



## The Draft Defamation Bill

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On the 15th of March 2011, the Government published the [Draft Defamation Bill](#) and a consultation paper (which included questions on a number of issues which were not included in the Bill itself). The consultation will remain open until 10 June 2011 and a Government response is promised by autumn 2011.

The draft Bill was the Government's response to a number of complaints that had been raised around the defamation laws in England and Wales. The consultation paper noted that "there has been mounting concern over the past few years that our defamation laws are not striking the right balance, but rather having a chilling effect on freedom of speech". It also acknowledged worries that the threat of libel proceedings might be used to frustrate robust scientific and academic debate or to impede responsible investigative journalism.

Reports on some of these issues had been issued by English PEN and the Index on Censorship (['Free Speech is Not for Sale'](#)) and the House of Commons Culture, Media and Sport Select Committee (['Press Standards, Privacy and Libel'](#)).

Following these reports, Lord Lester of Herne Hill QC introduced a [Bill](#) in the House of Lords, which received a [Second Reading](#) on 9 July 2010. The House of Lords Library produced a note on these issues, entitled [Defamation](#), which sets out the background to the main proposals for reform.

In a Written Ministerial Statement made on the same day as the publication of the draft Bill and consultation paper, the Lord Chancellor indicated that the draft Bill contains provisions on the following issues:

- A new requirement that a statement must have caused or be likely to cause substantial harm in order for it to be defamatory;
- A new statutory defence of responsible publication on matters of public interest;
- A statutory defence of truth (replacing the current common law defence of justification);
- A statutory defence of honest opinion (replacing the current common law defence of fair/honest comment);
- Provisions updating and extending the circumstances in which the defences of absolute and qualified privilege are available;

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- Introduction of a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one-year limitation period has passed;
- Action to address libel tourism by ensuring a court will not accept jurisdiction unless satisfied that England and Wales is clearly the most appropriate place to bring an action against someone who is not domiciled in the UK or an EU member state;
- Removal of the presumption in favour of jury trial, so that the judge would have a discretion to order jury trial where it is in the interests of justice.

The draft Bill relates to the law in England and Wales only.

The Government is also considering reforms in the area of litigation funding and the 'no-win, no fee' system. This is being done independently from the review of the defamation laws and a separate Library Note, [No win, no fee agreements: proposals for change](#), sets out the background.

The issue of lawyers' success fees (an 'uplift' of up to 100% on top of their normal fees) remains relevant, as in January 2011 (in a case brought by the publisher of the Daily Mirror) the European Court of Human Rights ruled that the recovery of 100% success fees by lawyers in privacy cases represented a violation of freedom of expression (contrary to Article 10 of the European Convention of Human Rights).

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## 1 Background

The Ministerial Foreword to the draft Bill acknowledges the tensions that can arise between the right to free speech, on the one hand, and the ability of persons to protect their reputations on the other.

Over recent years, there has been substantial commentary on the issue of the defamation laws in England and Wales. In 2006, the (then) Constitutional Affairs Committee considered the issue of ‘no-win, no fee’ agreements in libel cases, in its report ‘[Compensation Culture](#)’. More recently, reports on the defamation laws have been issued by English PEN and the Index on Censorship (‘[Free Speech is Not for Sale](#)’) and the House of Commons Culture, Media and Sport Select Committee (‘[Press Standards, Privacy and Libel](#)’).

Although concerns have been raised about the libel laws, it is important to note that views do not go entirely in one direction. Mr Justice Eady has commented on the issue of alleged ‘libel tourism’, in a speech entitled ‘[Privacy and the Press: Where are we now?](#)’ (an issue also considered by the former Law Lord, Lord Hoffman, in his Dame Ann Ebsworth [Memorial Lecture](#) at Inner Temple Hall). Other comments from legal practitioners defending the current system can be found in the ‘further reading’ section, below.

