



The Libel Reform Campaign

The Defamation Act 2013: What does it mean for you?

The Defamation Act received Royal Assent in April 2013. It is expected to be put into force by the end of the year. The new law is the product of a year-long parliamentary process and a longer period of consultation that has spanned two administrations.

Throughout, government and Parliament have sought to rebalance the English law of libel, which had become unfit for purpose. The complex and costly law was inaccessible to ordinary people, whether they were claimants or defendants. It enabled corporations and wealthy individuals to bully critics into silence.

The Defamation Act 2013 is intended to simplify and rebalance the law. It sets out defences to a libel claim, introduces new procedures, grants new powers to the court and limits libel tourism. The intention is to reduce the chill on freedom of speech so that writers, editors and publishers engage in less self-censorship and are able to resist legal threats. They will also be protected by more effective defences if a case comes to trial. The result promises an expansion of the space for freedom of expression in our democracy.

What does it mean for...

- ... **bloggers and citizen journalists?**
- ... **web forums?**
- ... **scientists and doctors?**
- ... **reviewers?**
- ... **writers living outside the EU?**
- ... **book publishers?**
- ... **novelists?**
- ... **bookshops?**
- ... **journalists and newspapers?**
- ... **NGOs?**
- ... **social media?**
- ... **claimants?**

A summary of the new law

[The Defamation Act 2013](#) delivered many changes to the law of libel in England & Wales.

- **Section 1 introduces a serious harm hurdle** The law now requires that a claimant shows they have suffered or are likely to suffer 'serious harm' before they can sue in libel. Companies have to show that the words complained of have caused, or are likely to cause, serious financial loss.
- **Section 2 offers a defence of truth** A defendant has a defence in libel if he or she can show that the words he or she wrote were 'substantially true'.
- **Section 3 introduces a defence of 'honest opinion'** This replaces the 'fair comment' defence. A defendant in a libel action has a defence if he or she can show that his or her words were an opinion that an honest person could have held, based on facts available at the time. It is for the *claimant* to prove that an opinion was not honestly held.
- **Section 4 delivers a new public interest defence** This gives protection when the publication is on a matter of public interest, and the defendant has a 'reasonable belief' that publishing the statement was in the public interest. This defence applies to both statements of fact and opinion. It can also be used in circumstances where the published statement turns out to be untrue.
- **Section 5 protects operators of websites** ISPs, hosts, operators of group blogs and forum operators are protected from being sued for material they host (but did not write), if they follow certain procedures when they receive a complaint. A set of regulations (expected to become law in the Autumn of 2013) will govern these procedures.
- **Section 6 introduces privilege for peer-reviewed publications in scientific or academic journals** The new law gives scientific conclusions, and the opinions based upon them, an extra layer of protection.
- **Section 7 protects the accurate reporting of official documents produced by government, companies and conferences** Reports of court and tribunal proceedings (both in the UK and internationally) are protected by 'absolute privilege', while fair and accurate reports of listed company AGMs, press conferences, corporate accounts and other official documents are protected by 'qualified privilege'. Reports of scientific and academic conferences are also protected.
- **Section 8 introduces a 'single publication rule'** This reform puts an end to indefinite liability. Material that is accessed after the limitation period has expired (for example, clicking a link in a web archive a year after an article was first published) will no longer be considered a 'new' publication.
- **Section 9 curbs 'libel tourism'** When a claimant wishes to sue a person who lives outside the European Union, he or she will have to demonstrate to the court that England & Wales is the most appropriate jurisdiction.
- **Section 10 protects booksellers and ISPs** Claimants cannot threaten bookshops with a libel action when they are able to bring proceedings against the author, editor or publisher of the book.
- **Section 11 introduces the presumption that a judge will hear the case without a jury**

- Claimants or defendants are still able to ask the judge to order a jury trial.
- **Section 12 gives the court power to order its judgement be published by the defendant**
This is not the same as the court ordering the author to apologise.
 - **Section 13 gives the court power to order a website to remove material that it has found to be defamatory** The court can also order booksellers or newspaper vendors to stop distributing printed matter.
 - **Section 14 repeals the Slander of Women Act 1891** This law allowed imputation of adultery or unchastity to result in an action for slander, and had fallen out of use. This section also clarifies that an imputation of a person having an infectious disease does not automatically give rise to an action for slander.
 - **Sections 15, 16 and 17** of the Act make general provisions, such as: the meaning of 'publish' and 'statement'; consequential amendments to other Acts of Parliament; which aspects of the new law apply to Scotland; and when the new provisions are to be commenced. There is nothing in Section 17 that extends the new law to Northern Ireland.

