

Business and Regulatory Impact Assessment

Title of Proposal

The Defamation and Malicious Publication (Scotland) Bill (“the Bill”)

Purpose and intended effect

- **Background**

The impetus for the Scottish Law Commission’s project on defamation and this associated Bill can be traced back to the reforms made to defamation law in England and Wales by the Defamation Act 2013 (“the 2013 Act”). This, in turn, had its origins in the civil society campaign for libel reform which developed over the course of a decade or more in the years following the millennium. Three charities – English PEN, Index on Censorship and Sense about Science – coalesced around what became known as the Libel Reform Campaign. The campaign was fuelled by increasing disquiet over the phenomenon of “libel tourism”; this involved foreign, often American, defendants being sued in the courts in England and Wales, in circumstances where there had been only modest publication of the defamatory statement in that jurisdiction. The effect was said to be to deter publication and to stifle public debate and criticism. At the same time, campaigners became concerned about what they saw as an emerging trend towards defamation actions being raised in England and Wales against non-governmental organisations, scientists, academics and online commentators with the perceived objective of suppressing legitimate criticism of authority and alleged abuses of power.

At the time of the passage of the 2013 Act the Scottish Government decided not to move to extend most of the provisions of the Act to this country, with the exception of a small number of sections relating to privilege in academic and scientific activities. The Cabinet Secretary for Justice told the Justice Committee of the Scottish Parliament that the Scottish Government considered the law here to be “relatively robust” and that there had not been the same issues as had arisen in England and Wales.

However, a number of respondents to the Scottish Law Commission’s consultation on its Ninth Programme of Law Reform took the view that there was a need to ensure that Scots law kept pace with the law in England and Wales, particularly in view of the development of information technology, the internet and social media and the reforms brought about by the 2013 Act. Amongst those supporting a project in this area were the Law Society of Scotland, the Faculty of Advocates, BBC Scotland and the Libel Reform Campaign. They and other respondents drew particular attention to the major reforms of the law of England and Wales introduced by the 2013 Act.

The current position is that Scots defamation law is piecemeal in nature and badly in need of modernisation. The law of defamation in Scotland is mainly based on the common law, although, in addition, there are some now fairly

elderly statutory provisions scattered across the statute book (for example, the provisions of the Defamation Act 1952 and the Defamation Act 1996). As noted above, very few of the more recent reforms brought about by the 2013 Act extend to Scotland.

Accordingly, the Scottish Ministers approved a project examining the Scots law of defamation for the Commission's Ninth Programme of Law Reform.

- **Objective**

The passage and implementation of the Bill would give effect to the recommendations contained in the Scottish Law Commission's Report on Defamation (Scot Law Com No 248, 2017).

The Bill contains a range of proposals to modernise the law of defamation in Scotland. In particular –

- the Bill provides that for a defamatory statement to be actionable it must have been published to someone other than the subject of the statement;
- it provides that in order to be actionable the publication of the statement must have caused (or be likely to cause) serious harm to the reputation of the claimant;
- it provides that in the case of a non-natural person trading for profit serious harm means serious financial loss;
- the Bill places certain key principles of defamation law on a statutory footing for the first time, including the *Derbyshire* principle that defamation actions cannot competently be brought by public authorities;
- it seeks to prevent defamation actions being brought against “secondary publishers” i.e. people other than authors, editors or publishers of material containing a defamatory statement;
- it restates in modern terms the main defences available in defamation actions, replacing common law equivalents; these include the defences of truth and honest opinion;
- it introduces a statutory defence of publication on a matter of public interest;
- it establishes a jurisdictional threshold for the bringing of defamation proceedings in courts in Scotland - a case will only be heard here if Scotland is clearly the most appropriate place for hearing it;
- it removes the presumption that proceedings are to be tried by jury;
- it provides for the abolition of common law verbal injury in so far as it relates to injury to feelings, as well as creating statutory equivalents of verbal injury affecting business interests;
- it strengthens the powers of the courts in granting remedies in defamation actions; in particular, the courts will be able to order the taking down of defamatory material from websites;
- it makes provision to reduce the limitation period within which defamation actions can be brought from three years to one;
- it introduces a ‘single publication rule’ to avoid the time limit being artificially extended by stale publication of the same material;

- it provides for the repeal and re-enactment of key sets of provisions of relevance to defamation proceedings, namely those relating to absolute and qualified privilege and those relating to offers to make amends.

