The Defamation Act 2013

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Section Home Affairs Section

The *Defamation Act 2013* came into effect on 1 January 2014. The Act seeks to give better protection to freedom of expression, whilst ensuring adequate redress for individuals whose reputations have been damaged unfairly.

It reforms aspects of the law of defamation, as well as modernising and codifying common law principles and defences.

This note describes the background to the *Defamation Act 2013* and summarises the main provisions. It also describes the procedural and cost reforms which accompanied the Act.

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1 Introduction

The Defamation Act 2013 ("the Act") came into force on 1 January 2014. According to a Ministry of Justice press release:

> The Defamation Act 2013 reverses the chilling effect on freedom of expression current libel law has allowed, and the prevention of legitimate debate we have seen in the past.[1]

The Act makes a number of substantive and procedural changes to the law of defamation, including:

- A new "serious harm" threshold to prevent people bringing trivial claims, and a requirement that bodies trading for profit show serious financial harm.
- Codifying and updating the common law and statutory defences of justification, fair comment and privilege.
- A new defence of qualified privilege for the publication of articles in peer reviewed academic and scientific journals.
- A new defence of publication on a matter of public interest.
- A new defence for operators of websites hosting third party content, provided a specific process is followed to facilitate contact between claimant and the author.
- A single publication rule to prevent repeated claims in relation to the same material.
- Tightening of jurisdictional rules in order to restrict libel tourism.
- A new defence for secondary publishers where it is reasonably practicable to pursue an action against the primary publisher.
- Reversing the presumption in favour of jury trials.

These changes are accompanied by changes to the civil procedure rules and costs rules designed to reduce the length of cases and consequent chilling effect brought about by the threat of disproportionate costs.

2 Background to the Act

Ministry of Justice Consultations

In September 2009, the Ministry of Justice published a consultation on *Defamation and the internet: the multiple publication rule*.[2] It invited comments on whether there was a need for reform of the law in relation to defamation proceedings to take account of technological changes and the development of online archives in the past few years. The Government accepted in response that such a change was needed.

In January 2010, the Ministry of Justice published a second consultation on *Controlling costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees.*[3] This

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[1] Ministry of Justice *Defamation laws take effect* 31 December 2013
[2] Ministry of Justice *Defamation and the Internet: The Multiple Publication Rule* (CP 20/09) 2009
[3] Ministry of Justice *Controlling costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees* CP1/2010 2010

consultation was prompted by concern about the impact of high legal costs in defamation proceedings on free speech. It invited comments on a proposal to reduce the maximum success fee that lawyers could charge in defamation cases conducted under Conditional Fee Agreements. The Ministry of Justice's response to the consultation concluded that the reduction of the maximum success fee should be implemented as an interim measure while further consideration was given to implementation of the more radical recommendations of the Jackson Report.[4]

Libel Reform Campaign

In 2009 the free speech campaigning organisations English PEN and Index on Censorship, along with Sense About Science, published a joint report on the impact of English libel law on freedom of expression, entitled *Free Speech is not for Sale*. The report concluded that English libel law had a negative impact on freedom of expression, both in the UK and around the world by imposing unnecessary and disproportionate restrictions on free speech. It made ten recommendations for reform in order to address these problems and suggested that these should be incorporated in a Libel Bill, which would simplify the existing law, restore the balance between free speech and the protection of reputation, and reflect the impact of the internet on the circulation of ideas and information.

The Culture Media and Sport Committee Report

In February 2010, the Culture Media and Sport Committee Report *Press Standards, Privacy and Libel* was published.[5]The Report considered the operation of libel law in England and Wales and its impact on press reporting, including important developments since the *Defamation Act 1996*. It made various recommendations for reform, in relation to the defences, libel tourism, corporate claimants, and the internet.

The Libel Working Group Report

In December 2009, the then Justice Secretary, Jack Straw, convened a working group consisting of members of the legal profession, the media, NGOs, academia and the scientific community to consider whether the law of libel was in need of reform and to make recommendations as to solutions.

The Libel Working Group Report[6] was published in March 2010, and made recommendations in relation to four principal areas: 'libel tourism'; the role of public interest considerations in establishing a defence to a libel action; the rules about multiple publication, with particular reference to the internet; and procedural and case management issues relating to the conduct of libel litigation.

Following the general election in May 2010, the Government's Coalition Agreement gave a commitment to review the law of defamation.

