Reform of English Libel Law

British Academy Forum
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England’s unsavoury reputation for being the libel capital of the world has led to increased calls for reform of its libel law in the last few years. The current law has come under criticism by the US and by international human rights organisations as having laws that are overly favourable to claimants from jurisdictions all over the world. The complex and lengthy processes, unclear outcomes and the high costs of defence mean that many publishers are put off publishing material that may land them with huge costs, even if they have a strong case to defend.

The growth in high-profile and costly libel actions brought by celebrities and businesses against the media, and increasingly against academics, NGOs, campaigners and bloggers in the age of the internet, has led many campaigners and international human rights bodies to say that the situation currently exercises an unduly chilling effect on freedom of expression and urgently needs redress.

In the face of cross-party consensus that the current laws need reform, the Government has recognised the need to redress the balance between protection of freedom of expression and protection of reputation, and in March 2011 the Government published a draft defamation Bill for public consultation.

On 17 May 2011, the British Academy held a Forum with the Minister of State for Justice, Lord McNally, at which a group of academics, campaigners and practitioners were invited to discuss the government’s proposals. The main provisions of the draft Bill are:

• New test of substantial harm
• New statutory defence of responsible publication
• New statutory defence of truth and honest opinion
• Single publication rule
• Extension of absolute and qualified privilege

The draft Bill was welcomed by the majority of participants, particularly in its objectives in reducing complexity and the costs that libel actions present. The introduction of a single publication rule, and the provisions that crack down on ‘libel tourism’, i.e. cases that are pursued in the UK because of the permissiveness of its libel laws, were welcomed – although greater clarity as to whether the single publication rule would extend to internet publication of archive material was sought. Online publication and the right of corporations to sue for libel were also identified as areas that needed addressing.
Participants also sought greater clarity as to how common-law precedents will interact with the new tests: a failure to set this out could increase, instead of reduce complexity. It was also pointed out that if the common-law precedents were to be largely retained, the substance of the draft Bill would not diverge fundamentally from the status quo.

**The new substantial harm test**

The development of a threshold test was welcomed by campaigners, but clarification over some key elements was strongly urged. In particular, the new test of substantial harm raised questions around whether this constituted a higher or lower threshold than the current test provided for in common law, with campaigners making the case that the test needed to be stronger and both supporters as well as sceptics of libel law reform agreeing that it was not clear enough in its current form.

**Responsible publication**

The draft Bill makes provisions for a defence based on public interest. In doing so, it has drawn largely on the so-called ‘Reynolds Defence’ in common law and declined the opportunity to develop a statutory definition of ‘public interest’. Concern was also raised at the prospect of having the law decide whether a defendant had ‘acted responsibly’. Campaigners were agreed that the ‘Reynolds Defence’ was inadequate: it was developed explicitly to address journalists and not scientists, NGOs or authors who were increasingly subject to libel actions. The incorporation of a stronger definition of ‘public interest’ was urged.

**Honest opinion**

The provisions for a defence of honest opinion in Clause 4 attracted much comment for the way that it appeared to widen current definitions of fair comment set out by the Supreme Court in *Spiller v Joseph*. Some felt that it would be a mistake to ignore the precedents that had been set, on the grounds that the current definitions were well understood and that it was desirable to minimise the need for new case law, while others felt that abandoning the standard of reasoned debate set out by the Court could potentially worsen the standard of public discourse.

**Corporations**

The current lack of any provisions in the draft Bill concerning the right of corporations to sue was criticised by some campaigners as a major lacuna in the draft Bill. Several participants voiced strongly the view that corporations should not be allowed to sue for libel, and that actions taken by individuals such as company directors would still be a possible way of obtaining justice. It was suggested however that companies, whilst not entities that can claim human rights, did have reputations that may not be protected under individual actions, and that discursive remedies may allow vindication without the chilling and bullying effect that some corporations have exercised on NGOs, scientists and writers.

**Costs**

All agreed that libel law reform needed to address the issue of costs, but differences of opinion emerged as to whether costs should be treated as a separate issue (which has not been directly addressed in the draft Bill) or whether it was bound up with the deficiencies of the current legislation. Some argued that an early test and a higher threshold were needed to deter claims that were unlikely to succeed, although there was a question mark over whether
the new test of substantial harm would weed out many claims at the start. Practitioners pointed out that a higher threshold will make it more costly to meet, and may put off defendants that might otherwise have a good case.

The impact of new statutory legislation on litigation and costs was also discussed, as the greater the departure from common law, the more likely there was to be litigation and greater costs. Others however pointed out that an initial spike in litigation was an inevitable and justifiable effect of any improvement to the law.

**Balance between freedom of expression and right to reputation**

There was general agreement that a Bill that introduced more complexity but made few substantive changes was undesirable, but whether substantive changes were necessary in the first place was also actively debated.

It was argued that the development of common law over the last 20 years had adequately addressed many of the problems identified, and that the attempt to shift the balance to favour freedom of expression more greatly by campaigners would lead to inadequate protection of claimants’ rights. In particular, the rights of claimants who do not have resources to pursue their case may be adversely affected, as the use of conditional fee agreements, which are currently under review, is likely to be curtailed.

In response, it was argued that freedom of expression was a more fundamental right than that of reputation and could not be weighed equally, and that the former was the more fundamental of the two. A debate ensued over whether the balance had been correctly struck, with some questioning whether American standards of free expression should be accepted as the ones to aim for, instead of those in other comparable European jurisdictions, which are much more in line with the current state of English libel law.

**Conclusion**

Notwithstanding, all participants welcomed the draft Bill as a valuable opportunity for some needed reforms and as providing a good framework for further development. It is clear however that reconciling the aims of lowering costs, introducing clarity and rebalancing the rights to freedom of expression and reputation will continue to present a significant challenge for the Government in the months ahead.