What does it mean for... bloggers and citizen journalists?

Several provisions in the new law support bloggers' and citizen journalists' right to free speech.

The Section 1 requirement of serious harm will weed out trivial and vexatious claims at an early stage. A company cannot sue, and should not threaten to sue, when it has been criticised (even unfairly) but has not suffered (or is likely to suffer) serious financial loss.

Bloggers and citizen journalists should be able to benefit from the new public interest defence, although since this defence can also apply in cases where the published words turn out to be false, defending a libel action under Section 4 may still be a costly undertaking until test cases have determined the limits of the new provision.

Citizen journalists who scrutinise local councils and companies will benefit from Section 7 of the Act. They can republish and summarise official minutes ('fair and accurate' reporting), reports of council meetings and other documents, and be protected by 'qualified privilege'.

Section 5 of the Act means that claimants will not be able to short-circuit the complaint process by threatening the web host. The web host can leave up a contentious post and not risk being sued for libel, provided they have passed the complaint onto the blogger who wrote the words.

However, new provisions may make *anonymous* criticism harder. When a website receives a complaint, they must pass it onto the blogger and ask whether the blogger wishes to defend their words against a legal action. An anonymous blogger who does not want their name and address revealed will find it difficult to avoid the removal of their writing by the web host.

Section 12 of the Act may require a blogger or citizen journalist who has lost a libel case to publish a summary court judgement. Section 13 gives the court power to order defamatory words to be removed from a website.

What does it mean for... web forums?

Section 1 of the Defamation Act 2013 introduces a 'harm' hurdle for claimants to meet before they can sue for libel. Casual chat on web forums may not meet the 'serious harm' threshold..

When the topics being discussed concern matters of public interest, the web forum may be able to use Section 4 of the Act (public interest). The operators of the CarerWatch forum (where criticisms of Atos Healthcare led to the site being shut down in 2011), and the operators of the Legal Beagles forum (which faced legal threats after the site published criticism of the civil recovery firm Retail Loss Prevention in 2012) would have been able to mount strong defences under Section 4.

Where members of a web forum are discussing the activities of a listed company (i.e. a PLC), Section 7 allows them to report the official documents filed by that company, and reports of any meetings, and be protected by qualified privilege. Honest opinions offered on the basis of these reports, and facts available in the news media, would also be protected under Section 3. This could have helped the members of the Owlstalk forum, who received legal threats from members of the board of Sheffield Wednesday FC in 2007.

The Section 5 provisions, and the associated regulations, offer new protections to web forums. If someone posts something defamatory on a forum, the forum operator can follow the Section 5 Regulations (for example, passing on the complaint promptly to the person who posted the words) and retain a strong defence against a libel action.

However the new defence offers no greater protection for content, if the author does not wish to reveal their identity and defend their words. In such case the material will be removed, unless the web forum operators choose to defend the content themselves.

When a web forum loses a defamation case, they may be required by the court to publish the summary judgment on their site (Section 12). The court may also require certain posts and comments to be removed from the forum (Section 13).

What does it mean for... scientists and doctors?

Scientists now have more effective protection against libel threats. Section 6 of the Act offers privilege to peer-reviewed papers published in academic and scientific journals. Academics and scientists writing for peer-reviewed publications will therefore be able to criticise medicine, products or methodologies robustly, as well as the companies and individuals who produce them.

Science writers and science bloggers are protected too. Anyone who quotes and discusses peer-reviewed material will benefit from Section 6(5) of the Act, which protects this kind of discussion. Meanwhile, science writers and bloggers can accurately report anything said at an academic or scientific conference, and be protected by qualified privilege under Section 7 of the Defamation Act.

Scientists and bloggers will also benefit from other defences in the Act. A scientist or doctor who accurately reports results of their experiments or trials would be protected by Section 2 (although if

their research is shown to be flawed then the defence is likely to fail). Professionals who offer a scientific or medical opinion in good faith will be protected by a Section 3 defence. Medical whistleblowers or science writers who criticise treatments should benefit from the Section 4 public interest defence.

Companies will not be able to bully web hosts into taking down material written by a scientist or academic. Section 5 allows the material to remain online while the web host passes on the complaint to the author. The Section 1 requirement that companies show serious financial loss before they sue should also ease the libel pressure on scientists and doctors.

What does it mean for... reviewers?

Honest opinion is protected under Section 3 of the Defamation Act 2013. Anyone who posts a product review, a service review, or who reviews a piece of art, will be able to rely on the defence of honest opinion. (Malicious reviews that tell lies about a product or service will lose this defence). The serious harm hurdle at Section 1 may also be invoked: companies will have to show how a single review on a website caused 'serious financial loss'.