Lord Lester's private member's Bill

In May 2010 Lord Lester of Herne Hill introduced a private member's Bill which sought to give effect to many of these recommendations. The Bill had its Second Reading on 9 July 2010. Lord Lester described the aims of the Bill as follows:

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[4] Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* 2009

[5] House of Commons Culture, Media and Sport Committee *Press Standards, privacy and libel* Second Report of Session 2009-10 HC 362-1

[6] Ministry of Justice *Report of the Libel Working Group* 2010

> [To] strike a fair balance between private reputation and public information as protected by the common law and constitutional right to freedom of expression ... modernise the defences to defamation proceedings of privilege, fair comment, justification, and innocent dissemination, in accordance with the overriding requirements of the public interest ... require claimants to demonstrate that they have suffered or are likely to suffer real harm as a result of the defamatory publication of which they complain ... require corporate claimants to prove financial loss (or the likelihood of such loss) as a condition of establishing liability ... encourage the speedy resolution of disputes ... make the normal mode of trial, trial by judge alone rather than by judge and jury ... enable the Speaker of either House of Parliament to waive Parliamentary privilege as regards evidence concerning proceedings in Parliament; and ... modernise statutory privilege.[7]

The Government's Defamation Bill

By way of response to the Second Reading debate on Lord Lester's private member's Bill, the Government undertook to consult upon, and introduce, its own Bill.

The Ministry of Justice published a draft Defamation Bill and consultation in March 2011, and a parliamentary Joint Committee was established to scrutinise and take evidence on the Bill. The Joint Committee on the draft Bill published its report in October 2011,[8] and a summary of responses to the consultation was published in November 2011.[9]

The Government's response to the Joint Committee's report and the consultation was published on 29 February 2012.[10]

The Defamation Bill was introduced in the House of Commons on 10 May 2012 and received Royal Assent on 25 April 2013.

3 The provisions of the Act

3.1 Threshold test

Section 1 of the Act establishes a threshold of serious harm which must be met before a defamation claim can be brought. A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. For claims brought by bodies which trade for profit, this threshold will not be met unless the publication has caused or is likely to cause serious financial loss.

3.2 Defences

Truth

The defence of truth, provided for by section 2, replaces the common law defence of justification. The Explanatory Notes to the Bill explain that the section is intended to broadly reflect the common law while simplifying and clarifying certain elements.[11]

The defence applies where the defendant can show that the imputation conveyed by the statement is substantially true. This reflects the common law position that the defendant does

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[7] HC Deb 9 July 2010 c 425.

[8] *The Joint Committee on the Draft Defamation Bill Report* Session 2010-2012, HL 203, HC 930-I

[9] Ministry of Justice *Draft Defamation Bill Summary of Responses to Consultation CP(R) 3/11* 2011

[10] Ministry of Justice *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* Cm 8295 2012

[11]

not have to prove the truth of every word that he or she has published, but must prove the essential or substantial truth of the "sting of the libel".[12]

Where the statement complained of contains two or more distinct imputations, the defence does not fail if, having regard to the imputations which are shown to be substantially true, those which are not shown to be substantially true do not seriously harm the claimant's reputation.

Honest opinion

Section 3 replaces the common law defence of fair comment with a new defence of honest opinion. Again, the new defence reflects, but simplifies and clarifies, the common law position.

The defendant must meet three conditions in order to be able to rely on the defence:

(1) That the statement complained of was a statement of opinion;
(2) That the statement complained of indicated, whether in general or specific terms, the basis of the opinion;
(3) That an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published or anything asserted to be a fact in a statement published before the statement complained of.

The defence is defeated if the claimant shows that the defendant did not hold the opinion.

Publication on a matter of public interest

Section 4 creates a new public interest defence, which is intended to reflect the principles established in *Reynolds v Times Newspapers*.[13]

In order to be able to rely on the defence, the defendant must show that the statement was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The defence therefore contains both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one.

Subsection 3 reflects the common law doctrine of "reportage", which describes the neutral reporting of attributed allegations (as opposed to the adoption of the allegations by the newspaper). In these circumstances a belief in the public interest in publication may be reasonable notwithstanding the fact that the publisher has not attempted to verify the truth of allegations, because the public interest lies in the reporting of the fact that the allegations have been made at all.

Operators of websites

Section 5 creates a new defence for operators of websites hosting third party content. The website operator must be able to show that they did not post the statement, and follow a process designed to facilitate contact between the claimant and the author of the statement, in order that the claimant can pursue a claim against the author directly. If the website operator fails to follow the procedure within the prescribed time limits then they would potentially become liable for the content.

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[12] *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, para 34.
[13] [2001]2 AC 127.

The *Defamation (Operators of Websites) Regulations 2013*[14] provide for the detailed procedure to be followed.

