

# Defamation Bill

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## EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Ministry of Justice, are published separately as Bill 5—EN.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

Secretary Kenneth Clarke has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Defamation Bill are compatible with the Convention rights.

# Defamation Bill

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# B I L L

~~[AS AMENDED IN GRAND COMMITTEE ON REPORT] TO~~

Amend the law of defamation.

**B**e it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## *Requirement of serious harm*

### **1 Serious harm**

~~(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.~~

~~(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.~~

## *Arbitration service*

### ~~**2** Arbitration service for defamation and related civil claims against members of Independent Regulatory Board~~

~~(1) The Lord Chief Justice shall establish a Defamation Recognition Commission.~~

~~(2) Schedule 1 makes provision relating to the Defamation Recognition Commission.~~

~~(3) The Defamation Recognition Commission shall certify bodies as Independent Regulatory Boards in accordance with the criteria in Schedule 1.~~

~~(4) An Independent Regulatory Board shall provide a recognised arbitration service as set out in Schedule 2.~~

~~(5) A court shall take into account when awarding costs and damages whether either party, claimant or defendant in a dispute has chosen not to use the recognised arbitration service of an Independent Regulatory Board.~~

~~(6) A court shall award costs under subsection (5) on an indemnity basis unless the interests of justice require otherwise.~~

~~(7) A court may order a successful party to pay all the costs of proceedings if such party has unreasonably refused to use an available recognised arbitration service.~~

~~(8) A court awarding in its judgment exemplary damages where a defendant is guilty of a flagrant breach of a defendant's rights can also take into account whether—~~

~~(a) a claimant refused to use a recognised arbitration service;~~

~~(b) a defendant refused to use or join a recognised arbitration service;~~

~~and the court shall also take into account whether a defendant first sought advice from a recognised Independent Regulatory Board before publication.”~~

### *Non natural persons*

### **3** **Non natural persons**

~~(1) This section applies to an action for defamation brought by—~~

~~(a) a body corporate;~~

~~(b) other non-natural legal persons trading for profit; or~~

~~(c) trade associations representing organisations trading for profit.~~

~~(2) The permission of the court must be obtained in order to bring an action to which this section applies.~~

~~(3) The court must strike out an application under subsection (2) unless the body corporate can show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the claimant.~~

~~(4) Non-natural persons performing a public function do not have an action in defamation in relation to a statement concerning that function.~~

### *Defences*

#### **242** **Truth**

(1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.

(2) Subsection (3) applies in an action for defamation if the statement complained of conveys two or more distinct imputations.

(3) If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation.

(4) The common law defence of justification is abolished and, accordingly, section 5 of the Defamation Act 1952 (justification) is repealed.

### 353 Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person (“the author”); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.

(7) For the purposes of subsection (4)(b) a statement is a “privileged statement” if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—

(a) a defence under section ~~4–6~~ (~~responsible~~ publication on matter of public interest);

(b) a defence under section ~~6–8~~ (peer-reviewed statement in scientific or academic journal);

(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);

(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

### 464 Responsible publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that~~acted responsibly in~~ publishing the statement complained of was in the public interest.

~~(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.~~

~~(23) If the Subject to subsections (3) and (4), in determining for the purposes of this section whether a defendant acted responsibly in publishing a statement the matters to which the court may have regard include (amongst other matters) —~~

~~(a) the nature of the publication and its context;~~

~~(b) the seriousness of the imputation conveyed by the statement;~~

~~(c) the relevance of the imputation conveyed by the statement to the matter of public interest concerned;~~

~~(d) the importance of the matter of public interest concerned;~~

~~(e) the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information;~~

~~(f) whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement;~~

~~(g) whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement;~~

~~(h) the timing of the statement's publication;~~

~~(i) the tone of the statement.~~

~~(3) Subsection (4) applies in relation to the defence under this section if the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court:-~~

~~(4) In determining for the purposes of this section whether the defendant acted responsibly in publishing the statement complained of, the court must, in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.~~

(34) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(545) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(656) The common law defence known as the Reynolds defence is abolished.

## 575 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

(4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.