The Section 5 provisions relating to website operators and hosts offer a robust process for critics (be they bloggers or journalists) to ensure their words are not suppressed. A claimant cannot ask a web operator to remove content without first contacting the author.

However, the same Section 5 process may prove less helpful for consumer reviews of products and services online. Regulations require any complaint to be passed on to the person who wrote the review, who must then decide whether to consent to their details being made available to the claimant for the purposes of a libel action. Ordinary people, who may not consider themselves to be 'publishers' or 'citizen journalists' are unlikely to consent to this. While the brief reviews and quick comments may be true, honest, and in the public interest (i.e. perfectly defensible under the Defamation Act 2013), those who post this content may be unlikely to have the time, the resources or the will to defend their words against a corporate legal threat.

There is therefore a risk that legal 'reputation managers' will be able to have negative reviews taken down from a website in bulk and with ease. In such situations, the individuals posting the reviews would have to rely on the website itself to defend content against this kind of attack.

What does it mean for... writers living outside the EU?

Journalists and bloggers who write about events and people outside the EU should no longer be threatened with a libel case in the London High Court, unless the court decides that England & Wales is clearly the most appropriate place in which to bring an action.

The author Rachel Ehrenfeld (USA) was sued by Sheikh Khalid bin Mahfouz (Saudi Arabia) in London, over a book published in the USA. *Forbes Magazine* (USA) was sued by Boris Berezovsky and Nikolai Glouckov (Russia) over an article published in the USA. The *Kyiv Post* (Ukraine) was sued by Rinat Akhmetov (Ukraine) over their reporting of his activities. All such cases will be harder to

bring to the London High Court, due to the jurisdiction limits set out by Section 9 of the Defamation Act.

However, this would not have protected the Danish newspaper *Ekstra Bladet* from being sued by the Icelandic Bank Kaupthing in 2006. Publishers from an EU member state cannot benefit from the new limitations.

What does it mean for... book publishers?

Book publishers will benefit from the serious harm hurdle to bringing a claim delivered in Section 1 of the Defamation Act 2013. They may also rely on the clearer defences of truth, honest opinion and public interest set out in Sections 2-4 of the Act. It is hoped that in-house legal teams and media lawyers will be able to rebut a greater number of libel threats confidently, and defend a larger number of cases. During the commissioning and editorial stages therefore, editors should feel confident in publishing controversial material.

Section 8 of the Act (single publication rule) gives the publisher greater confidence that they will not receive libel claims over the content of their back catalogue, if the material has been available for more than a year. Section 10 of the Act means that most claimants will contact the publisher (or author or editor) when they have a complaint, not short-circuit the legal process by threatening the bookshop with legal action.

What does it mean for... novelists?

Section 1 of the Act introduces a serious harm test. This will weed out vexatious and trivial claims, which should offer greater protection to fiction writers against being sued by anyone who decides that they are the inspiration for a real-life character. This provision in the Act might have protected Jake Arnott (*Johnny Come Home*, 2006) from being sued.

What does it mean for... bookshops?

Section 10 of the Defamation Act 2013 gives a strong defence for booksellers. Claimants will no longer be able to short-circuit the proper procedures by threatening retailers with libel action over the books on their shelves. The claimant will always have to complain to the author, editor and publishers in the first instance.

What does it mean for... journalists and newspapers?

The substantial harm test in Section 1 creates a greater legal hurdle for claimants in libel disputes. It is hoped that critical comments and opinion pieces will receive stronger protections under these provisions.

The greater clarity of the defences provided by Section 2-3 of the Act should embolden journalists and editors to publish news and opinion based on available facts. For a professional newsgathering organisation with the resources to fact-check and source their material, these defences should prove quite strong against vexatious claims.

Section 4 is a simpler public interest defence than the common law public interest defence (the Reynolds defence, developed in *Jameel* and *Flood*). However, the new defence of 'reasonable belief' criteria at Section 4 (1)(b) has yet to be tested in court, so some uncertainty remains. Section 4(4) of the Act allows the court to take editorial judgement into account.

Journalists and newspapers reporting on scientific and medical issues will be able to report on the scientific debate and conclusions published in peer-reviewed journals and be protected by qualified privilege. Likewise, fair and accurate reporting of the proceedings of academic conferences (Section 7) enjoys the same protections.

Section 7 clarifies that business journalists can report on the documents and shareholder meetings for listed companies, and be protected by qualified privilege. Any company that wishes to sue a journalist must show that they have suffered, or are likely to suffer, serious financial loss, before they bring a claim (Section 1) - an extra hurdle for legal action.