The Minister, Lord McNally, explained the regulations as follows:[15]

> My Lords, these regulations are made in exercise of the powers conferred on the Secretary of State for Justice by Section 5 of the Defamation Act 2013. Section 5 creates a new defence against an action for defamation for the operators of websites hosting user-generated content. Where an action in defamation is brought against a website operator in respect of such material the operator will not, however, be able to rely on that defence where the claimant shows: that he or she did not know who had posted the statement on the website; that he or she had complained to the operator about the statement in the proper way; and that the operator had failed to respond to that complaint in the way set out in these regulations.
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> The approach that we have taken in these regulations aims to support freedom of expression by allowing operators generally to retain the benefit of the defence without the need for material to be taken down where the person who has posted it co-operates with the process and wishes to stand by the material. In such a case the process will help to enable complainants to resolve their concerns with, or take action against, the poster of the allegedly defamatory material. Equally it will ensure that, to rely on the defence, an operator must remove the material complained about where the poster cannot be identified or is unwilling to engage in the process.
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> Informal views were sought on the contents of the process set out in the regulations from a range of key stakeholders including internet organisations, claimant and defendant representatives, media bodies and non-governmental organisations.
>
> To benefit from the Section 5 defence, operators will be required to carry out prescribed actions within a short fixed time limit. A range of views was expressed by stakeholders on what time limits were appropriate. We consider that the approach we have taken strikes the right balance in ensuring that action is taken as promptly as possible, without placing unreasonable burdens on operators or denying posters a reasonable opportunity to engage with the process.
>
> The time limits are subject to a general discretion, in the event of a defamation action being brought against the operator, for the court to waive any time limit if it considers that it is in the interests of justice to do so. That will ensure that the defence is not lost through, for example, an inadvertent or unavoidable failure by an operator to comply with a time limit if the court thinks that this would be unfair. The process is not compulsory, and operators can still choose either to remove a statement immediately on receipt of a complaint, or allow it to remain posted. An operator which takes either course of action can of course seek to rely on any other defences that may be available against a defamation action.

Peer-reviewed statements in scientific or academic journals

Section 6 extends the defence of qualified privilege to peer-reviewed material in scientific or academic journals. The defence applies if the statement in question relates to a scientific or academic matter, and an independent review of the statement's scientific or academic merit was carried out before it was published. As with other forms of qualified privilege, the defence is lost if the publication is shown to be made with malice.

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[14] Defamation (operators of websites) Regulations 2013/ 3028

[15] HL Deb 19 Nov 2013 cc GC371-372.

Absolute and qualified privilege

The defence of privilege refers to circumstances in which the public interest requires that a person should be protected from liability in defamation proceedings, even though the words cannot be proved to be true or otherwise defended.

Absolute privilege provides the defendant with complete protection from liability in certain limited circumstances, such as in parliamentary or court proceedings. Qualified privilege applies in a wider range of circumstances, where it is recognised that the public interest in ensuring freedom of communication outweighs the competing public interest in protecting the reputation of the individual. The defence may be defeated if it can be shown that the defendant was motivated by malice.

Section 7 amends the provisions contained in the *Defamation Act 1996* relating to the defences of absolute and qualified privilege, in order to extend the circumstances in which these defences can be used.

3.3 Single publication rule

Section 8 introduces a single publication rule to prevent an action for defamation being brought in relation to publication of the same material by the same publisher after a one year limitation period from the date of the first publication of that material. This replaces the longstanding rule that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period. This reflects the nature of modern publishing, in which each download of online material constitutes a new publication, giving rise to unlimited liability under the previous rule.

3.4 Jurisdiction

Section 9 aims to address the issue of libel tourism, where cases with a tenuous link to England and Wales are brought in this jurisdiction.

The courts no longer have jurisdiction to hear cases brought against non-EU defendants unless satisfied that, of all the places in which the statement has been published, England and Wales is clearly the most appropriate. This means that where a publication has been published in England and Wales and also abroad the court will be required to consider the overall global picture to determine where it would be most appropriate for a claim to be heard. According to the Explanatory Notes to the Act, the intention is that this will overcome the problem of courts readily accepting jurisdiction because a claimant frames their claim so as to focus on any damage which has occurred in this jurisdiction only.

The section is limited to cases where an action is brought against a person who is not domiciled in the UK or an EU member state in order to avoid conflict with European jurisdictional rules.

Section 10 limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement. The courts no longer have jurisdiction to hear a defamation claim against someone who was not the author, editor or publisher unless satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. This means that secondary publishers, such as booksellers, will have some protection against liability in defamation proceedings.

