seeks to rely on them), must be reasonable, and seem unlikely to release the department, or an individual Committee member, from all liability in the circumstances envisaged. I cannot say whether individual members could escape any liability. Even resignation may not completely exonerate a member from liability. Have the departments undertaken to assume any liability of a Committee member? If not, then an individual Committee member who believes himself to be truly at risk might need to seek his own advice.

However I assume that the departments will not wish to be associated with a defamatory statement, or negligent misstatement, and will ensure insofar as they are able to that no such statements are published.

I have not see the terms on which the two dissenting Committee members agreed to sit, so do not know what weight is to be accorded to the fact that the dissenters will view anything less than the departments' publication in full of their defamatory statements and negligent misrepresentations as "unacceptable". I assume that the departments are not in any way bound to publish any material, whether defamatory etc. or not, of the dissenting members, and cannot imagine that the departments would be willing to do so. I also assume that the departments will wish to ensure that nothing published is represented as the view of a dissenting member if it is not that member's view (unless, for example, a member is required to resign if he cannot agree with the majority view to be published as the view of the Committee, and the member has not resigned). I understand that, in fact, the Committee's report does identify the areas of disagreement. I suggested during our conversation that the Committee might, having first obtained the permission of the dissenting members, indicate to interested readers where they could obtain further information from the individual dissenting members about each of those members' views, as this may go some way towards meeting their concerns, but this is a matter for the parties. The department would need to be satisfied that it was clear to third parties that the views of the dissenters were not those of the Committee or the departments.

However, if the Committee is to publish two reports, each report must be free of defamatory statements, negligent misstatement and any other material that contravenes the law.

**(Second Departmental Opinion)**

We are in substantial agreement. In summary, I consider that there are significant legal risks associated with in any way sponsoring the publication of the minority report.

In advising, I make an assumption that the offending passages are (a) not true and (b) liable to cause damage to professional reputations, rather than being merely robust academic disagreement. I am not in a position to assess either of these, save that the passage on page 21 about loss of Danish data appears to contain an innuendo of a conspiracy to hide those data.

The 2 Departments, committee members, and anyone else involved in sponsoring/physically publishing the paper (e.g. possible COMARE) would potentially be liable in any defamation claim. I do not have information about the terms of appointment of committee members to know if they would be indemnified by the Departments, but that would not in any event prevent them from being named as Defendants.

The usual defences (qualified privilege, fair comment etc) do not appear to be available if the material is believed to be false, potentially defamatory, and not yet in the public domain.

There is also a risk of liability for negligent misstatement, attaching to the committee and the Departments if they publish a misleading report. The committee does owe a duty of care: there is a clear risk that third parties will rely on, and may suffer damage from relying on, these published reports. The scope for limiting that liability by disclaimers is less clear. I agree that a general disclaimer would probably not suffice. For specific disclaimers to have a prospect of working, they would have to cover all the points of disagreement and be sufficiently clear. Even then I could not say that publication would be risk free. But I assume that this possibility would not arise if the report is potentially defamatory- for the avoidance of doubt, disclaimers would NOT solve the problem of the report being defamatory.

I am not completely sure that resignation prior to publication would sufficiently protect committee members- I suspect it would, but they would, as the first opinion suggests, be wise to seek independent advice if concerned.

The dissenting members may seek to argue that failure to publish their report in some infringes their rights. Insofar as these derive from their appointment to CERRIE, I cannot comment without knowing their terms of appointment. A Human Rights (Article 10, Freedom of Expression) argument would, I consider, be unfounded, so long as the Departments simply refused to publish, rather than seeking to restrain publication of, the minority report.

**Subject:** CERRIE ; ANOTHER REVISED VERSION OF A POSSIBLE MINORITY REPORT

June 23, 2004

**Departmental Legal Advice**

My previous comments were general in nature (other than the material in brackets at the end of the second paragraph). They did not depend on a reading of the documents.

I confirm, therefore, that if only the most shocking passages have been removed, and you still have doubts about the legality of publishing, you should not publish. You are better placed than I am to determine the accuracy of statements in this field. You will know whether an untrue statement is “likely to lower the reputation of a person in the eyes of right thinking people.”

I have not scrutinised this draft prepared by the dissenting members.

If you arrive at a position where you are content to publish but have a lingering concern about a statement, I am happy to consider it.