



Ministry
of Justice

Post-Legislative Memorandum: The Defamation Act 2013

October 2019

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2019



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Introduction

1. This post-legislative memorandum is being published as part of the post-legislative scrutiny process set out in Cm 7320, and is being submitted in the first instance to the Justice Select Committee.
2. The Defamation Act 2013 was an Act of Parliament which made a number of changes to the law on defamation in England and Wales. The Act received Royal Assent on 25 April 2013 and came into force on 1 January 2014.

Objectives

3. The Bill was introduced to fulfil the commitment in the Coalition Agreement following the 2010 General Election to “review the law of libel to protect legitimate free speech”. In its response to the report of the Joint Committee on the Draft Defamation Bill published in February 2012¹ the Government stated:

“..... we are firmly committed to reform of the law on defamation and the protection of free speech. The right to speak freely and debate issues without fear of censure is a vital cornerstone of a democratic society. We believe that it is important that our defamation laws strike a fair balance so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech and freedom of expression are not unjustifiably impeded by actual or threatened defamation proceedings.”

Background

4. The Coalition Government published a Draft Defamation Bill for consultation in March 2011.² A Joint Committee of both Houses of Parliament was then appointed to examine the Draft Bill and its report was published in October 2011.³ Following publication of the Government response to the Joint Committee’s report, legislation was introduced in the House of Commons in May 2012.

5. At Second Reading in the House of Lords on 9 October 2012, the then Minister of State at the Ministry of Justice, Lord McNally, said:

“The issue for our defamation laws is ultimately one of striking the right balance between freedom of expression on the one hand and protection of

¹ <https://www.parliament.uk/documents/joint-committees/Draft-Defamation-Bill/Government%20Response%20CM%208295.pdf>

² https://consult.justice.gov.uk/digital-communications/draft_defamation_bill/supporting_documents/draftdefamationbillconsultation.pdf

³ <https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf>

reputation on the other.....I believe that the package of measures contained in this Bill meets our aim of rebalancing the law in a fair and effective way, so that free speech is not unjustifiably impeded and so that debate on issues of public importance is able to thrive, while still providing appropriate remedies for those who have been defamed.”

Summary of Changes made by the Act

6. **Section 1: Serious Harm** – This section provided that a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. This was intended to raise the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation could proceed. In the case of bodies trading for profit the serious harm test is only met if the body can demonstrate actual or likely serious financial loss.
7. **Section 2: Truth and section 3: Honest Opinion** – These sections renamed the common law defences of justification and fair comment as ones of truth and honest opinion and were intended to make the law simpler and clearer to understand and apply.
8. **Section 4: Publication on matter of public interest** – This section provided a new statutory defence to those publishing responsibly on matters of public interest, building on the previous common law defence. The defence focuses on whether the publisher of the material reasonably believed that the publication was in the public interest.
9. **Section 5: Operators of websites** – This section provided a defence to website operators who choose to follow a process aimed at enabling a complainant to protect their reputation by resolving matters direct with the person who is responsible for the defamatory posting. Where the person responsible cannot be identified or is unwilling to engage in the process, material must be removed for the defence to be available.
10. **Section 6: Peer-reviewed statement in scientific or academic journal etc** – This section created a new defence of qualified privilege for peer-reviewed material in scientific and academic journals.
11. **Section 7: Reports etc protected by privilege** – This section updated and extended the circumstances in which the defences of absolute and qualified privilege under the Defamation Act 1996 are available. These defences apply to reports on a wide range of matters of public interest (for example, reports of court proceedings, information published by local and national Governments, public meetings). The section made a number of amendments to provide protection in a wider range of circumstances, including to fair and accurate reports of press conferences and proceedings of a scientific or academic conference held anywhere in the world.

12. **Section 8: Single publication rule** – This section introduced a single publication rule which means that, provided subsequent publications are made in a similar manner, an action against a publisher must generally be brought within a year of the first publication by that publisher. Previously, each publication of defamatory material (e.g. each “hit” on a website) created a new cause of action, and so publishers were potentially liable however long after the original publication the material was accessed.
13. **Section 9: Action against a person not domiciled in the UK or a Member State etc** – This section addressed concerns about “libel tourism” (where cases with little connection to England and Wales are brought here) by tightening the test to be applied by the courts in relation to actions brought against people who are not domiciled in the UK, an EU Member State or signatories to the Lugano Convention (Iceland, Norway, Denmark and Switzerland). It did this by requiring that the court must be satisfied that England and Wales is clearly the most appropriate place to bring an action in respect of the statement complained of before accepting jurisdiction to hear the case.
14. **Section 10: Action against a person who was not the author, editor etc** – This section offered greater protection to secondary publishers such as booksellers by removing the possibility of an action for defamation being brought against them except where it is not reasonably practicable for the claimant to bring the action against the author, editor or commercial publisher.
15. **Section 11: Trial to be without a jury unless the court orders otherwise** – This section removed the presumption in favour of jury trial, leaving the judge a discretion to order jury trial where it is appropriate to do so. The existence of the right for either party to opt for trial with a jury and the role which juries (if used) had to play, had impeded early settlements and added to the length and cost of proceedings.
16. **Section 12: Power of the court to order a summary of its judgment to be published** – This section extended the power of the court to order publication of a summary of its judgment to all cases where the court considers it appropriate.
17. **Section 13: Order for removal of defamatory statement** – This section provided that where a court gives judgment for the claimant in a defamation action, it may order the operator of a website on which the defamatory statement is posted to remove the statement, or for any person who was not the author, editor or publisher to stop distributing, selling or exhibiting material containing the statement.
18. **Section 14: Special damage** – This section repealed outdated provisions in the Slander of Women Act 1891 relating to slanderous statements regarding the chastity of women.

