



Law Society
of Scotland

Stage 2 Briefing

Defamation and Malicious Publications (Scotland) Bill

January 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Defamation and Malicious Publications (Scotland) Bill¹ was introduced by the Cabinet Secretary for Justice, Humza Yousaf MSP, on 2 December 2019. Scottish Government conducted a consultation² in April 2019 to which we submitted a response.³ The Convener of our Obligations Committee, John Paul Sheridan, gave evidence to the Justice Committee on 1 September 2020.⁴ The Stage 1 Report of the Justice Committee⁵ was published on 14 October 2020. We broadly support the recommendations and conclusions set out in the Stage 1 Report.⁶ We also note the Scottish Government's response, which was published on 29 October.⁷ The Stage 1 Debate took place on 5 November and Parliament approved the general principles of the Bill.

General remarks

We support the overarching aim to modernise the law of defamation. Defamation lawyers are well used to interpreting the existing common law framework but we consider that codifying the law in this area could serve to enhance accessibility. At the same time, case law serves to clarify the ambit of rules, lending greater certainty as the body of jurisprudence develops: as the intention is not to alter the definition of defamation *per se*, we are keen to preserve the advantages of this clarification (see further below).

¹ <https://beta.parliament.scot/bills/defamation-and-malicious-publication-scotland-bill>

² <https://consult.gov.scot/justice/defamation-in-scots-law/>

³ <https://www.lawscof.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/obligations-law/>

⁴ <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12783>

⁵ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report/JS0520R17.pdf>

⁶ <https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report>

⁷ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20201029_MCStoAT_DefamationBillSGResponse.pdf

However, we consider that other parts of the Bill would benefit from further amendment: such alterations should in turn improve the accessibility of the law. We are also concerned that the need for introduction of a serious harm test has not been demonstrated.

Specific comments

Balancing freedom of expression and protection of reputation

The law of defamation must balance freedom of expression with the right of an individual to protect their reputation. The freedom of expression is internationally recognised as a fundamental human right, not least in the European Convention on Human Rights.⁸ Broadly speaking we consider that the Bill strikes the correct balance, subject to our comments on the serious harm test below.

Ensuring clarity and inclusive wording

S1(4)(b) provides an expansive definition of the ways in which a statement is understood to have been published. The broad reference to communication “by any means...in a manner the person can access and understand” ensures a technologically neutral and inclusive definition that captures the various ways in which people interact. We therefore believe that this text alone is sufficient and it is not clear what subsection (4)(c) would add to the definition. Indeed, the reference to being “seen or heard” may unnecessarily narrow the understanding of the way in which a statement could be communicated. We are concerned that it is also less inclusive, in particular with reference to those with sight and/or hearing impairments.

Concerns regarding the introduction of a serious harm test

The Bill introduces a “serious harm” test (see s1(2)(b)), which we note follows the example of the English legislation.⁹ We would be interested to see further evidence of the necessity of introducing this test in Scotland as we are not aware that there is a problem with vexatious litigation at present.

There is a balance to be found - as discussed in *Jameel (Yousef) v Dow Jones & Co Inc.*¹⁰ – between the right of freedom of expression as found in Article 10 of the European Convention on Human Rights and the protection of individual reputation. From an access to justice perspective, our concern would be that a serious harm threshold could deter legitimate claims. There may also be practical challenges around preliminary hearings to assess whether significant harm has occurred. In our view it would therefore be

⁸ https://www.echr.coe.int/documents/convention_eng.pdf see Article 10

⁹ Defamation Act 2013 <https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>

¹⁰ [2005] EWCA Civ 75.

preferable to adopt a pragmatic approach and to deploy existing court procedures - found at s100-s102 of the Court Reform (Scotland) Act 2014¹¹ and in the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 2) (Miscellaneous) 2016¹² - to deter vexatious claims, if required.

However, we consider that introducing a serious harm test in the case of non-financial loss to non-natural persons could help protect freedom of expression (see 1(2)(b) and (c)). It could mitigate against the potential chilling effect which might result from a well-resourced non-natural person threatening legal action, particularly in a situation where there was inequality of arms. We do not consider that the test needs to be limited only to micro enterprises as long as the pursuer can prove serious harm and robust defences operate so that the defender is not in practice prevented from exercising their right to freedom of expression.

Public authorities and the Derbyshire principle

From a policy perspective we would support the express inclusion of the “Derbyshire principle”¹³ in statute. Practitioners confirm the view expressed in the Explanatory Notes that the principle is already recognised in Scots law and we believe it would be helpful for this assumption to be placed on a statutory footing.¹⁴ However, we consider that this section of the Bill could be improved.

Interpretation of “public authority”

We understand that the definition of “public authority” as set out in s.2 of the Bill is modelled on the definition in s.6(3) the Human Rights Act 1998. Although consistency of definitions is generally to be welcomed, we have previously identified cases in which this definition proves unsatisfactory, which may not be remedied by the modified drafting in this Bill. We note that on the face of it the idea that “a person is a “public authority” if the person’s functions include functions of a public nature” could lead to “public authority” being interpreted very widely indeed. It could even potentially extend to, for example, public sector workers such as nurses or civil servants. We do not believe that this is the intention. Indeed, definition may not be strictly necessary as we consider that the term “public authority” could usually be understood in the context of defamation proceedings without requiring further definition as is currently the situation under common law.