~~(4) A notice of complaint is a notice which—~~

~~(a) specifies the complainant’s name;~~

~~(b) sets out the statement concerned and explains why it is defamatory of the complainant;~~

~~(c) specifies where on the website the statement was posted, and~~

~~(d) contains such other information as may be specified in regulations.~~

(5) Regulations may—

(a) make provision as to the action required to be taken by an operator of a website in response to a notice of complaint (which may in particular include action relating to the identity or contact details of the person who posted the statement and action relating to its removal);

(b) make provision specifying a time limit for the taking of any such action;

(c) make provision conferring on the court a discretion to treat action taken after the expiry of a time limit as having been taken before the expiry;

(d) make any other provision for the purposes of this section.

(46) Subject to any provision made by virtue of subsection (7), A notice of complaint is a notice which—

(a) specifies the complainant's name,

(b) sets out the statement concerned and explains why it is defamatory of the complainant,

(c) specifies where on the website the statement was posted, and

(d) contains such other information as may be specified in regulations.

(7) Regulations may make provision about the circumstances in which a notice which is not a notice of complaint is to be treated as a notice of complaint for the purposes of this section or any provision made under it.

(687) Regulations under this section—

(a) may make different provision for different circumstances;

(b) are to be made by statutory instrument.

(789) A statutory instrument containing regulations under this section may not be made unless a draft is subject to annulment in pursuance of the instrument has been laid before, and approved by, a resolution of either each House of Parliament.

(8910) In this section “regulations” means regulations made by the Secretary of State.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

(120) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

## **686 Peer-reviewed statement in scientific or academic journal etc**

(1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise)— is privileged if the following conditions are met.

(2) The first condition is that the statement relates to a scientific or academic matter.

(3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—

(a) the editor of the journal, and

(b) one or more persons with expertise in the scientific or academic matter concerned.

(4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—

(a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and

(b) the assessment was written in the course of that review.

(5) Where the publication of a statement or assessment is privileged by virtue of this section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.

(6) A publication is not privileged by virtue of this section if it is shown to be made with malice.

(7) Nothing in this section is to be construed—

(a) as protecting the publication of matter the publication of which is prohibited by law;

(b) as limiting any privilege subsisting apart from this section.

(8) The reference in subsection (3)(a) to “the editor of the journal” is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.

**797**

### **Reports etc protected by privilege**

(1) For subsection (3) of section 14 of the Defamation Act 1996 (reports of court proceedings absolutely privileged) substitute—

“(3) This section applies to—

(a) any court in the United Kingdom;

(b) any court established under the law of a country or territory outside the United Kingdom;

(c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;

and in paragraphs (a) and (b) “court” includes any tribunal or body exercising the judicial power of the State.”

(2) In subsection (3) of section 15 of that Act (qualified privilege) for “public concern” substitute “public interest”.

(3) Schedule 1 to that Act (qualified privilege) is amended as follows.

(4) For paragraphs 9 and 10 substitute—

“9 (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

(a) a legislature or government anywhere in the world;

(b) an authority anywhere in the world performing governmental functions;

(c) an international organisation or international conference.

(2) In this paragraph “governmental functions” includes police functions.

10 A fair and accurate copy of, extract from or summary of a document made available by a court anywhere in the world, or by a judge or officer of such a court.”

(5) After paragraph 11 insert—

“11A A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.”

(6) In paragraph 12 (report of proceedings at public meetings)—

(a) in sub-paragraph (1) for “in a member State” substitute “anywhere in the world”;

(b) in sub-paragraph (2) for “public concern” substitute “public interest”.

(7) In paragraph 13 (report of proceedings at meetings of public company)—

(a) in sub-paragraph (1), for “UK public company” substitute “listed company”;

(b) for sub-paragraphs (2) to (5) substitute—

“(2) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company—

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of, extract from or summary of any document circulated to members of a listed company which relates to the appointment, resignation, retirement or dismissal of directors of the company or its auditors.

(4) In this paragraph “listed company” has the same meaning as in Part 12 of the Corporation Tax Act 2009 (see section 1005 of that Act).”

(8) In paragraph 14 (report of finding or decision of certain kinds of associations) in the words before paragraph (a), for “in the United Kingdom or another member State” substitute “anywhere in the world”.

(9) After paragraph 14 insert—

“14A A fair and accurate—

(a) report of proceedings of a scientific or academic conference held anywhere in the world, or

(b) copy of, extract from or summary of matter published by such a conference.”