Implementation

19. The Act was brought into force on 1 January 2014.

Secondary Legislation

20. The following statutory instrument came into force at the same time as the Act:

The Defamation (Operators of Websites) Regulations 2013⁴

21. These regulations prescribed the procedure to be followed to provide website operators with the defence under section 5 of the Act. The regulations aimed 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 helps to enable complainants to resolve their concerns with, or take action against, the poster of the allegedly defamatory material. It also ensures 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.
22. There is no obligation on the operator to follow the process set out in the Regulations. On receipt of a notice of complaint, the operator can choose to remove the posting at any point, or to allow it to remain posted. If the operator chooses not to follow the process prescribed in the regulations, the Section 5 defence will not be available to the operator in the event that it is sued for defamation. However, this does not affect the availability of any other defences which may apply (for example under the Electronic Commerce (EC Directive) Regulations 2002).

Legal Issues

23. There are no issues on which the statutory provisions have been challenged in the courts. However, a number of key aspects of the Act have been the subject of interpretation by the courts. These are referred to in the Preliminary Assessment section below.

Other Reviews

24. None.

⁴ <https://www.legislation.gov.uk/ukdsi/2013/9780111104620>

Preliminary Assessment of the Act

25. There has not been any body of opinion calling for a review or for the amendment of the Act. That may be because the provisions are seen to be working reasonably effectively, and in some respects were intended largely to codify the existing common law, or because it is still too early to feel their full impact given the length of civil litigation. In a recent debate in the House of Lords in the context of an amendment seeking to extend the Act's provisions to Northern Ireland, Lord Black of Brentwood, supported by a number of other speakers, referred to the Act as having achieved its aims and had a significant positive impact on the law in this area.⁵
26. There have been a number of recent judgments on key aspects of the Act. These include the following:

Section 1: Serious Harm

Lachaux v Independent Print Ltd [2019] UKSC 27

In this case the Supreme Court considered how the serious harm test should be interpreted and operate in practice. The court held that the definition of a defamatory statement includes that it must have caused or is likely to cause serious harm. The threshold for that harm is also now higher than that described in previous case law and must be determined by reference to the actual facts and not merely the tendency of the words to cause harm.

The court also held that the limitation period runs from the date of publication and not the date of harm. Any subsequent harm is merely of evidential value.

Section 3: Honest Opinion

Butt v Secretary of State for the Home Department [2019] EWCA Civ 933

In this case the Court of Appeal considered the defence of honest opinion under section 3 and, in particular, whether a statement issued by the government was a statement of opinion. In that consideration the court accepted the proposition that the common law principles developed in relation to the defence of fair comment continued to apply to the statutory defence.

Section 4: Public Interest Defence

Economou v De Freitas [2018] EWCA Civ 2591

In this case the Court of Appeal confirmed that the availability of the section 4 defence was not restricted to cases concerning the mainstream media and

⁵ [https://hansard.parliament.uk/lords/2019-07-15/debates/842240B3-D732-4643-9387-6C2E9D874C47/NorthernIreland\(ExecutiveFormation\)Bill](https://hansard.parliament.uk/lords/2019-07-15/debates/842240B3-D732-4643-9387-6C2E9D874C47/NorthernIreland(ExecutiveFormation)Bill)

that the court should continue to pay close regard to the factors established under the previous common law in the case of *Reynolds v Times Newspapers* when assessing the reasonableness of a defendant's belief under section 4 of the Act. However, it should exercise considerable flexibility in that assessment, having regard to the particular defendant and "all the circumstances of the case" as required by the Act.

Doyle v Smith [2018] EWHC 2935 (QB) HC

In this case the High Court confirmed that the section 4 defence could potentially apply in the case of bloggers and amateur journalists, and considered the standards that should be required for such a defendant to succeed in establishing the defence.

Section 9: Action against a person not domiciled in the UK or a Member State etc

Ahuja v Politika Novine I Magazini DOO [2015] EWHC 3380 (QB); Huda v Wells & Others [2017] EWHC 2553 (QB); Craig Wright v Roger Ver [2019] EWHC 2094 (QB)

In these cases the High Court gave guidance on the approach to be taken under section 9 on an application for service out of the jurisdiction of England and Wales and indicated that the hurdle for a claimant suing a foreign defendant is a high one as intended by the Act.

Other sections of the Act

27. Other aspects of the Act do not as yet appear to have been the subject of significant case law. In particular, we are not aware of any decisions in relation to section 5 (website operators), section 6 (peer reviewed statements in scientific and academic journals) or section 8 (single publication rule). In relation to the latter two sections, this is likely to reflect the fact that the provisions have been operating effectively in accordance with the intentions of the Act.
28. In relation to section 5, it is understood anecdotally that the provisions have been little used, with website operators preferring to remove material or rely on other existing defences. However, the defence under section 5 was introduced because of concerns at that point that operators might not have adequate protection, and there is no obligation on operators to follow the process set out in the Regulations. As noted above, if the website operator chooses not to follow the process established under the Act, the defence under section 5 will not be available to the operator in the event that it is sued for defamation. However, this does not affect the availability of any other defences that may apply. The fact that website operators are choosing not to rely on the defence does not therefore appear to constitute a significant issue in practice.

29. More generally, while there has inevitably been comment on developments in case law from differing perspectives, we are not aware of any significant overarching concerns arising from the implementation of the Act.

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