

## DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

### AMENDMENTS TO BE MOVED AT STAGE 2

In section 1, page 4, line 23, leave out <and (c) a statement is published when the recipient has seen or heard it>

#### Effect

To remove unnecessary text.

#### Reason

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.

## DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

### AMENDMENTS TO BE MOVED AT STAGE 2

In section 1, page 1, line 11, leave out section 2(b) and insert

<(b)(i) Where B is a natural person, the publication of the statement has caused (or is likely to cause) harm to the reputation of B; or

(ii) where B is a non-natural person, the publication of the statement has caused (or is likely to cause) B serious financial loss>

#### Effect

To maintain the existing test of “harm” (as opposed to “serious harm”) in connection with defamatory statements relating to natural persons and to replicate the introduction of a “serious financial loss” threshold with respect to defamatory statements regarding non-natural persons, in line with the current drafting of the Bill.

#### Reason

The Bill as currently drafted introduces a “serious harm” test into Scots law. We note follows the example of the English legislation<sup>1</sup> but we have not seen 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 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 the introduction of a “serious harm” threshold could deter legitimate claims. There may also be practical challenges around preliminary hearings to assess whether significant harm has occurred.

We consider that existing rules of court procedure – found at s100-s102 of the Court Reform (Scotland) Act 2014 and in the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 2) (Miscellaneous) 2016 -could be deployed to address any vexatious claims and that this is likely to be a more pragmatic and appropriate approach.

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

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<sup>1</sup> Defamation Act 2013 <https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted>

chilling effect which might result from a well-resourced legal person threatening legal action, particularly in a situation where there was inequality of arms.

## **DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL**

### **AMENDMENTS TO BE MOVED AT STAGE 2**

In section 1, page 1, line 13, delete subsection (3)

#### Effect

Consequential amendment following the preceding amendment

## DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

### AMENDMENTS TO BE MOVED AT STAGE 2

In section 2, page 2, line 19, insert at end <(5) Where a non-natural person exercises functions of a public nature but would not otherwise be regarded as a public authority, the person may not bring defamation proceedings in respect of a defamatory statement, which relates to the exercise of those public functions or tasks.>

#### Effect

To clarify 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.

#### Reason

As currently drafted the Bill recognises that persons not usually classified as public authorities, may from time to time fulfil functions of a public nature. 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. 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. The proposed amendments are intended to clarify the drafting to ensure that the Bill gives effect to the policy intention.

## DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

### AMENDMENTS TO BE MOVED AT STAGE 2

In section 3, page 4, line 7, insert at end <in order to reflect technological developments and changes in use of technology for dissemination of materials and information>

#### Effect

To limit the delegated powers of the ministers to technical amendments while allowing flexibility to modernise the law in line with technological developments.

#### Reason

The powers to modify subsections 3(3) and 3(4) under the delegated powers in s3(6) are very wide. As a point of principle, we are therefore of the view that any significant changes should be brought by way of an amending Bill. 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. 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.

## DEFAMATION AND MALICIOUS PUBLICATION (SCOTLAND) BILL

### AMENDMENTS TO BE MOVED AT STAGE 2

In section 32, page 15, line 31, leave out subsection (2)(b)

#### Effect

To retain the three-year limitation period currently applicable to defamation proceedings in Scotland.

#### Reason

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. We further note that generally the claimant will be keen to ensure that a correction is made as soon as possible and maintain that there is an obligation on parties to litigation to mitigate any economic loss.

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.