

“THREE JURISDICTIONS BUT ONE REPUTATION”

Campaigners for defamation law reform have expressed satisfaction at the impact of measures introduced by the Defamation Act 2013 to England and Wales. For example Robert Sharp, communications manager at English Pen, which campaigns to defend writers and readers from threats to freedom of expression, told *Scottish Legal News* recently that the Act appeared to be working well and as Parliament intended. The requirement in section 1 for serious harm to be caused (or likely to be caused) to the reputation of a claimant for a statement to be considered defamatory has resulted in a reduction of the number of libel cases being brought. Frivolous defamation claims were being discouraged, but without adverse effects on the ability of claimants to seek redress where they had been smeared. Some issues remained – notably around costs, where English Pen would like to see libel actions both brought and defended more cheaply – but overall the recent reforms could be considered a success.

Free speech organisations have now turned their energies to extending the 2013 Act’s reforms throughout the UK to Scotland and Northern Ireland. Scotland decided to accept only a small part of the legislation in the form of section 6, which extends a defence of qualified privilege to peer-reviewed material in scientific or academic journals, and section 7(9) which extends this privilege to relevant conference reports. This decision to confine incorporation of the Act’s provisions into Scots law to a single issue was confirmed in the form of a Sewel Motion in the Scottish Parliament, which meant that MSPs were never given the opportunity to debate the legislation as a whole. The Scottish Government took the view that the jurisdiction’s existing defamation law was generally fit for purpose and not in need of amendment; as a consequence Scotland missed out on the rest of the 2013 Act reforms, including the serious harm requirement; the new statutory defences of truth, honest opinion, and publication on matters of public interest; greater protection for the operators of websites; and the single publication rule, which replaced the longstanding principle that each publication of defamatory material gave rise to a separate cause of action.

Scotland’s refusal to embrace change is already being challenged. English Pen, Scottish Pen, Sense About Science and Index on Censorship are all calling for appropriate legislative action to be taken in the rest of the United Kingdom, and the Glasgow-based *Herald* newspaper has mounted a freedom of speech campaign in support. The *Herald* campaign has attracted high-profile support from Scotland’s most celebrated writers, including James Kelman, Ian Rankin, Val McDermid, Chris Brookmyre and Neal Ascherson, who warn that they and others are facing the “chilling” effect of libel action.

Furthermore, the Scottish Law Commission is in the process of gathering evidence prior to publishing a consultation document in the first half of 2016 which will examine the current state of Scots law on defamation and consider the case for change – including implementation of the rest of the 2013 Act.

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Prospects for legislative reform in Scotland look positive. Unfortunately the same cannot be said of Northern Ireland, which declined to implement any of the 2013 Act provisions following disagreement between politicians for reasons which are not entirely clear. The Northern Ireland Law Commission published a consultation paper in 2014 (*Defamation law in NI*, NILC 19 (2014)) requesting responses by February 20, 2015, but funding to the Commission has been drastically reduced by the Ministry of Justice and as from April 2015 only “essential law reform” will continue. To date there have been no indications that the defamation law consultation will be followed up. The Libel Reform Campaign in Northern Ireland has called for members of the Assembly to adopt the 2013 Act in full, and cites overwhelming support for this from writers, academics, scientists and members of the public in surveys it has undertaken.

The unreformed defamation laws in Scotland and Northern Ireland threaten to undermine English law and establish Edinburgh and Belfast as strong options for replacing London as, in the words of Mr Sharp, “a town named Sue.” Journalists and authors fear that defamatory statements published in England and Wales through the internet (eg in the electronic version of a newspaper story) could also be deemed to have been published elsewhere in the UK, and in these circumstances they would face the risk of claims being brought against them through the back door in the courts of Scotland or Northern Ireland. The same risk to free speech from libel tourism could also potentially affect users of social media.

Mr Sharp described Scotland’s defamation laws as being “two communications revolutions behind the scenes, dating as they do before the advent of the internet and even before that of ‘hot type’ in the late 19th century.” As he also remarked, the UK has “three jurisdictions but one reputation.”

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