The single publication rule at Section 8 of the Act encourages newspapers to continue to make their archives available online.

What does it mean for... NGOs?

In the past, NGOs such as Global Witness and Human Rights Watch have received legal threats regarding their reports into human rights abuses around the world.

The 'serious harm' hurdle in Section 1 and defences available in Sections 2-4 of the new law, should all assist NGOs in publishing reports in the public interest.

When NGOs are criticising corporations, the provisions for reporting on official reports and listed company shareholder meetings (Section 7) may be of some benefit, along with the 'serious financial loss' hurdle at Section 1(2).

When an NGO based outside the EU publishes a report, and includes statements from people living in a country outside the EU, Section 9 of the Defamation Act will make it harder for claimants to threaten legal action in England & Wales.

Section 5 of the Act will prevent claimants from suppressing NGO reports by threatening the web host or ISP. They will have to take their complaint directly to the NGO itself.

What does it mean for... social media?

Public social media messaging, on Twitter, Facebook and similar sites, is a form of publishing and subject to the law of libel, as the recent libel case brought by Lord McAlpine against Sally Bercow made clear.

Most social media users have relatively few followers and 'friends'. The Section 1 hurdle of 'serious harm' may offer a stronger free speech protection for users of social media, especially when they only have a few followers. However, since the possibility of *sharing* is implicit in social media, someone who has only a few followers may nevertheless write a Tweet or message that is widely shared, and meets the Section 1 threshold. Also, a serious allegation published to a small number of followers may still cause serious harm.

The truth defence (Section 2) relies on facts. A defendant can still rely on those facts, even if they are not present in the Tweet. However, they should at least indicate, in general terms, what the underlying facts are. Likewise with the honest opinion defence (Section 3) - the defendant need not have Tweeted the facts upon which they base their opinion, but there should be an expressed or implied reference to them. A defendant might show this by referring to other Tweets in their timeline. Social media users should be aware that messages or opinions that are not supportable by facts cannot benefit from these defences.

The public interest defence at Section 4 applies to social media as much as other forms of publishing. If a libel dispute arises from a Tweet in the public interest, the judge will have to consider the 'reasonable belief' of the Tweeter. Where the defendant is a journalist, they may be held to the editorial standards of a newspaper article. Where the defendant is a citizen journalist or simply an ordinary member of the public, the standards may be different. This is one area where a test case must develop the law, because Section 4 is a completely new defence.

The provisions for website operators at Section 5 of the Act will adversely affect social media users. The host or service provider must pass on any complaint if it wishes to take advantage of the defence available. This would leave the Tweet or message author to decide whether they wish to seek legal advice and defend their words. Unless the Tweeter is an activist or a journalist, or someone well-versed in libel law, it is highly unlikely they will consent to their details being passed on and the message will be removed. Large social media sites like Twitter and Facebook may seek to defend the words themselves and not take advantage of the defence offered by Section 5. But this means that Tweepers will have to rely on these large companies, not the law, to keep the words public.

However, where a person is confident of their words and is happy to defend them, the Section 5 provisions will prevent the claimant from forcing the web host to remove the statement.

Section 7 means that anyone attending an international scientific conference can live-tweet the proceedings, even if the content is defamatory to others. However, this section of the Act specifies 'a fair and accurate' report, and the 140 character limitation on Twitter may compromise this requirement.

The limits on libel tourism in Section 8 will make it harder for any claimant to sue someone living

outside the EU for the tweets or other social media messages they may publish.

The single publication rule at Section 9 means that it is unlikely that someone will be sued if their words are re-tweeted after the one year limitation period. However, Section 8(4) demands that the republication is not 'materially different'. The manner and presentation of the re-tweet may be taken into account.

What does it mean for... claimants?

The right to a reputation was debated extensively during the passage of the Defamation Bill in 2012-13. The reduced complexity of the law should assist claimants by making all libel disputes cheaper and quicker to resolve, regardless of the outcome. Furthermore, The Defamation Act 2013 includes several provisions that favour claimants seeking redress.

In particular, Section 5 of the Act provides a clear notice of complaint procedure for claimants who have been unfairly defamed online. The claimant must set out in their notice why the words complained of will cause harm, and the facts relating to the matter. Under the (draft) regulations, a web host will be obliged to pass these on to the defendant. This will be of particular use to claimants who have been defamed by anonymous comments.

When a claimant has won a libel action, the court has the power (Section 12) to order a summary of the judgment to be published on the defendant's website. In many cases, this is precisely the vindication that the claimants seek. Section 13 gives the court power to order the removal of defamatory content from a website, if it has yet to be removed.