Law Society of Scotland

Consultation Response

Scottish Law Commission call for views on the draft Defamation and Malicious Publications (Scotland) Bill

September 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 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,[1] 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.

We welcome the opportunity to consider and respond to the call for views on the draft Defamation and Malicious Communications (Scotland) Bill by the Scottish Law Commission (SLC). We responded[2] to the SLC's consultation on this topic in 2016. This response has been prepared on behalf of the Law Society by members of our Obligations Law Sub-Committee with input from practitioners who specialise in defamation law.

General remarks

Generally speaking we support the SLC's objective to modernise the law of defamation in Scotland. However, we have identified a number of issues with the drafting of the Bill along with a number of policy concerns which are explored further below. In particular we are concerned that the Bill does not provide for sufficient levels of parliamentary scrutiny in terms of delegated powers. The signposting of the Bill could also be improved to facilitate accessibility of the legislation.

[1] Solicitors (Scotland) Act section 1

[2] https://www.lawscot.org.uk/media/891709/obl-written-evidence-scottish-law-commission-discussion-paper-on-defamation.pdf

Part 1: Defamation

s.1 Actionability of defamatory statements

We observe that it seems anomalous to codify the law of defamation but retain the common law test when all other common law rules are specifically abolished. It would be better to transpose the existing common law test from *Sim v Stretch*[3] into the legislation, with an explicit reference to the continuing relevance of the existing jurisprudence if this is considered necessary.

The test is as follows: "a statement which tends to lower the plaintiff in the minds of right-thinking members of society generally". Furthermore, the vocabulary in the test as outlined is very dated and it would be preferable for the wording to be modernised in line with the general purpose of the Bill.

As stated previously[4] we do not think that the introduction of the requirement that the statement has been published to a third party is necessary. However, we recognise that it would usually be necessary for a statement to be published to a third party to satisfy the other requirements of the test in any case. The cases where a party might wish to bring a claim for a statement which was communicated only to the claimant would accordingly be few and far between and we are therefore satisfied that the introduction of the requirement is unlikely to significantly impede access to justice or deprive individuals or non-natural persons of a right which they would otherwise have had if the law had not been altered in this way.

Section one 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. We are concerned that the introduction of the "serious harm" threshold could present an additional hurdle to those with an otherwise legitimate claim seeking to access justice.

s.2 Prohibition on public authorities bringing proceedings

From a policy perspective we would support the express inclusion of the "Derbyshire principle" in statute. Practitioners confirm the view expressed in the Draft Explanatory Notes that the principle is already

[3] [1936] 2 All ER 1237

[4] See https://www.lawscot.org.uk/media/891709/obl-written-evidence-scottish-law-commission-discussion-paper-on-defamation.pdf

recognised in Scots law and we believe it would be helpful for this assumption to be placed on a statutory footing.

However, we do not believe that the definition of "public authority" provides clarity. 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 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. To the remove the ability to bring defamation proceedings would be detrimental to this. We consider that s.2(3)(a) should be amended accordingly.

Furthermore, we consider that in the case of individuals, at least, 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. 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.

s.3 No proceedings against secondary publishers

We do not think that the title of section 3 is helpful.

Firstly, 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 SLC intended 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.

Furthermore, 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?

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.

s.4 Power to specify persons to be treated as publishers

As in our comments in relation to s.2(5) 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 outwith these limitations were required, it would be appropriate to pursue primary amending legislation.

s.5 Defence of truth, s.6 Defence of publication on a matter of public interest, s.7 Defence of honest opinion

We note the abolition of the common law defences in s.8. If the intention is to codify these defences, we are not convinced that this objective has been achieved.

At a general level we support the defences of truth, public interest and honest opinion. However, we have concerns around the scope and definition of these defences as set out in the draft Bill.

We consider that s.5(1) should be amended to say "It is a defence to defamation proceedings for the defender to show that the imputation conveyed by the statement complained of **is true or** substantially true."

