



Law Society  
of Scotland

# Stage 1 Briefing

## Defamation and Malicious Publications (Scotland) Bill

2 November 2020



## Introduction

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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) Bill<sup>1</sup> was introduced by the Cabinet Secretary for Justice, Humza Yousaf MSP, on 2 December 2019. Scottish Government conducted a consultation<sup>2</sup> in April 2019 to which we submitted a response.<sup>3</sup> The Convener of our Obligations Committee, John Paul Sheridan, gave evidence to the Justice Committee on 1 September 2020.<sup>4</sup> The Stage 1 Report of the Justice Committee<sup>5</sup> was published on 14 October 2020. We broadly support the recommendations and conclusions set out in the Stage 1 Report.<sup>6</sup> We also note the Scottish Government's response, which was published on 29 October.<sup>7</sup>

## General remarks

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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). However, we consider that other parts of the Bill would benefit from further amendment: such alterations

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

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

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

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

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

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

<sup>7</sup> [https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20201029\\_MCStoAT\\_DefamationBillSGResponse.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20201029_MCStoAT_DefamationBillSGResponse.pdf)

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.

## Defamation

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### 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. Both the freedom of expression and the right to private and family life are internationally recognised as fundamental human rights, not least in the European Convention on Human Rights.<sup>8</sup> Broadly speaking we consider that the Bill strikes the correct balance, subject to our comments on the serious harm test below.

### Defining defamation

We welcome the inclusion of a definition in statute. We note that the current draft transposes the existing common law test from *Sim v Stretch*.<sup>9</sup> As we commented in our response to the Scottish Government's consultation in April 2019, it might be worth considering whether a specific reference to the continuing relevance of existing jurisprudence should be included. While we do not consider that the lack of a statutory definition has proved problematic to date, we consider that its inclusion here will make the law more accessible as all relevant provisions can be found in one place. At the same time, this approach would allow us to retain the benefits of existing jurisprudence which gives greater detail to the way in which the test should be interpreted.

### Concerns regarding the introduction of a serious harm test

The Bill introduces a “serious harm” test which we note follows the example of the English legislation. 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*.<sup>10</sup> – between the right of freedom of expression as found in Article 10 of the European Convention on Human Rights and the right of protection of individual reputation. From an access to justice perspective, our concern would be that a threshold would deter legitimate claims. There may also be practical challenges around preliminary hearings to assess whether significant harm has occurred.

<sup>8</sup> [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) rights 10 and 8 respectively

<sup>9</sup> [1936] 2 All ER 1237

<sup>10</sup> [2005] EWCA Civ 75.

A pragmatic approach around the deployment of existing court procedures to deter vexatious claims may be the most appropriate response, and we argued similarly in response to the Courts Reform (Scotland) Act 2014 and its introduction of a permission stage for judicial review at the Court of Session, again because we did not see evidence of vexatious claims being brought in our jurisdiction. These concerns may be alleviated (at least to some extent) if the serious harm threshold is defined in such a way as to guard against vexatious litigation without presenting a hurdle to legitimate claimants.

However, we consider that introducing a serious harm test in the case of non-financial loss to legal persons could help protect freedom of expression. It could mitigate against the potential chilling effect which might result from a well-resourced legal 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.

Lastly, we note that “serious harm” applies in the context of defamation but it is only “harm” that must be occasioned in the context of malicious injury.

## Public authorities and the Derbyshire principle

From a policy perspective we would support the express inclusion of the “Derbyshire principle”<sup>11</sup> in statute. Practitioners confirm the view expressed in the Draft 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. However, we consider that this section of the Bill could be improved.

### *Interpretation of “public authority”*

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 what the SLC intended and consider that the definition should be amended accordingly. Indeed, definition may not be strictly necessary as we consider that the term “public authority” could usually be understood without requiring further definition.