¹¹ <https://www.legislation.gov.uk/asp/2014/18/part/3/chapter/6>

¹² <https://www.legislation.gov.uk/ssi/2016/229/article/4/made>

¹³ Ie that public authorities should not be able to raise defamation actions- see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534

¹⁴ See page 4 para 18

Private businesses performing public functions

On the one hand, we consider that where a private company performs a public function, for example, when it does so as a one-off contract performance or as a small element of its overall activities, then it should be allowed to bring an action in defamation to protect its reputation. However, in a situation where a particular public function was effectively outsourced to a company, or where work for public authorities formed the large majority of a private firm's work, it appears less reasonable for that company to be able to bring an action for defamation.

We understand the policy intention is to allow the law to reflect the fact that in circumstances where a private person is exercising public functions, it may be inappropriate for them to be able to bring defamation proceedings in that connection but that they should be able to bring a defamation claim as a general rule. This accords with the policy memorandum which states that "Whether a person is a public authority for the purposes of defamation will be a matter for the courts to resolve based on the individual facts of each case".¹⁵ The law requires to be sufficiently flexible to take account of these scenarios. We support this policy intention but are concerned that the Bill as currently drafted would not achieve the stated objective.

We are concerned that the current drafting also fails to provide the level of flexibility required to give effect to this intention as in our view it leads to a binary analysis, whereby a person will either be a public authority by reason of the exercise of public functions, or excluded from this definition by virtue of the fact that they only exercise these functions from time to time. We therefore consider it would be helpful to set out in more explicit terms that a person may be barred from bringing a defamation case where a defamatory statement has been made in the context of a person exercising functions of a public nature but should be able to bring defamation proceedings when acting in a privacy capacity.

Achieving clarity in relation to exceptions

While we recognise that certain categories of person could be excluded from the definition of public authority (and therefore able to bring defamation proceedings) through regulations made under s.2(6), we do not consider that this is a satisfactory solution to the problem. Furthermore, s.2(6) leaves too much discretion to the Scottish ministers (see further on democratic scrutiny below). We welcome the requirement for the Scottish Ministers to consult on proposed regulations but we consider that it would be preferable to consult on the list of exclusions and list these in a schedule, or to set criteria for the persons (legal or natural) who could be excluded under such regulations.

¹⁵ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf> p19 at paragraph 63

Appropriateness of title of section 3

We do not think that the title of section 3 is helpful. S.3(1) defines the categories of persons against whom a defamation claim can be brought (presumably as they are identified as having primary responsibility). The heading is therefore misleading as it is only at s.3(3) that secondary publishers are dealt with. It would be preferable for the title to reflect this, for example by altering it to “Persons against whom proceedings may be brought”,

If it were considered helpful to highlight the restriction on proceedings against secondary publishers, subsections (3) to (8) could be moved into a new section, retaining the title “Restriction on proceedings against secondary publishers” to ensure greater signposting within the Bill.

Scope of delegated powers and the importance of democratic scrutiny

As in our comments in relation to s.2(6), we are concerned that the powers to modify subsections 3(3) and 3(4) under the delegated powers in s3(6) and the power to specify persons to be treated as publishers and create defences under s 4(3) are very wide. Such changes go to the heart of the substantive law and as a point of principle, we are therefore of the view that any significant changes should be brought by way of primary legislation.

At the same time, we can see that there may be situations where such powers could be used to clarify the application to a particular set of circumstances or where amendment is needed to reflect technological innovation. In such situations, it may be helpful to have the ability to include these clarifications by way of regulation and therefore consider that the powers should be limited by reference to particular categories of person who may be added to the existing definition or guiding principles which would determine who could be included. Similarly, categories or guiding principles should be set out in primary legislation to restrict the scope of defences. If amendment outwith these limitations were required, it would be appropriate to pursue primary amending legislation. In particular under s3(4) we understand that changes may be needed to take account of technological developments: confining the regulation-making power to such situations would allow the law to be modernised in line with the current principles, without granting Scottish ministers inappropriately wide powers.

We welcome the fact that the regulation-making powers identified are subject to the affirmative procedure as this provides a higher level of democratic scrutiny.

Reducing the limitation period

We do not believe that there should be further reduction of the limitation period for defamation actions (see s.32(2)(b)). We note the gradual reduction in limitation periods for defamation in England and Wales, from six years, to three years, to one year. As HHJ Parkes stated in *Frank Otuo v The Watchtower Bible and*

*Tract Society of Britain*¹⁶, “The rationale of those reductions is clear. Time is of the essence in defamation actions, and the claimant will normally be anxious – and will be expected to be anxious — to obtain an apology or correction at the earliest possible moment, in order to undo the damage to his reputation.”

We maintain that there is an obligation on parties to litigation to mitigate any economic loss, and it may be, with longer limitation periods, arguments could be advanced that a party had failed to do so in bringing an action late within a limitation period. We do not, though, see significant issues around delayed defamation actions in Scotland.

For further information, please contact:

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¹⁶ [2015] EWHC 509 (QB)