3.5 Trial by jury

Section 11 removes the presumption in favour of jury trials in defamation cases.

Jury trials are currently permitted in certain civil proceedings, including libel and slander, on the application of either party, unless the court considers it inappropriate. Section 11 alters this position, so that defamation cases will be heard without a jury unless the court orders otherwise.

3.6 Other provisions

Power to order a summary of judgment to be published

Section 12 gives the courts a power to order an unsuccessful defendant in defamation proceedings to publish a summary of its judgment.

Order to remove statement or cease distribution etc

Section 13 deals with situations where an author is not in a position to remove or prevent further dissemination of material which has been found to be defamatory. It enables a court which has given judgment for a claimant in an action for defamation to order the operator of a website on which the defamatory statement was posted to remove the statement, or require any person who was not the author, editor or publisher of the statement but is distributing, selling or exhibiting the material to cease to do so.

4 Costs in defamation proceedings

Civil Justice Council Report

Alongside the substantive changes contained in the Act, the Ministry of Justice also asked the Civil Justice Council (CJC) to consider and make recommendations as to how to control costs in defamation proceedings.

The CJC published its report[16] in March 2013 and made a number of recommendations, including:

- A call for greater judicial case management, with specialist judges allocated to ensure proceedings are dealt with swiftly and at minimal cost, with early intervention, approval of costs budgets and overseeing progress.

- A suggestion that a system of ‘Variable Costs Protection’ is introduced, a form of qualified one way costs shifting that both claimants and defendants could apply for, on the basis that in this area of law either claimant or defendant could require costs protection to conduct their case.

- Agreeing in which circumstances parties might lose their cost protection – for example if a claim is found to have been fundamentally dishonest, or has been struck out.

- Applying costs budgeting measures, as adopted in other areas of law, so that parties draw up realistic budgets for cases and adhere to them under judicial supervision.

- Allowing the courts to continue to use their cost capping powers to supplement the costs management and protection systems developed.

Ministry of Justice consultation

The Ministry of Justice consulted on proposals to introduce a form of costs protection in defamation and privacy cases between September and November 2013.[17]

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[16] Civil Justice Council *Defamation Costs Working Group 2013: Final Report* 28 March 2013

The consultation explained that costs protection affects the liability that one party in civil litigation has to pay the other party's costs.

The general rule in civil litigation in England and Wales is that the losing party must pay the other side's legal costs, as well as their own. However, the Government recognises that certain litigants should be generally protected from having to pay the other side's legal costs if their case is unsuccessful. In relation to defamation and privacy cases, the consultation paper explains that the rationale for introducing costs protection is to ensure that meritorious cases are able to be brought or defended by the less wealthy, who should not be deterred from bringing or defending an appropriate claim through the fear of having to pay unaffordable legal costs to the other side if they lose.

The consultation proposed that costs protection should be available to both claimants and defendants, in proceedings for:

1. Defamation;
2. Malicious falsehood;
3. Breach of confidence involving publication to the general public;
4. Misuse of private information;
5. Harassment, where the defendant is a news publisher[18]

It would be open to the parties to agree the costs protection position. If that were not possible it would be for the judge to decide, based on a statement of assets provided by the applicant.

Entitlement to costs protection would depend on the means of the party by whom it was sought. For this purpose there would be three groups:

1. Those of modest means, who should be entitled to costs protection in full ('nil net liability'). The proposed test would be that the party would face 'severe financial hardship' if they had to pay the other side's costs. Full costs protection would mean that the party would be protected from having to find any additional money to pay to the other side in the event that the case was lost. If the case was won, and damages awarded they would not have to pay anything beyond those damages.

2. Those of some means – who could pay something, but not the costs in full – should be entitled to costs protection in part ('capped liability'). This group would include those who could pay a reasonable amount without seriously affecting their overall financial position but would suffer severe financial hardship if required to pay all of the opponents' costs. Liability would depend on the applicant's statement of assets, and the costs budget. The opponent's assets might also be a relevant factor.

3. Those of substantial means, who should not get any costs protection because they would not face 'severe financial hardship' if they were ordered to pay the other side's costs. This would include wealthy individuals or organisations which can readily afford to pay the other side's costs.

The consultation paper identified a number of other measures which are available to control costs: parties will continue to be expected to comply with the Pre-Action Protocol for

[17] Ministry of Justice *Costs protection in defamation proceedings and privacy claims: the Government's proposals* September 2013
[18] Para 21.

Defamation,[19] and face sanctions if they do not; costs budgeting will occur in all defamation cases; and, the court's powers in relation to costs capping will continue.

