The Libel Reform Campaign

What next?

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Libel reform: What next?

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The Defamation Act 2013 was passed on 25th April. The Libel Reform Campaign has been calling for four years for reforms that would produce a less expensive and complicated law that would be less able to be used to chill free speech worldwide. The 60,000 people and hundreds of organisations who are part of the campaign called for a law that anyone would be able to read to understand their rights. We focused on the most significant of the problems with the law, which were also the areas where change was most resisted, including

- the conversion of the common law Reynolds defence into a clearer, broader and more effective statutory public interest defence;
- an end to claimants’ ability to censor criticism by threatening web hosts with libel actions;
- restrictions on the ability of corporations to sue for libel, as applies to public bodies;
- easier ‘strike out’ of trivial or inappropriate claims including by raising the threshold of harm before a libel action can proceed.

The Defamation Act contains a new public interest defence (section 4), measures on internet publication (section 5); restrictions on corporations suing in libel and a hurdle of serious harm (section 1). However, there are outstanding issues:

- we need clarity that the new statutory public interest defence will not lead to the importation of the problems of the Reynolds defence;
- we are still awaiting new court procedures which must provide for early strike out of trivial claims along with the Government’s plans for costs protection;
- we need the regulations and procedures to accompany section 5 on internet publication to deliver an effective defence;
- the Northern Ireland Assembly has failed to adopt the Defamation Act.

The Defamation Act 2013 has not yet been commenced. This is the process where the Secretary of State puts the legislation in the Act onto statute, and the law becomes ‘live’. Any undue delay would continue to damage free expression.
Section 4 Publication on a matter of public interest

Section 4 of the Defamation Act 2013 puts a public interest defence into statute for the first time and abolishes the Reynolds defence. However there is still a risk that the current common law checklist of factors, that most defendants find impossible and too costly to fulfil, will be imported into the new defence. Section 4 asks defendants to prove they “reasonably believed” it was in the public interest to publish their words. We asked the Government to make a small change to the wording to reflect the Flood judgment which said that a defendant would have to show they could have reasonably decided that publication was in the public interest but the Government did not believe that this change was necessary. However Justice Minister Helen Grant MP said in the final debate on the Defamation Bill that section 4 ‘captures the essence of the Flood judgment’.

The Government must clarify the intention of section 4 and provide reassurance that an onerous check list will not be allowed to be imported into this new defence as it develops in case law.

Procedures for an early strike out

Section 1 of the Defamation Act introduces a test of serious harm: a statement is not defamatory unless it has caused or is likely to cause serious harm to the reputation of the claimant. This may not prevent a defendant facing heavy costs in vexatious or trivial claims. There needs to be an early strike-out procedure, so that cases that do not pass the serious harm test are stopped before innocent publishers are exposed to significant costs.

LASPO Act and cost protection

The Government must ensure that it deals with the issue of excessive costs in defamation actions. The LASPO Act abolished the recoverability of ‘success fees’ from the losing party in Conditional Fee Agreements in order to reduce chill from excessive legal costs, but little has been done to ensure that claimants or defendants on limited means can get access to justice. This is particularly problematic in defamation claims as damages are a small percentage of overall case costs, meaning it is not possible for claimants to pay success fees from their damages when they are successful. The Libel Reform Campaign recognises that recoverable After the Event insurance premiums need to be abolished (and replaced by a system of either-way qualified costs-shifting) and that the existing success fee regime needs revision. There are a number of suggestions to reduce case costs in English PEN and Index on Censorship’s Alternative Libel Project which is available online (http://tiny.cc/i1l9xw).
Section 5 Regulations on internet publishers

Throughout the legislative process, the Government promised to publish the detailed regulations that would govern the complaints procedure for online content. The Ministry of Justice has still not published these rules, despite the fact that it consulted on the issue in January 2013 and the legislative process is now complete.

The regulations must be published as soon as possible, and must resolve issues of confusion and uncertainty that have arisen:

Section 5 does not use the language of the existing E-Commerce regulations. The Defamation Act 2013 states that a notice of complaint must include details of why a statement complained of is defamatory. The E-Commerce Directive requires that a statement be unlawful in order for web hosts to lose the protection of the defence. The Defamation Act therefore risks introducing a degree of confusion into what should be a clear and simple procedure. The section 5 regulations must align the law with the E-Commerce Directive on this point.

The notice of complaint procedure should be underpinned by a low-cost court-based procedure that would allow claimants, defendants and web hosts to seek a ruling from a master on whether there is a prima facie case to answer. Without this foundation there is a risk that malicious authors and vexatious reputation managers may be able to abuse the section 5 process. The section 5 regulations should make provisions for any party in the dispute to seek a declaration. This will deliver certainty and efficiency and discourage abuse of the law.

The system, while protecting individuals from unlawful conduct by anonymous defamers on-line, must also ensure that the words of genuine whistle-blowers are protected from forced take-down.

Northern Ireland

The Northern Ireland Assembly must legislate for libel reform. As a free speech and human rights issue, libel reform must be delivered at Stormont, not Westminster. British citizens living in Northern Ireland must enjoy the same free speech protections as their neighbours living elsewhere in the United Kingdom. It would be intolerable if Belfast became A Town Named Sue.
The Libel Reform Campaign was formed in 2009 to campaign for the reform of the England and Wales’s libel laws. The impact of libel had long been recognised as the most significant chilling effect on freedom of speech in the UK, but a number of events over the previous two years had finally created urgent momentum for an effective campaign: the UN Human Rights Committee had criticised the negative effect of the UK’s libel laws; the United States passed a law defending its citizens from libel tourism; the suing of scientists in the UK created a public outcry as it became clear that the use of libel laws to silence criticism and whistleblowing now endangered public health and safety. The demand for libel reform as a result became an issue that engaged a wide sector of society: in the age of the internet, this was no longer a matter just for newspapers and established authors, it potentially affected anyone who spoke out or blogged. Sixty thousand people and hundreds of organisations joined the campaign. Individual citizens, scientists, writers, lawyers, bloggers and whistleblowers along with human rights groups, consumer watchdogs, community groups and online forums worked with the Libel Reform Campaign to make the case for reform. Their experiences have ensured the debate was focused on the public interest in open discussion.

All three main political parties included a commitment to reform the libel laws in their general election manifestos in 2010. The Defamation Bill was published in May 2012 and was given Royal Assent in April 2013 to become the Defamation Act 2013.

Minister Lord McNally said in June 2013: “Whilst enactment is a very significant step down the road it is of course not the end of the process. My determination to ensure that the new legislation is effective extends to a desire to see that the section 5 regulations are passed through Parliament successfully; and that the new costs protection regime for defamation and privacy cases can be resolved as quickly and cheaply as possible. Work is being taken forward on these aspects to ensure that we can commence the Defamation Act 2013 before the end of the year.”

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