- **Rationale for Government intervention**

As noted above, the Bill stems from a project that was included in the Scottish Law Commission's ("SLC") Ninth Programme of Law Reform. The main impetus for the examination of the law of defamation may be traced to the reforms in England and Wales introduced by the 2013 Act. In a more indirect way it may be attributed, also, to the civil society campaign for reform of libel law.

A modernised and refined law of defamation would contribute to greater legal certainty and fairness and promote the efficient use of resources thereby making a valuable contribution to a strong sustainable economy. The Bill would make the law more accessible and hence easier to understand and apply. Improved transparency of the law leads to lower legal costs and greater efficiency in the legal sector.

The Bill would therefore contribute to the overarching purpose of the Scottish Government in terms of the National Performance Framework: 'to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth' (National Performance Framework, March 2016).

The Bill would also contribute to the underlying National Outcome 1 – "We live in a Scotland that is the most attractive place for doing business in Europe." We hope that implementing a modern, accessible law of defamation will be a factor in attracting more creative industries such as publishing, broadcasting and other media outlets to Scotland. The Bill, in bringing closer harmonisation with defamation law in the other UK jurisdictions, should also make it easier for media businesses which operate across different UK jurisdictions to access and understand how defamation law applies to them (see "Benefits" below).

The Bill, if implemented, would help to achieve a fairer balance between the interests of those seeking to exercise freedom of expression and those claiming to have been defamed. This is the central purpose of the Bill; it is one that is strongly supported by most stakeholders. The Bill should also reduce the possibility of Scotland becoming, over the course of time, a popular "libel tourism" destination, with attendant court infrastructure and legal and economic costs associated with that. Moreover, the Bill, and the introduction of a "serious harm" threshold in particular, should help to reduce the number of "vanity" claims brought where little is at stake and where the time, costs and resources involved in a litigation are difficult to justify.

The Bill, if implemented, would also be responding to the strong desire of stakeholders, as expressed in responses to our consultation on our Ninth Programme of Law Reform in 2014, that Scots law needs to keep pace with

England and Wales, particularly in view of the development of information technology, the internet and social media and the reforms brought about by the 2013 Act.

Consultation

- **Within Government**

The project is part of the Scottish Law Commission's Ninth Programme of Law reform which was discussed with Scottish Government officials before being submitted and approved by the Scottish Government and laid before the Scottish Parliament. A copy of the SLC Discussion Paper on Defamation ("the Discussion Paper") was sent to colleagues in the Civil Law Reform Unit of the Scottish Government. On 12 October 2017, the Commission team met with officials from the Civil Law Reform Unit and the Parliament and Legislation Unit of the Scottish Government to discuss possible implementation of the project and they have been kept informed about progress throughout the project.

- **Public Consultation**

The SLC has carried out extensive public consultation on this project.

The Discussion Paper was published in March 2016. It was circulated to individuals and organisations whom the SLC had identified as having a potential interest in the project, including the judiciary, advocates, solicitors, academics, media organisations, campaign groups and internet intermediaries, such as Google. It was also published on the SLC website and was therefore freely available to the general public online. The Discussion Paper sought views on a total of 53 questions. The consultation was open for 12 weeks and generated 38 responses.

A further consultation, on a working draft of the Bill, took place between 31 July and 31 August 2017. The draft Bill, a covering minute and explanatory notes were posted on the Commission's website. A link to these documents was distributed widely, among those who had responded to the Discussion Paper or who had otherwise expressed an interest in the project, as well as to other individuals and organisations whom we had identified as having a potential interest. The consultation was also publicised via Twitter and in the Law Society Journal Online. A total of 19 substantive responses were received, one of which is to be treated as confidential. In addition 93 responses were issued for the purposes of expressing support for the position taken by the Libel Reform Campaign in its response.

- **Business**

During the course of preparation of the Discussion Paper we made contact with a number of individuals and organisations who had expressed support for an examination of defamation law by the SLC, or whom we had otherwise identified as having experience or expertise in the area. On that basis we

formed an advisory group representing a spread of interests from solicitors and advocates advising on defamation law to journalists, academics, and those representing the interests of the consumer as a recipient of content provided by the media. A number of discrete meetings were held to seek views of different members of the group on areas of interest to them. We developed links with specialist defamation lawyers in London, many of whom had been involved in the evolution of the 2013 Act.