(10) For paragraph 15 (report of statements etc by a person designated by the Lord Chancellor for the purposes of the paragraph) substitute—

“15 (1) A fair and accurate report or summary of, copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph by order of the Lord Chancellor.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

(11) For paragraphs 16 and 17 (general provision) substitute—

“16 In this Schedule—

“court” includes—

- (a) any tribunal or body established under the law of any country or territory exercising the judicial power of the State;
- (b) any international tribunal established by the Security Council of the United Nations or by an international agreement;
- (c) any international tribunal deciding matters in dispute between States;

“international conference” means a conference attended by representatives of two or more governments;

“international organisation” means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation;

“legislature” includes a local legislature; and

“member State” includes any European dependent territory of a member State.”

### *Single publication rule*

#### **8108** **Single publication rule**

(1) This section applies if a person—

- (a) publishes a statement to the public (“the first publication”), and
- (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.

(2) In subsection (1) “publication to the public” includes publication to a section of the public.

(3) For the purposes of section 4A of the Limitation Act 1980 (time limit for actions for defamation etc) any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

(4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.

(5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters)—

- (a) the level of prominence that a statement is given;
- (b) the extent of the subsequent publication.

(6) Where this section applies—

- (a) it does not affect the court's discretion under section 32A of the Limitation Act 1980 (discretionary exclusion of time limit for actions for defamation etc), and
- (b) the reference in subsection (1)(a) of that section to the operation of section 4A of that Act is a reference to the operation of section 4A together with this section.

### *Jurisdiction*

#### **9 119 Action against a person not domiciled in the UK or a Member State etc**

(1) This section applies to an action for defamation against a person who is not domiciled—

- (a) in the United Kingdom;
- (b) in another Member State; or
- (c) in a state which is for the time being a contracting party to the Lugano Convention.

(2) A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

(3) The references in subsection (2) to the statement complained of include references to any statement which conveys the same, or substantially the same, imputation as the statement complained of.

(4) For the purposes of this section—

- (a) a person is domiciled in the United Kingdom or in another Member State if the person is domiciled there for the purposes of the Brussels Regulation;

(b) a person is domiciled in a state which is a contracting party to the Lugano Convention if the person is domiciled in the state for the purposes of that Convention.

(5) In this section—

“the Brussels Regulation” means Council Regulation (EC) No 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time and as applied by the Agreement made on 19th October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L299 16.11.2005 at p 62);

“the Lugano Convention” means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark signed on behalf of the European Community on 30th October 2007.

**10-120 Action against a person who was not the author, editor etc**

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

(2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

*Trial by jury*

**11-131 Trial to be without a jury unless the court orders otherwise**

(1) In section 69(1) of the Senior Courts Act 1981 (certain actions in the Queen’s Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.

(2) In section 66(3) of the County Courts Act 1984 (certain actions in the county court to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit “libel, slander,”.

*Summary of court judgment*

### **12-142 Power of court to order a summary of its judgment to be published**

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
- (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
- (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
- (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances.
- (5) This section does not apply where the court gives judgment for the claimant under section 8(3) of the Defamation Act 1996 (summary disposal of claims).

~~Websites: removal~~ *Removal, etc of statements*

### **13-135 Order to remove for removal of defamatory statement or cease distribution etc from website**

- (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
  - (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
  - (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.;
- (2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.
- (23) Subsection (1) does not affect the power of the court apart from that subsection.

### *Slander*

### **13-1464 Special damage**

- (1) The Slander of Women Act 1891 is repealed.
- (2) The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.

### *General provisions*

**14-1575      Meaning of “publish” and “statement”**

In this Act—

“publish” and “publication”, in relation to a statement, have the meaning they have for the purposes of the law of defamation generally;

“statement” means words, pictures, visual images, gestures or any other method of signifying meaning.

**15-1686      Consequential amendments and savings etc**

(1) Section 8 of the Rehabilitation of Offenders Act 1974 (defamation actions) is amended in accordance with subsections (2) and (3).

(2) In subsection (3) for “of justification or fair comment or” substitute “under section 2-42 or 3-53 of the Defamation Act 2012-2013 which is available to him or any defence”.