Following the publication of the abovementioned reports, Lord Lester of Herne Hill QC introduced a [Defamation Bill](#) in the House of Lords, which received a [Second Reading](#) on 9 July 2010. The House of Lords Library produced a note on these issues, entitled ‘[Defamation](#)’, which sets out the background to many of the proposed reforms. This note will not attempt to rehearse these arguments.

Although that Bill has not gone forward, the Ministry of Justice recognised the contribution made by Lord Lester (and Sir Brian Neill and Heather Rogers QC who had supported his work in this area) and indicated that it had taken the Bill “into account” in formulating its own proposals. The [Explanatory Notes](#) to Lord Lester of Herne Hill’s Defamation Bill includes a useful legislative history.

## 2 Summary of Proposals

In a Written Ministerial Statement made on 15 March 2011, the Lord Chancellor said that the [draft Bill](#) contains provisions on the following issues:

- A new requirement that a statement must have caused or be likely to cause substantial harm in order for it to be defamatory;
- A new statutory defence of responsible publication on matters of public interest;
- A statutory defence of truth (replacing the current common law defence of justification);
- A statutory defence of honest opinion (replacing the current common law defence of fair/honest comment);
- Provisions updating and extending the circumstances in which the defences of absolute and qualified privilege are available;
- Introduction of a single publication rule to prevent an action being brought in relation to publication of the same material by the same publisher after a one-year limitation period has passed;
- Action to address libel tourism by ensuring a court will not accept jurisdiction unless satisfied that England and Wales is clearly the most appropriate place to bring an action against someone who is not domiciled in the UK or an EU member state;
- Removal of the presumption in favour of jury trial, so that the judge would have a discretion to order jury trial where it is in the interests of justice.

He also noted a number of issues for consultation which had not been included in the draft Bill. These included:

- Responsibility for publication on the internet. The paper seeks views on whether the law should be changed to give greater protection to secondary publishers such as internet service providers, discussion forums and (in an offline context) booksellers, or alternatively how the existing law should be updated and clarified;
- A new court procedure to resolve key preliminary issues at as early a stage as possible, so that the length and cost of defamation proceedings can be substantially reduced;
- Whether the summary disposal procedure should be retained, and if so whether improvements can usefully be made to it;
- Whether the power of the court under the summary procedure to order publication of a summary of its judgment should be made more widely available in defamation proceedings;
- Whether further action is needed beyond the proposals in the draft Bill and the introduction of a new court procedure to address issues relating to an inequality of arms in defamation proceedings, including whether any specific restrictions should be placed on the ability of corporations to bring a defamation action;
- Whether the current provisions in case law restricting the ability of public authorities and bodies exercising public functions to bring defamation actions should be placed in statute and whether these restrictions should be extended to other bodies exercising public functions.

### **3 Litigation funding and ‘no win-no fee’ agreements**

In addition to the proposal contained in the draft Bill, the Government is also considering reforms in the area of litigation funding and the ‘no-win, no fee’ system. This is being done independently from the review of the defamation laws and a separate Library Note, [No win, no fee agreements: proposals for change](#), sets out the background.<sup>1</sup>

The issue of lawyers’ success fees (an ‘uplift’ of up to 100% on top of their normal fees) remains relevant, as in January 2011 (in a case brought by the publisher of the Daily Mirror) the European Court of Human Rights ruled that the recovery of 100% success fees by lawyers in privacy and defamation cases represented a violation of freedom of expression (Article 10 of the European Convention of Human Rights).<sup>2</sup>

### **4 Response to the draft Bill and Consultation**

The immediate response to the publication of the draft Bill and consultation paper has been mixed, although law reform in this area has been broadly welcomed by many commentators.