Following publication of the Discussion Paper, a seminar on reform of defamation and verbal injury was held at the University of Edinburgh on 22 April 2016, in association with the Commission. This was attended by a combination of practitioners, academics, journalists and campaigners. It generated lively and constructive discussion on a number of the topics covered by the Discussion Paper, in particular in relation to online defamation, threshold of seriousness and defences. A further seminar on reform of defamation law was held on our behalf by Pinsent Masons LLP on 29 June 2016.

On 11 October 2016 we held a roundtable discussion with representatives of Scottish PEN, CommonSpace and The Ferret, to discuss issues of defamation law from the perspective of new media. Significant emphasis was placed on the importance of having a new and modern statute, setting out the Scots law of defamation in one place, in view of the increasing move away from traditional print media, towards “new” media, including publication of material on websites and other interactive platforms.

Many of those receiving a link to the draft Bill, as part of the consultation referred to above, were members of law firms. We made contact, also, with media organisations which we identified as having a potential interest. We understand that, during the Bill consultation period, roundtable events were held among solicitors (facilitated by the Law Society of Scotland) and separately among media stakeholders to discuss the draft Bill. This generated further interest and engagement, in particular in relation to the position of individuals connected to public authorities who may wish to bring proceedings in defamation; and to the application of the provision excluding proceedings against secondary publishers to people simply re-tweeting or sending links to material alleged to be defamatory.

Options

Option 1 - Do nothing

In terms of Option 1, the Bill would not be introduced and the current Scots law on defamation, scattered across a confusing mixture of elderly statutes and common law, would remain. The opportunity would be lost to modernise and make substantive reforms to Scots law in this area and to address the uncertainties, lack of clarity and inefficient use of resources stemming from the current law of defamation. Also, the benefits discussed in more detail below would not be realised.

Option 2 – Introduce the Bill

In terms of Option 2, the Bill would be introduced. If implemented, the changes to the law listed under “Objective” above would be brought about resulting in increased clarity, certainty, fairness and the more efficient use of resources. The benefits of Option 2 are discussed below in more detail. See “Benefits”.

Sectors and groups affected

- Writers, journalists, broadcasters, online commentators;
- Media organisations (broadcast, print, online);
- Internet intermediaries, such as search engines, social media platforms and blogging sites;
- The publishing industry;
- Private individuals either protecting their own reputations in court, as consumers of media or as users of social media;
- Legal professionals – solicitors, advocates, judges and sheriffs.

Generally, for all the sectors and groups mentioned above, Option 1 (do nothing) would not result in any benefits for them. The law on defamation would remain in need of modernisation and continue to be in a piecemeal state. This would mean that Scots law in this area would not take account of modern technological advances in the world of communications and would remain behind the pace of more recent legal reforms in England and Wales and elsewhere in the World.

Option 2 (introduce the Bill) on the other hand would present all these sectors and groups with the benefits of increased certainty and clarity of the law. The law of defamation would (largely) be contained in one statute for ease of accessibility and use. The law would be modernised and brought up to date to take into account the development of information technology, the internet and social media. Developments such as the introduction of the “serious harm” threshold for defamation and a public interest defence will reduce the risk of spurious “vanity cases” being brought to court and avoid the resultant inefficient use of resources associated with the costs and time expended in such litigation as well as the anxiety and stress such claims are liable to cause to individuals. The “offer of amends” procedure, as restated in the Bill, if taken up by parties, will also reduce the number of disputes that reach the courts in the form of litigation and the costs and time associated with that.

Benefits

Option 1 (Do nothing)

Option 1 would not produce any benefits, given that the result would be that the law of defamation in Scotland would still be in need of modernisation, particularly in view

of the development of information technology, the internet and social media. Also Scots law would continue be out of step with the developments in defamation law brought about for England and Wales by the 2013 Act.

Option 2 (Introduce the Bill)

Introducing the Bill would result in a number of key benefits –

a) Ensuring defamation law is fit-for-purpose in the age of social media

A large amount of the existing legislation relating to defamation that applies to Scotland (the Defamation Act 1952, the Defamation Act 1996) predate developments in technology and the internet and crucially the age of social media. A key benefit of the Bill, if implemented, is that it would modernise and update the law of defamation to take into account such developments.