(3) In subsection (5) for “the defence of justification” substitute “a defence under section 2-42 of the Defamation Act 2012-2013”.

(4) Nothing in section 1 or 13-164 affects any cause of action accrued before the commencement of the section in question.

(5) Nothing in sections 2-42 to 7-97 or 10-120 has effect in relation to an action for defamation if the cause of action accrued before the commencement of the section in question.

(6) In determining whether section 8-108 applies, no account is to be taken of any publication made before the commencement of the section.

(7) Nothing in section 9-911 or 11-131 has effect in relation to an action for defamation begun before the commencement of the section in question.

(8) In determining for the purposes of subsection (7)(a) of section 3-53 whether a person would have a defence under section 4-64 to any action for defamation, the operation of subsection (5) of this section is to be ignored.

**16-1797      Short title, extent and commencement and extent**

(1) (4) This Act may be cited as the Defamation Act 2012-2013.

(2) Subject to subsection (3), this Act extends to England and Wales only.

(3) The following provisions also extend to Scotland—

(a) section 686;

(b) section 797(9);

(c) section 1575;

(d) section 168(5) (in so far as it relates to sections 686 and 797(9));

(e) this section.

(4) Subject to subsections (5) and (6), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(5) Sections 686 and 797(9) come into force in so far as they extend to Scotland on such day as the Scottish Ministers may by order appoint.

(26) Section 1575, ~~This section and~~ subsections (4) to (8) of section 15168 and this section come into force on the \_\_\_\_\_ day on which this Act is passed.

# SCHEDULES

## SCHEDULE 1

### RECOGNITION COMMISSION

~~1 This Schedule provides the method by which the Recognition Commission may be constituted for the purposes of this Act.~~

~~2 Appointments to membership of the Recognition Commission will be made by the Lord Chief Justice.~~

~~3 An individual may be appointed only if he or she has consented to act and is~~

~~(a) a present or former Civil Service Commissioner;~~

~~(b) a present or former holder of high judicial office (within the meaning of Part 3 of the Constitutional Reform Act 2005); or~~

~~(c) a person who in the opinion of the Lord Chief Justice is suitable for appointment having regard to their reputation and experience and is independent of all political parties and all media organisations.~~

~~4 The Recognition Commission must consider whether an Independent Regulatory Board body has~~

~~(a) sufficient guarantees of independence, including suitable independent, fair and transparent procedures for appointments and funding;~~

~~(b) suitable functions, powers, personnel and resources to ensure that it can fulfil its principal objectives effectively;~~

~~(c) an appropriate standards code;~~

~~(d) an arbitration service able to deal with defamation and related civil claims, effective processes for upholding standards;~~

~~(e) an efficient procedure for handling complaints;~~

~~and is open to all news publishers.~~

~~5 The Recognition Commission must review a recognised regulator at least once during the period of two years beginning with the date of certification, and at intervals of not more than three years after that.~~

~~6 If having reviewed a body the Recognition Commission is no longer satisfied that it complies with paragraph 4, the Recognition Commission must consult the body and give directions designed to ensure that the body complies with paragraph 4 within a reasonable time.~~

~~7 If the body fails to comply with directions given under paragraph 6 the Recognition Commission must revoke the body's certification.~~

~~8 The Recognition Commission shall not be involved in the regulation of any subscriber to an Independent Regulatory Board.~~

## SCHEDULE 2

### SPECIALIST ARBITRATION SERVICE

~~1 An Independent Regulatory Board must provide an arbitration service in relation to defamation and related civil legal claims drawing on 5independent legal experts on a cost only basis to the subscribing member.~~

~~2 The arbitration rules must provide for a fair, quick and inexpensive process, which is inquisitorial and free for complainants to use (save for a power to make an adverse order for the costs of the arbitrator if proceedings are frivolous or vexatious).~~

~~3 The arbitrator shall have the powers set out in section 48(3) to (5) of the Arbitration Act 1996.~~

~~4 The arbitrator must be able to hold hearings where necessary or dispense with them where not necessary.~~

~~5 The process must include provision for frivolous or vexatious claims to be struck out at an early stage.~~

~~(3) The other provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.~~

~~(4) This Act extends to England and Wales only.~~