



Libel Reform Campaign

Initial summary assessment of the Defamation Bill

The Defamation Bill has been agreed by Parliament and is awaiting Royal Assent to become the Defamation Act 2013. We have campaigned for four years for a law that would be less expensive and complicated, up to date and less able to be used to chill free speech worldwide. The Libel Reform Campaign has focused on the most significant of the problems with the law, which were also the areas where change was most resisted. We campaigned for the conversion of the common law Reynolds defence into a clearer, stronger, more accessible statutory public interest defence; an end to the ability of claimants to censor criticism extra-judicially by threatening innocent web hosts with libel actions; restrictions on the ability of corporations to sue in libel, as applies to public bodies; easier 'strike out' of trivial or inappropriate claims by raising the threshold of harm before a libel action can proceed. We campaigned for reforms that would produce a law that anyone can read to understand their rights. Until now the laws were mainly in common law, the development of which proceeds slowly in libel as there are few cases. The Defamation Bill 2012 was the first time Parliament had debated wholesale libel reform since 1843.

Trivial claims can lead to libel cases

One of the major problems of the libel laws is that trivial claims, or those for which the defendant has a robust defence, can ruin people before the case is dismissed or reaches trial. This is one of the reasons why libel threats have such power in getting sound material retracted. The defendant can't afford to get to first base or defend a valid case.

The new law introduces a test of serious harm which says that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. This builds on the *Thornton* case from common law and represents a higher hurdle to succeed in a libel case. This is very welcome. It may not prevent all cases launched on claims without merit and there needs to be a strike-out provision, so that cases that do not pass the serious harm test are not allowed to proceed.

There is no clear statutory public interest defence

The libel laws did not contain a public interest defence that people speaking out on matters of public interest such as doctors, human rights NGOs and consumer groups could rely on. The common law

public interest defence, the Reynolds defence, has been interpreted by judges as a checklist of 10 factors the defendant is asked to prove they complied with to demonstrate that they were responsible when they published the material. The defence is complicated and has been applied differently by different judges. This makes it unreliable, very expensive and only available to large media organisations who can afford the time and money involved.

The Defamation Bill puts a public interest defence into statute for the first time and abolishes the Reynolds defence. This is a welcome inclusion. When the Bill is enacted defendants will be asked to show that they “reasonably believed that publication was in the public interest” to be able to use the defence. While reasonable belief will grant better protection than the Reynolds defence test of “responsible publication”, there is still a risk that the defence will encourage expensive and prolonged litigation as claimants launch arguments about defendants’ states of mind and a possibility that judges will reintroduce the consideration of a series of factors (as a checklist or otherwise) to decide what a defendant should have believed was reasonable which would move the law back towards its current unsatisfactory state.

Companies use libel laws to silence discussion

Corporations can sue individuals for libel without having to show they were harmed. Human rights NGOs, investigative journalists, doctors discussing medical products and carers discussing Government disability policies have been threatened with libel action by companies and often have to withdraw their words and back down in the face of a ruinous libel claim.

The new law will include an addition to the serious harm test that says bodies trading for profit will be asked to show that the words complained of caused or are likely to cause serious financial loss. As with the serious harm test we hope that new court procedure rules will provide an early strike out opportunity for those failing to meet this test without imposing unnecessary costs on the defendant.

A change that would have barred corporations from suing in relation to their delivery of contracted public services has not made it into the new law. The *Derbyshire* principle, which established that public bodies cannot sue in libel because of the importance of those who provide public services being open to criticism, has been left as common law. Its extension to private companies providing public services, a situation that is becoming much more frequent, has been left in the hands of judges.

Hosts of material can be sued for libel

The law encouraged private censorship by bodies which are neither authors nor traditional publishers because parties who were not responsible for composing, writing, editing or approving material can be sued for libel. Internet intermediaries (such as ISPs, search engines, web hosts, social networks and discussion boards) host content and thus not in a good position to defend the words being complained of in response to the threat of a libel action. Powerful interests regularly threaten internet intermediaries because this is an effective tool of “reputation management” to get rid of criticism about a product or service.

The bill aims to require complainants to seek first to take action against the author or editor of an internet article where that person is identifiable, contactable and willing to defend the action. The requirement to pursue the original author first and the extra protection it offers to booksellers is welcome. The Government said they would address this issue further in regulations which have not yet been published. We remain concerned that the defence will not provide as much protection as the E-commerce directive.