Simon Singh, who had been involved in well known defamation litigation with the British Chiropractic Association<sup>3</sup> argued that while the Government deserved “praise for taking the first steps towards creating a fairer, more balanced libel law”, there were “a few unresolved areas”. In particular, he said that the Ministry of Justice has not made proposals about libel

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<sup>1</sup> An assessment of the proposed changes, as they would affect media law, is available from the Infrom Blog: See: [HConditional Fee Agreements, Government Responds to ConsultationH](#), 29 March 2011

<sup>2</sup> *MGN Ltd v UK* (Application No 39401/04), 18 January 2011. For commentary on the case, see for example: Law Society Gazette, [H Campbell ruling exposes “deeply flawed” CFA systemH](#), 27 January 2011 and UK Human Rights Blog, [HAnalysis: Costs Regime in Peril after Strasbourg Naomi Campbell RulingH](#), 19 January 2011

<sup>3</sup> See for example *The Lawyer*, [HSimon Singh's Bogus JourneyH](#), 23 February 2010 and *Independent*, [HBritish Chiropractic Association drops defamation claim against Simon SinghH](#), 15 April 2010

relating to corporations and that there was another problem area around the issue of threats to internet service providers.<sup>4</sup>

The Financial Times described the move as “an advance for free speech”, but also noted the issue of “companies using libel law to silence their critics” and argued that “reforming a punitive libel regime without regard for developing privacy laws addresses only half the problem.”<sup>5</sup> The FT also cited Rod Dadak, head of defamation at the law firm Lewis Silkin as saying “whilst overall the bill is good, its structure is such that costs to claimants will be increased significantly”.<sup>6</sup>

It was reported that the Libel Reform Group welcomed the draft Bill, whilst again highlighting the fact that “the Government needed to go further in key areas, including a stronger public interest defence and an end to the ability of corporations to sue for libel”.<sup>7</sup> The Guardian also commented on the fact that the Government had no plans to introduce legislation regarding the controversial use of “super injunctions” (for more background on this issue, and how it interacts with the question of parliamentary privilege, see [Library Standard Note Parliamentary privilege and qualified privilege](#)).<sup>8</sup>

The Daily Telegraph quoted media lawyer Niri Shan as having said “while the Defamation Bill is very welcome and will help promote freedom of speech in relation to defamation actions, it’s disappointing that the Government isn’t actively looking at privacy reform in the same way. The current privacy law is in many ways a bigger threat to free speech especially because it is quite common for the court to grant pre-publication injunctions in privacy claims”.<sup>9</sup>

John Kampfner, the chief executive of Index on Censorship suggested that the bill was well balanced:

When we launched the Libel Reform Campaign in 2009, only the Liberal Democrats backed change. Now the cause has cross party support. The aim of the bill is not to allow a free-for-all in which reputations are impugned without redress. It is about balance and proportion.<sup>10</sup>

Robin Shaw and Paul Chamberlain, writing in the legal periodical the Solicitors Journal, contended that there were “no alarms and no surprises”, but suggested that some parts of the draft bill did “little more than restate the relevant common law principles”.<sup>11</sup>

Jenny Afia and Phil Hartley, lawyers at Schillings, were more critical, arguing in the New Law Journal that “our libel laws are highly regarded” and that “new libel laws could decimate years of painstakingly crafted common law principles.”<sup>12</sup>

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<sup>4</sup> *Sunday Times*, ‘Just a step further and speech truly will be free’, 20 March 2011

<sup>5</sup> *Financial Times*, ‘Restoring the good name of libel law; Proposed defamation code is an advance for free speech’, 17 March 2011

<sup>6</sup> *Financial Times*, ‘Libel reform groups want wider curbs’, 17 March 2011

<sup>7</sup> *The Guardian*, ‘Clarke’s reforms aimed at ending libel tourism: Defamation bill to protect freedom of speech: Current laws have ‘chilling effect’ on academic debate’, 16 March 2011

<sup>8</sup> *Ibid*

<sup>9</sup> *Daily Telegraph*, ‘No action on gagging orders or privacy law before next election’, 16 March 2011

<sup>10</sup> *Financial Times*, ‘At last, a blow to oligarchs’ 16 March 2011

<sup>11</sup> Robin Shaw and Paul Chamberlain, ‘No alarms and no surprises’, *Solicitors Journal*, 21 March 2011

<sup>12</sup> Jenny Afia and Phil Hartley, ‘Tipping the balance’, *New Law Journal*, 18 March 2011

## **5 The Joint Committee on the draft Defamation Bill**

In addition to the consultation exercise carried out by the Ministry of Justice, the draft Bill has been referred to a Joint Committee of both Houses for pre-legislative scrutiny.