For example, section 3 of the Bill clarifies the position of “secondary publishers” and provides that no proceedings may be brought against a person unless that person is the author, editor or publisher of the statement or is an employee or agent of such a person and is responsible for the statement. Section 3(3) clarifies, for example, that persons whose only involvement is moderating a statement are not to be treated as being the author, editor or publisher of that statement. Also, the Bill’s introduction of a statutory equivalent of the defence of fair comment – honest opinion – is wider in scope than its common law predecessor, for the purpose of seeking to ensure that the position of social media commentators is catered for adequately. Specifically, this is reflected in the provision that “evidence”, for the purposes of the defence, includes anything that the defender reasonably believed to be a fact at the time the statement was published. The Bill also clarifies that a statement can be communicated “by any means” and can in itself be “words, pictures, visual images, gestures or any other method of signifying meaning”.

The Bill brings defamation law into the 21st century and this is a key benefit in terms of having law that is modern and in touch with today’s society and also clear and accessible to the public and stakeholders. This is important as while there has recently been a decrease in the number of actions brought by businesses, the number of social-media related cases has increased¹.

b) Bringing key elements of defamation law into one place

As noted previously, the existing law on defamation in Scotland is piecemeal in nature, scattered across common law rules and several statutes. The expansion of the journalist community in recent times beyond what might typically be regarded as such – including to community journalists working on local publications and private individuals writing blogs – heightens the importance of having a statute setting out key elements of Scots defamation law in one place in a clear and accessible manner.

¹ See article “Defamation cases fall”, dated 2nd June 2017 in the New Law Journal.

The Bill, whilst it does not replace completely Scots common law on defamation, places certain key elements of it on a statutory basis (e.g. the variety of common law defences are replaced and the common law relating to verbal injuries is replaced with modern statutory delicts relating to malicious publication). Also, elements of existing statutory provision (e.g. provision in the Defamation Acts of 1952, 1996 and 2013) are replaced and restated in the Bill.

BBC Scotland, in their response to the consultation on the draft Bill, picked up on this key benefit when they commented that the Bill, if enacted, would “give Scots law a cause of action in defamation both fit for the 21st century and much more accessible to the lay person. At present, important matters like privilege are scattered across the 1952, 1996 and 2013 Acts, as well as in the case law. This Bill would honourably fulfil Strasbourg’s “prescribed by law” limb.”

The benefit of having much of the law of defamation in one accessible modern statute is that legal clarity and certainty is increased, which should in turn reduce the amount of cases which reach the courts and the associated time, costs and anxiety that litigation brings.

c) Clarification of the key purpose of defamation law – reduction of “vanity cases”

The Bill, when read as a whole, emphasises that the key purpose of defamation law is the protection of reputation, rather than protection against hurt feelings and damage to self-esteem. This is evidenced by the introduction of the “serious harm” test in the Bill and the creation of a statutory public interest defence. This approach should, again, prevent so called “vanity cases” being brought in the courts and reduce the time and costs associated with litigation.

A spokesman for the campaign group Scottish PEN commented around the time of the consultation on the Bill being launched that “Steps to establish both a serious harm threshold and a statutory public interest defence will bring about a significant barrier to vanity cases brought solely to silence others and stifle criticism and debate.”²

d) The Bill achieves a re-balancing of competing interests

It does so by enabling those who have been defamed to protect their reputations, but equally ensuring that freedom of expression is not unjustifiably interfered with by defamation actions or the threat of them where little is at stake; or where there has been no damage to *reputation*, as opposed to self-esteem (e.g. by the introduction of a “serious harm” threshold and a statutory public interest defence). In doing so we believe that the Bill strikes an appropriate balance between the right to respect for private and family life under Article 8 ECHR and the right to freedom of expression under Article 10 ECHR.

² See article “Defamation law reform inches closer” by David Leask, page 11 of the Herald, Tuesday 1 August.

e) The Bill makes defamation law apply more easily to cross-border publications

It does so by creating a broadly uniform defamation law as between England and Wales, and Scotland; and potentially Northern Ireland if the recommendations which have been made to the Department of Finance of the Northern Ireland Executive are implemented³. This increases accessibility of the law and will make it easier for media businesses which operate across different UK jurisdictions to access and understand how defamation law applies to them; they will not have to deal with different sets of rules depending merely on where a particular publication happens to be read or downloaded. This also makes more sense in the context of the online sphere where the internet does not respect borders. The Bill provision on jurisdiction (section 18) will increase clarity as to whether Scotland is the most appropriate place to bring defamation proceedings.

f) The Bill is broadly supported by stakeholders

In addition to the benefits set out above, there is broad stakeholder support for the Commission's defamation law reform proposals.