It is also not clear whether it is the intention to exclude organisations such as universities, social housing providers etc from being able to bring defamation actions. As they operate functions of a public nature it seems they would be excluded under the current drafting of s.2(2). In terms of s.2(3)(a) these sorts of organisations do not have a primary purpose to trade for profit so could fail to meet the requirements of s.2(3)(a)(i) and may have arguably some purposes which are non-charitable (eg in the case of universities the recruitment of fee paying students) despite being charities, so would not be captured by s.2(3)(a)(ii). Therefore, one interpretation would be universities, social housing providers and other “public authorities” with mixed functions cannot bring defamation proceedings. Taking universities as an example, Scottish

<sup>11</sup> That public authorities should not be able to raise defamation actions

universities have a good reputation in terms of international recruitment and world class research. They are becoming global brands and are increasingly seeking to proactively manage their reputations. Equally, universities, housing providers and others provide key public services at substantial public expense and do so to populations which may be disproportionately vulnerable due to age or poverty. There may be significant public interest in, for instance, news reports regarding these institutions. We believe that clarity around the application of this section is required.

### *Rights of individuals*

Furthermore, we consider that in the case of individuals, there should be recognition of the detrimental impact on public individuals in the private sphere. For example, false statements about an elected representative could have a significant impact on their private life, while being of little relevance to people's assessment of their ability or suitability to perform their public functions. Such allegations could be made, for example, at a private party, where the harm would be to their reputation among friends and others in their social circle, rather than to their public reputation. It seems unjust that public figures should have no remedy for wrongs which have a detrimental effect on them in a private context, even if there are sound public interest justifications for barring them from bringing defamation actions on the basis of their public "personality".

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(5), we do not consider that this is a satisfactory solution to the problem.

Furthermore, s.2(5) leaves too much discretion to the Scottish ministers. It would be preferable to consult on the list of exclusions and list these in a schedule, or at least to set criteria for the persons (legal or natural) who could be excluded under such regulations.

### *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 might not be reasonable for that company to be able to bring an action for defamation. Similarly, we do not consider that a private company in which a public authority was the sole or even a primary shareholder should be permitted to bring a defamation action.

### *Businesses*

We are aware of developments in defamation law reform in Australia, which have limited the rights of profit-making bodies in defamation actions.<sup>12</sup> The issue of whether such bodies are able to bring actions for loss of reputation raises a number of issues which merit further consideration. A significant requirement of access to justice is equality of arms, and actions brought by profit-making bodies could risk this principle, as was found in *Steel and Morris v. United Kingdom*<sup>13</sup> in which the European Court of Human Rights stated, “At the time of the proceedings in question, McDonald's economic power outstripped that of many small countries (they enjoyed worldwide sales amounting to approximately \$30 billion in 1995), whereas the first applicant was a part-time bar-worker earning a maximum of £65 a week and the second applicant was an unwaged single parent. The inequality of arms could not have been greater.”

We know, however, that many profit-making businesses, however, are either SMEs (under 250 employees) or micro-businesses (under 10 employees) and that defamatory statements about a profit-making company could generate significant economic harm. The Australian approach has been to remove title for any profit-making body save a micro-business and this could be a means to achieve more effective equality of arms. Equally, the availability of legal aid (the lack of which was found to breach human rights in *Steel and Morris*) could be a means to address such inequality.

### *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. It would be preferable to consult on the list of exclusions and list these in a schedule, or at least to set criteria for the persons (legal or natural) who could be excluded under such regulations.

## **Secondary publishers**

We note that the idea of behind the single publication rule referred to can be found in English law. However, we consider it would be possible in principle to separate the single publication rule from the Scottish rule which dictates that the date of accrual is the date upon which a person becomes aware of the defamatory statement. That said, this may be more difficult in practice, as the certainty offered by a limitation period could be undermined if an individual searching the internet could bring action at any stage.

<sup>12</sup> For instance, *Corporations' right to sue for defamation: an Australian perspective*, David Rolph, Ent. L.R. 2011, 22(7), 195-200

<sup>13</sup> [2005] E.M.L.R. 15

### *Title of section three*

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.

