

New defamation consultation published for England and Wales

The Government has published a [consultation paper](#) on a draft Defamation Bill relating to the law in England and Wales. It follows a statement in the Coalition Agreement that measures to "reverse the erosion of civil liberties and roll back state intrusion" would include the "review [of] libel laws to protect freedom of speech". It includes new requirements for a potential claimant to show "substantial harm" arising from a defamatory statement, and will codify certain defences currently only available at common law. The proposals may make it more difficult for claimants to bring defamation proceedings.

The draft Bill aims to change the law in a number of respects. The main proposals in the six-page draft legislation are:

- A new requirement that a statement must have caused substantial harm in order for it to be defamatory. At present, a claimant is only required to show that a defamatory statement identifying the claimant was published to at least one third party, and the law presumes damage. It is interesting to note that the Government has not adopted the suggestion made by Lord Lester in his Private Member's Bill introduced in 2010 that a company seeking to bring defamation proceedings should have to show that the statement had caused it, or was likely to cause it, "substantial financial loss". "Harm" arguably covers more types of damage than "financial loss".
- A new statutory defence of responsible publication on matters of public interest. Clause 2(2) of the draft Bill sets out eight matters to which the court may have regard in deciding whether a publisher has acted "responsibly". However, responsible publication is already available as a common law defence and the eight matters listed in the Bill are currently part of that defence. It is not clear whether the statutory defence is intended to change the position materially, but the new defence also incorporates the current "reportage" defence, by stating that "[a] defendant is to be treated as having acted responsibly in publishing a statement if the statement was published as part of an accurate and impartial account of a dispute between the claimant and another person."
- A statutory defence of truth, which will replace the current common law defence of justification. The new defence will require the defendant to show "that the imputation conveyed by the statement complained of is substantially true."
- A statutory defence of honest opinion, which will replace the current common law defence of fair/honest comment. The new defence does not require the underlying facts or other material to be indicated in the words complained about, which is a change from the current position.
- The introduction of a single publication rule to prevent an action being brought in relation to publication of the same or "substantially the same" material by the same publisher after the one year limitation period has passed. At present, statements on the internet are "republished" in defamation terms every time they are downloaded, which means that, while a statement remains available to view, the limitation period never expires.

Key Issues

- Proposals include a requirement for claimants to show "substantial harm"
- Existing defences are to be codified
- A new "single publication" rule will prevent proceedings being brought after the one-year limitation period has expired
- Trials will now be before a judge alone, unless a jury is thought particularly appropriate

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- A requirement that a court will not accept jurisdiction in a defamation case unless it is 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. This is being described as the answer to "libel tourism", notwithstanding that very few actions brought in England and Wales do not involve either a claimant or defendant based here.
- Removal of the presumption in favour of a jury trial, so that the judge would have a discretion to order a jury trial where it is in the interests of justice.

The proposed changes are not as drastic as some campaigners have called for. However, the requirement to show "substantial harm" may mean that claimants are less likely to bring trivial claims in the future. At present, a claim can be struck out as an abuse of process if the court is satisfied that there has been no real and substantial tort, but the claimant can issue a claim form and wait to see whether the defendant takes the point. A requirement for a claimant to set out the harm (or potential harm) at the outset of proceedings may focus attention on this issue at an earlier stage.

There are also some issues in the consultation paper which are not included in the draft Bill. These include:

- Responsibility for publication on the internet, and whether the law should be changed to give secondary publishers such as ISPs and discussion forum owners greater protection. Currently, someone republishing a defamatory statement is as liable as the original publisher, with only a few exceptions.
- A new court procedure to resolve key preliminary issues at as early a stage as possible, to save time and costs.
- Whether the summary disposal procedure should be retained, and if so whether improvements can usefully be made to it. This procedure allows a court to give a declaration that a statement was false and defamatory of the claimant, order the defendant to publish an apology, award damages of not more than £10,000 and order the defendant not to publish or further publish the statement complained about. An order for a correction or apology can only be obtained using this procedure.
- 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 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. In Australia, for example, the law now says that trading companies with more than ten employees cannot bring an action for defamation.
- 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.

These are all areas in which changes have been suggested in the past and, in particular, responsibility for publication on the internet and the ability of companies to bring defamation proceedings are likely to be the subject of considerable further debate. Any proposal along the law in Australia, which prohibits proceedings by certain companies, would have a significant effect on the ability of companies to seek redress for damage to their reputation. However, there are currently no separate provisions for companies in the draft legislation. Rather, they, along with all other claimants, will be required to show "substantial harm" resulting from the publications on which they sue.

The consultation timetable is as follows:

- Consultation on draft Bill ends on 10 June 2011
- Government's Response Paper to be published in Autumn 2011.

It is expected that a Defamation Bill will be introduced to Parliament in the Spring of 2012.

The firm will be responding to the consultation and welcomes views from readers of this briefing.

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