Libel Reform Campaign submission to the Scottish Law Commission's consultation on its Ninth Programme of Reform

Executive Summary

The Defamation Act 2013 introduced significant changes to the law of libel in England and Wales. The Act was passed after international condemnation of the law by the UN Human Rights Committee, pressure from civil society and significant parliamentary scrutiny. The reformed law introduced new provisions to better balance the right to freedom of expression with protections for reputation.

Only one of the provisions in the new legislation was adopted by the Scottish parliament, leaving the law in Scotland with fewer statutory defences and less protection of free expression now than in England and Wales. As publication is often across the UK, this creates the possibility that vexatious litigants could 'forum shop' and take their action in Scotland where the law offers less protection for defendants. This could potentially undermine freedom of expression throughout the UK.

Serious consideration should therefore be given to reforming the Scottish law of defamation, to ensure a proper balance between the right to free expression and adequate protections for reputation.

Introduction

In this document we lay out a brief case for the Scottish Law Commission recommending reform of the law of defamation. Our submission has four sections:

1. First, we give an overview of the passage of the Defamation Act 2013 at Westminster.
2. Second, we discuss how the increased divergence between the English and Scottish defamation laws could undermine freedom of expression throughout the UK. We also list common issues with the law that were fixed by the Defamation Act 2013 but remain unreformed in Scotland.
3. Third, we examine the Scottish Parliament's legislative consent motion of 2012 and show this was an incomplete examination of the existing defamation law
4. Finally, we urge the Scottish Law Commission to recommend reform of the defamation law, and set out potential considerations for the Commission on this issue.

1. Background: Reform of the law of libel in England and Wales

The consensus that the law of libel in England and Wales should be reformed was built over several years. The pre-legislative debate on the issue was extensive, with participation from the legal profession, civil society, publishers, government officials and parliamentarians.

In 2009, English PEN and Index on Censorship's report Free Speech Is Not For Sale identified ten distinct problems with the law as it was then operating. These included the lack of an adequate statutory defence for honest opinion or publication in the public interest; confusion over the liability of secondary publishers (such as ISPs or bookshops); an antiquated definition of what constituted 'publication'; jurisdictional issues that had caused the emergence of "libel tourism" in the 1990s; and inadequacies in the management of cases that allowed legal costs to escalate, with no low-cost alternative to the High Court.

In February 2010 the House of Common's Culture, Media and Sport Select Committee report into Press Standards, Privacy and Libel described the situation that politicians in the US were trying to protect their citizens from libel actions in the High Court in London (a phenomenon known as "libel tourism") as a "national humiliation" and recommended action in a number of areas. These included: a new statutory public interest defence, a 'single-publication rule' to protect online publication and additional hurdles for companies wishing to sue using libel law. The following month the Report of the Libel Working Group set up by the Secretary of State for Justice identified a number of options for reform. These included measures to prevent libel tourism, to prevent corporations suing individuals and the possibility of an improved statutory public interest defence.

During the 2010 general election campaign, all three main political parties agreed that the law needed to better protect freedom of expression and the rights of citizen critics and all included a pledge to reform the libel laws in their election manifestoes. The new coalition government included libel law reform in the Coalition Agreement.

In July 2010, Lord Lester of Herne Hill tabled a private member's bill in the House of Lords. The government took this forward to become the draft Defamation Bill. The proposals underwent significant consultation with 129 responses from across the legal profession, civil society, publishers and academia to the Ministry of Justice consultation paper on the draft Defamation Bill, and a further 75 responses to a short-form questionnaire. The government then tabled its own Defamation Bill that underwent significant pre-legislative scrutiny by a joint committee of the House of Commons and the House of Lords. The final Defamation Act was subjected not just to pre-legislative scrutiny, but to extensive debate and amendment in the House of Commons and the House of Lords.

The Defamation Act 2013 received Royal Assent on 25 April 2013 and came into force on 1 January 2014.

