

In recent years, mounting concerns have been expressed at the state of English and Welsh libel law.

- A broad coalition including academics, journalists, scientists and lawyers have conducted an increasingly vociferous campaign against a perceived use of libel laws to suppress legitimate debate on matters of public interest and free speech in general.
- A report by the Department of Culture, Media and Sport Select Committee concluded that the attractiveness of English and Welsh libel law to so-called “libel tourists” was a national “humiliation”.
- A Ministry of Justice Libel Working Group recognised the difficulties in applying 19th Century libel law in the age of internet publications, and the criticisms levelled at the prohibitive costs of libel proceedings.

In response to such concerns, the Government published a draft Defamation bill and accompanying consultation paper on 15 March 2011. The main proposed changes are set out below.

## Substantial Harm

The draft Bill codifies the existing common law, which has recently developed<sup>1</sup>, in accordance with the Human Rights Act 1998, a minimum threshold of seriousness which excludes trivial claims. This test is reformulated in the draft Bill as a “requirement of substantial harm”. The draft Bill contains no guidance on how this should be interpreted by the Courts.

## Responsible publication

The current common law defence of “responsible journalism”<sup>2</sup> recognises the general obligation of the press, media and other publishers to communicate important information on matters of general public interest and the general right of the public to receive such information. The case-law has set out a list of non-exhaustive factors that will

be relevant to whether the defence is available, including the seriousness of the allegations, the steps taken to verify the information, and whether a right of reply was afforded. However, non-governmental organisations and the scientific community have raised concerns about the lack of certainty over how the defence applies outside the context of mainstream media. The draft Bill codifies the defence as “responsible publication on a matter of public interest” and addresses these concerns by providing an additional factor of “the nature of the publication and context” which the Court can have regard to when considering whether the defence applies.

## Truth

For the sake of clarity, the draft Bill would abolish the common-law defence of justification and replace it with a statutory defence of truth, which will apply if a defendant can show that the meaning conveyed by the statement complained of is substantially true.

## Honest opinion

The defence of fair comment can apply where a defendant makes a statement that is comment, rather than fact, on a matter of public interest, where the comment is based on fact and indicates in general terms at least what those facts are, and where the comment is one which an honest person could have made on those facts.

The law has recently been considered and developed by the Supreme Court and renamed “honest comment”<sup>3</sup>. In response to a broad consensus that the law in this area is complex and uncertain, the draft Bill would abolish the common law defence and replace it with a statutory defence of “honest opinion”. However, it is unclear whether the draft Bill will go far enough for those who have argued that the distinction between what is fact and opinion should be clarified.

<sup>1</sup> *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); *Jameel v Dow Jones & Co* [2005] EWCA Civ 75.

<sup>2</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127, HL; *Jameel (Mohammed) v Wall Street Journal Europe SPRL* [2006] UKHL 44.

<sup>3</sup> *Spiller v Joseph* [2010] UKSC 53.

## Privilege

The law generally recognises certain situations where it is in the public interest that a person should be able to speak or write freely without fear of being sued for defamation. These situations are protected by absolute (ie where the defence is absolute) or qualified (ie where the defence can be defeated by evidence of malice) privilege. In response to the concerns raised by the scientific community about the effects of libel law on free speech, the draft Bill includes provision for the types of reports which attract qualified privilege to be extended, to include fair and accurate reports of proceedings at academic and scientific conferences. The draft Bill also extends qualified privilege to reports relating to non-UK public companies.

## Single Publication

As the law currently stands, each communication of defamatory material is a separate publication that gives rise to a cause of action in libel for a period of 1 year after the date it is communicated. However, whereas this “multiple publication” rule gives publishers some certainty as to the extent of their potential liability for hard copy publications, online archives of materials are communicated to readers whenever they are accessed over the internet, and so the liability of publishers for such material is potentially open-ended. The draft Bill proposes the introduction of a new “single publication” rule to address this problem, so that where the same or substantially similar material is republished and the manner of publication remains substantially the same, then the 1-year limitation period will run from the date of first publication.

## Jurisdiction

The term “libel tourism” is used to describe the phenomenon of libel claims with tenuous links to the UK being fought in English and Welsh Courts because of a perception that the law is more favourable to claimants here than it is elsewhere in the world. The draft Bill tackles this problem by removing the Court’s jurisdiction to hear such claims, unless England and Wales is the most appropriate place in which to bring an action.

## Trial by jury

There are widespread concerns that the right to trial by jury for defamation claims can significantly increase costs, because, for example, it means that issues that might determine the ultimate outcome of a trial, such as meaning, cannot be resolved at an early stage. The draft Bill proposes that defamation trials should be tried without a jury unless the Court orders otherwise.

## Consultation on other issues

As well as the wording of the draft Bill itself, the Ministry of Justice is consulting on other issues including:

- (a) a new High Court procedure for defamation claims to allow for key issues to be determined at as early a stage as possible;
- (b) whether there should be any restriction on the right of companies to sue for defamation (the Government’s view is that there should not); and
- (c) the liability of internet service providers for material posted on their sites and the desirability of statutory notice and take down procedures.

The closing date for the consultation is 10 June 2011.

### For further information please contact:



**Jeremy Dickerson**  
Partner

Tel: +44(0)117 902 2728  
jeremy.dickerson@burges-salmon.com



**Andrew Tibber**  
Senior Associate

Tel: +44(0)117 902 7758  
andrew.tibber@burges-salmon.com