Other issues

Moving some areas of discussion away from the courts

Qualified privilege is to be extended to peer reviewed statements in scientific and academic journals. It is also extended to reports of proceeding of government from anywhere in the world, international conferences and court proceedings which means that when the Bill is enacted fair and accurate reporting about any of these things will be protected from libel actions.

An end to the multiple publication rule

Currently the multiple publication rule (the Duke of Brunswick rule) means that every new publication of material complained of is the start of a new period of limitation for a libel action. The definition of publication in libel law has meant that reproducing copy online is counted as a new publication. The new law does away with this and introduces a single publication rule. When the Defamation Bill is enacted the time period to bring a libel action starts with the first publication and cannot be restarted with subsequent publications, unless the material is published in a materially different manner.

Measures on libel tourism

Claimants with only marginal flimsiest connections to London have brought cases here because English libel law are so claimant friendly a phenomenon known as “libel tourism” or “forum shopping.” The new law says that a libel action against a person who does not live in Europe can only be heard in London if the claimant can show that England is the most appropriate place. This is welcome.

What must happen now?

The Defamation Bill must be enacted. The Secretary of State for Justice Chris Grayling MP can decide when the new law is brought into effect by means of the issue of a statutory instrument in Parliament. He must do this as soon as possible.

The Government must publicise the changes to the law, especially to small law firms and web hosts.

Complexity and uncertainty are allies of those who wish to censor free debate and legitimate criticism. Smaller law firms will be the first port of call for many defendants who have received a legal letter. The Ministry of Justice must provide clear guidance on what the new law means. Web hosts must also be made aware of the new law regarding libel complaints, and the legal protection available to them.

The Government must publish detailed regulations that ISP, web hosts and forum operators must follow when they receive a libel complaint. The Ministry of Justice consulted on this issue in January

2013, so a response is now overdue. Throughout the legislative process, Ministers promised to share the draft regulations, but so far nothing has been forthcoming. The shape of the regulations will have a significant impact on whether reputation managers can continue to confuse and threaten web hosts, or whether all complaints will be funnelled through a standardised, transparent procedure.

The Government must issue new Civil Procedure Rules. There is broad consensus in the legal profession that procedural reform must follow the new legislation. High legal costs are a deterrent to ordinary people having access to the law - whether they are claimants seeking redress for a tabloid smear, or defendants threatened by powerful interests. The [Alternative Libel Project](#), published by English PEN and Index on Censorship in 2012 and funded by the Nuffield Foundation's Law in Society programme recommends that Early Neutral Evaluation and mediation should be routine elements in any libel dispute.

The Government must ensure that there is cost protection for defendant publishers of limited means and that access to Conditional Fee (no-win, no-fee) Agreements to such defendants is not harmed by the abolition of the reclaimability of success fees (win bonuses) since defendants do not get damages with which to pay these.

The Northern Ireland Assembly must legislate for libel reform. As a free speech and human rights issue, Libel Reform must be delivered at Stormont, not Westminster. British citizens living in Northern Ireland must enjoy the same free speech protections as their neighbours living elsewhere in the United Kingdom. It would be intolerable if Belfast became *A Town Named Sue*.

Background

The Libel Reform Campaign was formed in 2009, to campaign for the reform of the UK's libel laws. The impact of libel had long been recognised as the most significant chilling effect on freedom of speech in the UK, but a number of events over the previous two years had finally created urgent momentum for an effective campaign: the UN Human Rights Committee had criticised the negative effect of the UK's libel laws; the United States passed a law defending its citizens from libel tourism; the suing of scientists in the UK created a public outcry as it became clear that the use of libel laws to silence criticism and whistleblowing now endangered public health and safety. The demand for libel reform as a result became an issue that engaged a wide sector of society: in the age of the internet, this was no longer a matter just for newspapers and established authors, it potentially affected anyone who spoke out or blogged. Sixty thousand individuals and more than 100 organisations joined the campaign. Individual citizens, scientists, writers, lawyers, bloggers and whistleblowers along with human rights groups, consumer watchdogs, community groups and online forums worked with the Libel Reform Campaign to make the case for reform. Their experiences have ensured the debate is focused on the public interest in open discussion.

All three main political parties included a manifesto commitment to reform the libel laws in their general election manifestos in 2010. The Defamation Bill published in May 2012 is about to be given Royal Assent to become the Defamation Act 2013.

Minister Lord McNally said in reference to the members of the Libel Reform Campaign: **“These are organisations that I have listened to, and have had contact and dialogue with, throughout the two years' gestation of the Bill. My aim remains to get as close as possible to the aspirations of those organisations.”**