2. What are the problems with the defamation law in Scotland?

While Scotland has a separate legal system, most of the problems identified and debated during the evolution of the Defamation Act 2013 apply equally to the Scottish law of defamation as they did to the English law (prior to 2014). While the Westminster Parliament has addressed these issues for England and Wales, these problems persist in Scotland.

The disparity between the two systems creates a legal problem, due to the predominance of cross-jurisdictional publishers. Most national newspapers, academic journals and scientific publications publish in both England and Wales and Scotland. In turn, a claimant with a reputation in England can legitimately claim a reputation in Scotland too. This means that claimant 'forum shopping' could increase in Scotland, as the lack of defamation reform will make a more attractive jurisdiction for claimants.

The effect of 'forum shopping' may be that publications with any kind of Scottish audience are forced to make editorial decisions based on the state of the unreformed Scottish law, rather than the updated English law.

Problems

The defamation law in Scotland

- has no clear statutory public interest test. Publications in Scotland must rely on the uncertain case law. Running a public interest based on the *Reynolds* defence is extremely expensive and uncertain.

- has no statutory requirement for claimants to prove they have been seriously damaged by defamatory statements (a requirement which would makethe law more proportionate);

- does not provide adequate defences for 'secondary publishers' who are neither the author nor the editor of comment that is accused of being defamatory;

- has no hurdle to stop corporations from bullying individual defendants (since companies do not have to prove financial loss);

- retains the rule on publication that dates from the Duke of Brunswick ruling in 1849, which makes the re-publication of content potentially defamatory.

Additionally, it is unclear whether case law in defamation that originated in English courts apply in Scotland. This means that Scottish citizens may not be able to rely in the *Reynolds* public interest defence, nor *Derbyshire* (which says that public bodies cannot sue citizens because

there is a public interest in citizens over criticisms of their public functions). These defences need to be put into statutory law.

Prior to the Defamation Act 2013, the defamation law in England and Wales cast a very real chill over publisher, academics, science and medicine. A Publisher's Association survey of members in 2010 found that *all* the respondents had modified content or language of a book before publication to avoid the risks presented by the existing defamation laws. A third of publishers had refused work from authors for fear of a libel action, and 43% of respondents had withdrawn a publication as a result of threatened libel actions. In a 2010 survey by *Pulse* magazine 80% of GPs who had an opinion felt that libel was restricting open discussion of the safety of drugs and medicines.

As the law in Scotland is unreformed and continues to lack strong statutory defences, there is nothing to suggest that the self-censorship outlined above will dissipate, for either publishers in Scotland or even publishers in England and Wales who publish across the two jurisdictions. It is possible that publishers will curtail publication on the basis of the more restrictive Scottish law, or decide to withdraw from publishing in Scotland. Both scenarios have a chilling effect on freedom of expression.

3. The legislative consent memorandum of 2012

S.6 and s.7(9) of the Defamation Act 2013 apply in Scotland (as set out in s.17 of the Act). These provisions on 'extent' were included by virtue of a legislative consent motion in the Scottish parliament, passed on 4 October 2012.

The Justice Committee of the Scottish Parliament very briefly considered a legislative consent motion for the Defamation Bill on 18 September 2012. During the session, Justice Minister Kenny McAskill MSP gave the following rationale for inclusion of s.6 into the law of Scotland:

> *Given that much academic research is done collaboratively across the border, and given that conferences are held throughout the UK with delegates attending from across the UK, the Scottish Government takes the view that it is desirable to extend to Scotland the provisions on qualified privilege. After all, parity of protection in this sphere will facilitate robust and constructive scientific and academic exchange.*

This is entirely sensible reasoning. However, it raises an important question: why were no other new defences and privileges set out in the Defamation Act incorporated on the same basis? Scottish businesses trade globally. Publishing, journalism and democratic debate also take place "across the border" and "parity of protection" is surely desirable for these activities, too. In particular the lack of clarity over ISPs' liability and the outdated 'multiple publication rule' (addressed respectively by s.5 and s.8 of the Defamation Act 2013) creates legal uncertainty with an international dimension.