Further information on this Committee will be provided once its membership and terms of reference have been confirmed.

## **6 Further Reading**

### **6.1 Reports and related documents**

Ministry of Justice, Draft Defamation Bill and Consultation, [Consultation Paper CP3/11](#), March 2011

[Explanatory Notes to Lord Lester of Herne Hill's Defamation Bill](#) (this paper includes a useful legislative history)

House of Commons Culture, Media and Sport Select Committee '[Press Standards, Privacy and Libel](#)'. HC 361-I, 24 February 2010

English PEN and the Index on Censorship, '[Free Speech is Not for Sale](#)' (2009)

### **6.2 Selected press reports**

Sunday Times, 'Just a step further and speech truly will be free', 20 March 2011;

Financial Times, 'Restoring the good name of libel law; Proposed defamation code is an advance for free speech', 17 March 2011;

Financial Times, 'Libel reform groups want wider curbs', 17 March 2011;

The Guardian, 'Clarke's reforms aimed at ending libel tourism: Defamation bill to protect freedom of speech: Current laws have 'chilling effect' on academic debate'', 16 March 2011;

Daily Telegraph, 'No action on gagging orders or privacy law before next election', 16 March 2011;

Independent, 'Government refuses to outlaw celebrity gagging orders', 16 March 2011;

The Times, 'Blow for rich and powerful as ministers act on 'libel tourism'', 15 March 2011;

The Times, 'These disgraceful libel laws must be torn up; The public suffers because the rich and their lawyers have the power to silence their critics', 15 March 2011;

The Independent, 'Defamation Bill intended to kill off 'libel tourism'', 15 March 2011;

### **6.3 Selected articles in legal periodicals**

Robin Shaw and Paul Chamberlain, 'No alarms and no surprises' Solicitors Journal, 21 March 2011;

Jenny Afia and Phil Hartley, 'Tipping the balance', New Law Journal, 18 March 2011;

Amber Melville-Brown, Legal update: Media law – redefining the defence of fair comment, Law Society Gazette, 10 February 2011;

Daniel Bekos and Clare Arthurs, 'In tune with the zeitgeist' New Law Journal, 7 January 2011;

John Kampfner, 'The Way Ahead', Counsel Magazine, October 2010;

Niri Shan, 'Opinion: It's time for defamation proceedings to ditch the jury', The Lawyer, 21 June 2010

Sarah Webb, 'Chill out – Libel Laws may need reviewing, but Lord Lester's Defamation Bill is likely to increase complexity and frontload costs', Solicitors Journal, 15 June 2010;

Sarah Webb, 'Grabbing the headlines', New Law Journal, 11 June 2010;

Rod Dadek, 'Out of touch – Libel reform should not be a high priority for Parliament – the proposals in the new Defamation Bill are unnecessary and are likely to lead to unfairness and uncertainty', Solicitors Journal, 8 June 2010;

William Bennett, 'Think again – The law of defamation may not be perfect, but the recent campaign for reform is not based on careful consideration', Solicitors Journal, May 2010;

Sarah Webb, 'Opinion: Does the Defamation Bill go far enough?', The Lawyer, 31 May 2010

William Bennet, 'The jury's out – Abolishing juries in defamation cases would not only keep costs down for both sides, but would also open up the verdicts to scrutiny', Solicitors Journal, 25 May 2010.

Paul Harris, 'Closing the net' – Paul Harris says it's time to clamp down on internet defamation', New Law Journal, 14 May 2010.

#### **6.4 Other useful resources**

The Inform Blog (The International Forum for Responsible Media Blog):  
<http://inform.wordpress.com/>

The UK Human Rights Blog (which contains a helpful media law section):  
<http://ukhumanrightsblog.com/category/legal-topics/media/>