We also consider that s.6(3)(a) should be amended to say "**must** make allowance for editorial judgement…"

In s.7 it is unclear whether "evidence" must be some form of primary evidence or whether for example information from a generally reliable source (such as a respected broadsheet newspaper or journal) should suffice. We consider that if the source of the evidence upon which a statement is made is obvious or if the information referred to is a matter of general public knowledge which would be apparent to the reasonably well informed reader, then specific reference to the relevant evidence should not be required.

We are further concerned that s.7 could unduly restrict freedom of expression. For example, a person might make deliberately provocative statements or take a viewpoint which was not their own for the purposes of satire, parody or entertainment. In this context we consider that the defence of honest opinion may not go far enough in protecting freedom of expression, particularly where a reasonably well informed member of the public would not be misled.

s.9 Contemporaneous reports of court proceedings

We support the application of absolute privilege to contemporaneous reporting of court proceedings.

s.11 Other statements protected by qualified privilege

It seems that under s.11 any statement in the schedule is privileged except where made with malice and only if it is in the public interest. However, the drafting of the provisions in s.11 seem to be unnecessarily confusing: they should be restricted in a way which makes apparent the objective this section is seeking to achieve.

Furthermore, it may be difficult to ascertain what is in the public interest or for the public benefit and ultimately that could restrict reporting eg on legislative proceedings or court proceedings. Particularly in the latter case if reporting were not “contemporaneous” it would be subject to rules governing qualified privilege. We note that s.11(6) states that privilege does not apply to “the publication of matter which is not of public interest and the publication of which is not for the public benefit” We would question the impact of this section. Say for example there was a high profile divorce proceedings. On one view this could be regarded as a private matter and so it would not be in the public interest or for "public benefit" for it to be reported. However, equally it is in the public interest/benefit to ensure accurate reporting of court proceedings, it is important that proceedings are reported for justice "to be seen to be done" and accordingly ensure that the public has confidence in the legal system.

s.18 Actions against a person not domiciled in the UK or a Member State etc

We note that the intention of s.18 is to prevent forum shopping. The clause maintains the *forum non conveniens* position in Scotland but it is the rules of other jurisdictions which would determine whether or not their courts could hear the case. While it may prevent people from bringing cases in Scotland where it would not be the most appropriate forum, we observe that it would not prevent forum shopping in the other direction – ie where Scotland would be the most appropriate forum, the case may nevertheless be brought elsewhere, particularly if it appears to be more attractive from a claimant perspective.

We observe that the provision as currently drafted does not cater for the UK’s withdrawal from the EU.

s.19 Removal of the presumption that proceedings are to be tried by jury

We consider that some guidance on the circumstances when a jury trial would be appropriate could usefully be included in the legislation. Scenarios which might be considered could include cases where both parties agree to a jury trial; where there is no or no substantive dispute between parties on the law but

a dispute as to fact; cases where there is no or minimal expert evidence; or cases where the defences of public interest or honest opinion are not pled.

We note that the practical effect of removing the presumption is likely to be limited by the fact that jury trials do not take place at the sheriff court level in these types of cases in any case and the £100k threshold means few cases would be raised in the Court of Session

Part 2: Verbal Injury

We observe that verbal injury is an anomolous title for part 2 which abolishes verbal injury as understood under the current common law rules. However, we support the categories of actionable statements contained in this section and other changes to the law currently known as verbal injury contained therein.

Part 3: General

s.30 Limitation of Actions

We consider that the existing three year limitation period should be preserved: a limitation period of only one year is too short and could constrain access to justice. Damage to the potential pursuer's reputation might not occur and importantly may not be discovered or the cause may not be discovered until some time after publication of the statement. In addition the pursuer needs time to seek legal advice and for evidence to be gathered and to allow the case to be prepared in order to bring legal proceedings. The limitation period should take account of all of these considerations.

We are content that a new limitation period should not commence on republication of material as a general rule. However, where repeat publication had led to wider dissemination of the statement which then resulted in damage to the pursuer's reputation, including a discretionary power to allow cases to be considered could provide an important safeguard in the interests of ensuring access to justice.

For further information, please contact:
Carolyn Thurston Smith
Policy Team
Law Society of Scotland
DD: 0131 476 8205
carolynthurstonsmith@lawscot.org.uk