The legislative consent memorandum and Mr MacAskill's testimony to the Justice Committee made the point that there had been very few complaints about the defamation law in Scotland. While this may have been true in the past, it was not because the Scottish law was adequate. Rather, the significant international criticism was directed at the law of England and Wales because it was exceptionally chilling to free speech. Now that the English law has been reformed, the Scottish law is comparatively worse.

As the official record of the Scottish Parliament shows, the detailed examination of the defamation laws that happened in London, was not replicated in Edinburgh. The legislative consent motion was agreed to in September 2012, before the crucial clauses that became s.1 (harm) and s.4 (public interest) of the final Defamation Act were amended into the Defamation Bill, and before any of the provisions had their final wording agreed. Scottish ministers and MSPs never had the opportunity to consider the improved and refined Defamation Act 2013 in its entirety.

4. Considerations for the Scottish Law Commission with respect to the law of defamation

The widening variance between the law of Scotland and the law of England and Wales will create legal uncertainty.

Many publishers operate across the entirety of the UK including newspapers, book publishers, academic publications, consumer magazines, online parenting forums and blogs. Consideration should be given as to whether a significantly different law of libel in Scotland would create a level of legal uncertainty that could either chill freedom of expression or increase the cost of publication.

The Scottish Parliament could go further than the Defamation Act 2013 to improve freedom of expression and encourage democratic debate.

During the passage of the Defamation Bill, the Libel Reform Campaign identified a number of areas where it believes the Westminster parliament should have gone further to protect freedom of expression. The Scottish Law Commission should consider recommending improvements to the Scottish Law that *improve* on the Defamation Act 2013, including stronger protections for individuals being sued by corporations or other non-natural persons, increased incentives for mediation, a stronger public interest defence, and better protections for internet intermediaries.

This is now the debate that is happening in Northern Ireland where the non-application of the Defamation Act has caused a considerable amount of public and political debate. The Finance

and Personnel Committee of the Northern Ireland Assembly has taken evidence on the need for reform and Mike Nesbitt MLA the leader of the UUP has tabled his own private members bill to reform the law. The Northern Ireland Law Commission is launching a consultation on reform of defamation law in late October and it is expected that the Commission will publish its blueprint for reform of the law in early 2015.

Scotland now has an opportunity to set out a comprehensive framework for reform of the defamation law that sets a standard for free expression throughout the world. Such comprehensive reform would position Scotland as the best place possible to attract inward investment from technology and media companies, while balancing the right to reputation and the right to freedom of expression.

Supporting documentation

- 'Free Speech Is Not For Sale' (November 2009)
  https://www.scribd.com/doc/71553250/Free-Speech-is-Not-For-Sale

- 'Reforming libel – what must a Defamation Bill achieve?' (September 2010)
  http://www.libelreform.org/news/471-reforming-libel-what-must-a-defamation-bill-achieve

- 'Libel Reform Campaign - Evidence to Joint Committee on the Draft Defamation Bill ' (May 2011)
  http://www.senseaboutscience.org/data/files/LRC_submission_to_Joint_Ctt__cover_note_2011_may_25.pdf

- 'Libel Reform Campaign – initial analysis of the Defamation Act' (April 2013)
  http://www.senseaboutscience.org/data/files/Libel/Libel_Reform_Campaign_-_Initial_asssesment_of_the_Defamation_Act.pdf

About us

The Libel Reform Campaign was set up by Index on Censorship, English PEN and Sense About Science in December 2009 to obtain major changes in the English libel laws to better protect free expression. The campaign was joined by 60,000 individuals and more than 100

organisations including human rights groups, scientific and medical bodies, consumer and community groups.