In confining the persons against whom a statement can be brought to authors, editors, publishers and the employees or agents of authors, editors or publishers who have responsibility for the statement's content of the decision to publish it, s.3(1) appears to exclude many of the individuals against whom a claim might otherwise be brought under s.1. We are not sure if the intention is to limit the scope of those against whom action may be brought in this way but our reading of s.3 is that this is the effect of the current drafting.

### *Lack of clarity of definitions*

We are concerned that the definitions of author, editor and publisher are not sufficiently clear.

Definition of author: it is not clear exactly how far the concept of author extends. For example, would it include someone who posted a link to a newspaper story containing defamatory statements, or indeed a comment on the story itself from which it was unclear whether the individual agreed with the defamatory statements contained in the original piece? Similar questions could be raised regarding a person who reshares (or eg retweets) social media content originally generated by another party, or even the author of an algorithm in circumstances where the algorithm selects and publishes particular materials or content.

Definition of editor: it is not apparent who is intended to be caught within the scope of the definition from a policy perspective, nor is the drafting sufficiently clear to provide legal certainty.

Definition of publisher: we do not think that definition of publisher is sufficient. For example, a company providing goods or services might circulate customer/client updates or newsletters, have a twitter account, or publish a blog on its website. While they would not be regarded as a commercial publisher as defined in s.3(2) they would be issuing the material containing the statement in the course of their business and it is difficult to see why a claim should not be brought against them if they made defamatory statements.

Even if the definition were to be confined to commercial publishers, it is not clear whether for example an individual with say a YouTube channel with over 100,000 followers (not uncommon) receiving YouTube royalties would be considered a commercial publisher. We anticipate that there will be many examples similar to this where it would be difficult to ascertain whether a person was a "commercial publisher" for the purposes of the act.

The idea of "secondary publishers" could suggest a different category to that which is intended, particularly in the context of social media where a story may be shared (for example on Facebook or Twitter), increasing the circulation of the initial text but with neither authorship nor editorial functions attaching.

We note that the categories listed in s.3(3) are those deemed "secondary publishers" under the existing common law. All of these categories perform a function in the publishing process but without exercise

control over the content. In other parts of the Bill, modernisation of the law includes modernisation of terminology. We support this approach and suggest that an alternative term - perhaps something along the lines of “disseminators” – could be used which would be more in line with modern technology. Similarly, guidance on how the law would apply to those who select material to replicate or publicise with the intention that it should reach a wider audience could be helpful, particularly in an online context.

The SLC has noted that the position on internet intermediaries should be settled at a UK level but the proposed legislation would nonetheless apply to online issues and as drafted the Bill leaves a number of questions which are likely to arise in an online context unanswered. For example, it is unclear what the status of a social media post, for example sharing a story with a comment attached, would be. Similarly it is not clear what would happen to private emails which were later published without the author’s consent. We note that s.5 of the English Defamation Act succeeds in providing a little more guidance and framework for this type of “secondary” publisher and it is not clear why the same cannot happen here.

We are concerned that a strict interpretation of s.3(1)(b)(i) as currently drafted would lead to an anomalous situation where a sub-editor might become personally liable for small tweaks, such as altering a headline or correcting grammar. This is because the exceptions set out in 3(3) and 3(4) only apply to s.3(1)(a). We consider that they should be extended to 3(1)(b) in the interests of fair application.

## **Democratic scrutiny**

As in our comments in relation to s.2(6) we are concerned by the lack of democratic scrutiny if the Scottish Ministers can add categories of persons to the definition of “publisher” under s.4(1). Likewise under s.4(2) the Scottish Ministers are to be given powers to provide defences. Both the definition of “publisher” and the defences to be available go to the heart of the substantive law. As a point of principle, we are therefore of the view that any changes required should be brought by way of an amending Bill.