5 Procedural changes

During the Defamation Bill's passage through Parliament there was discussion of procedural changes that could be made to expedite the progress of defamation proceedings and encourage the early resolution of disputes, in order to further reduce costs.

The Joint Committee on the draft Bill described the limitations of the existing means of reaching early settlement and endorsed the Government's proposals for a new procedure. These were that all defamation cases should be channelled through a new process which allows for key issues to be determined at as an early a stage as possible. The key issues would be: whether the publication caused substantial harm (now serious harm); meaning (what the actual meaning of the statement is and whether this is defamatory); and, whether the words are a statement of fact or an expression of opinion.

The Committee further recommended that there should be strict enforcement of the Pre-Action Protocol governing defamation proceedings, including a presumption that mediation or neutral evaluation will be the norm; voluntary arbitration; and, if the claim has not been settled, court determination of key issues using the proposed improved procedures.

In response to the Committee's Report, the Government said:

> We welcome the Committee's support for our intention of promoting the early resolution of key issues through a new preliminary court procedure. Our proposals were also broadly welcomed on consultation and we will develop them further to ensure that the new system is brought into effect on a timely basis on passage of the Bill.[20]

Responsibility for making the necessary changes to the Civil Procedure Rules lies with the judiciary. On 2 January 2014, Lord Dyson, the Master of the Rolls, made the following statement regarding procedural changes in defamation cases:[21]

> Background
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> During the passage of the Bill that became the Defamation Act 2013, Parliament discussed procedural changes to assist with the implementation of the legislation and the policy underlying it. The Civil Procedure Rule Committee (CPRC) has now made the rule changes. However, as these have not been as extensive as members of Parliament may have anticipated, I am issuing this statement to provide some clarification and reassurance to Parliament and others.
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> Concerns expressed in Parliament
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> During the passage of the legislation, a number of members with experience of defamation proceedings and with an interest in the topic spoke of the desirability of early resolution processes – for example enabling a judge to decide critical issues at

[19] *Pre-Action Protocol for Defamation*

[20] Ministry of Justice *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* February 2012, para 65

[21] Available at http://www.judiciary.gov.uk

the heart of a dispute at as early a stage as possible. This was in line with recommendations from (amongst others) Sir Charles Gray's Early Resolution Procedure Group, and the Joint Committee on the Draft Defamation Bill, both of which were anxious to see early resolution and steps taken to encourage it and reduce costs.

The existing powers of the court

In addition to the new measures in the 2013 Act, there already exists a formidable array of powers which judges can use to achieve these goals.

Civil Procedure Rule 3 provides a judge with a wide range of options to intervene in cases and 'call in' parties at an early stage. For example in determining the order of issues to be dealt with, requiring parties to attend hearings and to "*dismiss or give judgment on a claim after a decision on a preliminary issue*".

Rule 3.4 gives the court the power to strike out a claim as an abuse of process or where there are no reasonable grounds for bringing the claim. The rules also provide for courts to take into account compliance with pre-action protocols, a specialist protocol being in place for defamation cases - http://www.justice.gov.uk/courts/procedurerules/civil/protocol/prot_def.

In addition, the pre-action protocol encourages the use of ADR (Alternate Dispute Resolution), another issue on which speakers in Parliamentary debates were keen to see an emphasis.

Rule changes made

The CPRC has considered and made amendments to the rules, in the light of a report from a Sub-Committee whose membership included specialist judges and practitioners. These amendments will take effect when the Act is brought into force.

In particular, a change has been made to Rule 26.11 to reflect the removal by the Act of the presumption to trial by jury in defamation cases. This will have the effect of giving judges greater scope to achieve early resolution. Previously some issues could not have been decided until a decision on whether there would be trial by jury had been taken.

The Government has consulted on proposals for costs protection in defamation and privacy claims to ensure that people of modest means can bring and defend proceedings (https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamationand-privacy-claims). The proposals were developed in consultation with the CPRC, which will be responsible for implementing any rule changes decided on in the light of the public consultation.

Conclusion

I am confident that the courts have the powers they need to ensure early resolution of defamation cases, and are fully aware of the importance of using these powers. The exercise of these powers will not be appropriate in every case, but it should be the aim wherever possible.

Early resolution is desirable in defamation and privacy cases, as in other areas of litigation, to sort out disputes quickly and economically.

It is particularly important in defamation cases, however, in view of the very high costs that can arise.

All of us – Parliament, Government, the Judiciary, the CPRC and everyone with an interest in this area of law – will want to see the effects of the Act and the new procedural framework on cases, and will expect to see earlier resolution of disputes than before.