Failing this, powers under s.4 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 without these limitations were required, it would be appropriate to pursue primary amending legislation.

## **Remedies and defences**

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### **Remedies**

From the pursuer’s perspective we consider that the range of remedies is sufficient. However, we note that the provisions on offers to make amends (s.13-18) differ from existing law and are concerned that the terms of 14(5) could discourage defenders from offering to make amends. Under the current legal system, a discount is awarded if the defender has offered to make amends but there is no reference to this in the



new legislation. We consider that this device should be maintained. Furthermore, it be made clear that an offer of amends is made without admitting that a threshold test has been met

## Defences

Generally speaking, we are satisfied with the defences of truth, publication on a matter of public interest and honest opinion. However, we note that an objective test is applied to “honest opinion” when honesty is necessarily subjective in nature. Furthermore, where the context indicates that a person did not seriously intend to espouse a view as their own or was, eg, quoting another person or group, we do not consider that they should be capable of being sued for defamation. We consider that the recast defence of honest opinion ought to take into account situations where the relevant facts are likely to be known to readers as, in practice, a lot of important debate proceeds on the back of implicit assumptions. The controversies which are big enough to generate prolonged discussion are often news stories where familiarity with the underlying facts is reasonably assumed. We consider that this would be in line with the Scottish tradition allowing fair comment.

## Unjustified threats

We note paragraphs 261-262 of the Report relates to the wider issues to be considered in relation to the Bill, in particular around unjustified threats. As the report correctly states (paragraph 263) the Scottish solicitor profession is subject to stringent practice rules (Law Society of Scotland Practice Rules 2011<sup>14</sup>) which underpin the minimum standards<sup>15</sup> that solicitors are expected to meet. Principally solicitors must be trustworthy and act honestly at all times so that their personal integrity is beyond question. In particular, solicitors must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful – which would include not threatening legal action if there was no intention to raise an action. Solicitors are required to act in the best interests of their clients at all times, subject to preserving their independence and complying with the law, the Practice Rules 2011 and the principles of good professional conduct.

We look forward to discussions with the Justice Committee in due course in relation to the evidence received by the committee concerning unjustified threats.

## Reducing the limitation period

We do not believe that there should be further reduction of the limitation period for defamation actions. 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 Richard Parkes stated in *Frank Otuo v The Watchtower Bible and Tract*

<sup>14</sup> Law Society of Scotland Practice Rules 2011 see: <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/>

<sup>15</sup> <https://www.lawscot.org.uk/for-the-public/client-protection/standards-for-solicitors/>

*Society of Britain*<sup>16</sup>, “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 do 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. There may be situations in which a defamatory statement may not be discovered for a significant period (for instance, contained in an employment reference). As the discussion paper notes, this issue had been considered by the Law Commission of England and Wales in 2001, with a recommendation (though unimplemented) that the limitation period extend from one to three years, in part as the former created challenges for claimants in preparing their cases.

Though we do not agree with this approach, if a reduction in the limitation period were pursued, we believe that the court should have the discretion to permit otherwise time-barred claims if good grounds are shown (similar to the equitable exception in England and Wales contained in s32A of the Limitation Act 1984). The discretionary power could be used to disapply the one-year period in cases in which the claimant became aware of the publication at date beyond the end of the limitation period (such as with an employment reference) in the interests of ensuring access to justice. Similarly, we consider that the period of limitation should be capable of being extended to reflect the period of time parties engage in alternative methods of dispute resolution as a sensible way to encourage alternative dispute resolution without prejudicing the pursuer’s right to bring a claim. We maintain the view that current approach offers greater certainty and is therefore to be preferred to either of these exceptions.

## **Internet publication**

We note that the Bill does not deal specifically with issues created by the ease of internet publication. In practical terms it would be helpful for consistency of approach in all parts of the UK and we consider that this might usefully form a joint project for the Law Commissions to explore.

<sup>16</sup> [2015] EWHC 509 (QB)



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