For example, in their responses to the draft Bill consultation -

i) the Libel Reform Campaign commented that –

“The publication of the working draft of the Defamation and Malicious Publication (Scotland) Bill 2017 by the Scottish Law Commission is a significant step towards defamation reform in Scotland that will help protect free expression across the country.”

ii) The Herald newspaper noted that –

“The reforms proposed in the new Bill are in broad line with changes sought by The Herald's long-standing Freedom of Speech campaign.”⁴

iii) BBC Scotland commented that it –

“very much welcomes the consultation draft and is indebted to the Scottish Law Commission for the depth and quality of the work which has gone into this.”

iv) News Scotland commented that –

“The changes proposed by the draft Bill are welcomed. In our view, it is appropriate that Scots Law is being brought into line with the law of England and Wales. It is in fact long overdue.”

³ See further the report by Dr Andrew Scott entitled Reform of Defamation Law in Northern Ireland: http://eprints.lse.ac.uk/67385/1/Scott_Reform%20of%20defamation%20law_2016.pdf

⁴ See article mentioned in footnote 2 above.

v) The Scottish Newspaper Society commented –

“Many of the Bill’s provisions are long overdue, and in broad terms we welcome the effort to introduce the best elements of the 2013 Defamation Act into Scots law, which will assist publishers in addressing problems and managing risk in a digital environment which cannot by its nature conform to legal jurisdictions.”

vi) The Law Society of Scotland said –

“Generally speaking we support the SLC’s objective to modernise the law of defamation in Scotland.”

Costs

Option 1 (Do nothing)

As option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen option 2 however, the lack of additional costs imposed by option 1 would not add any positive value.

Option 2 (Introduce the Bill)

The increased clarity and legal certainty which the implementation of Option 2 would bring should, overall, reduce costs, particularly those associated with bringing and defending defamation actions in court.

Savings from reducing the need to resort to court action

The introduction of a “serious harm” threshold should mean that fewer cases reach court that are spurious or “vanity” in nature and so there will be a saving of the cost and time associated with bringing these actions to court and of defending them.

Also, the re-stated “offer of amends” procedure as set out in sections 13 to 18 of the Bill should, if taken up as an option by parties, again avoid disputes reaching the courts and therefore save costs and time in the process.

Even if cases do make it to court, it is thought that the increased clarity and certainty that the Bill provisions bring will make proceedings quicker, with a resultant saving in costs for parties. In particular, cases that do not meet the serious harm criterion will be struck out at an early stage.

We asked the Scottish Courts and Tribunal Service (“SCTS”) for estimates as to the amount of judicial and administrative time and costs involved in defamation cases.

They confirmed that different case recording systems in the Court of Session and the Sheriff courts mean that it is not possible for them to isolate exact numbers and figures for defamation cases specifically given they are recorded as a subset of the general heading of “Damages”. There was noted, however, a general feeling from them that defamation cases take longer than average cases, but they were unable to

provide anything further to pin that down.

In terms of costs, SCTS confirmed that unit cost figures are not currently available for civil court business and that, for judicial costs, they instead use rough estimates based on applying an hourly divisor (which takes into account guidance on allocation of court business, in particular judicial annual leave and training requirements) to overall salary costs, including pension and NI contributions. Staff costs are calculated in a similar way.

Applying the criteria above SCTS estimate the current costs per hour of a case to be-

- For an Inner House case (3 IH judges, depute clerk and macer) = £872
- For an Outer House case (1 OH judge, depute clerk and macer) = £281
- For a Sheriff court case (1 Sheriff, clerk and court officer) = £214

Whilst these figures are estimates they do give an indication as to how much judicial time costs in a litigation. Of course, these figures do not include running and overhead costs to the courts and also costs to the parties in paying for legal representation.

Training costs

An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in the relevant fields, would be likely. The costs would be small, and would be incurred only on first implementation. Any such costs would be quickly offset by the savings made under the Bill.

Generally, familiarisation costs of any change in the law will be incurred by those providing the training within the solicitors' firm. Professional Support Lawyers could, for example, prepare a seminar which will explain the reforms to fee-earners. However, the provision of such training is typically already provided for within a firm's budget. It is probable that a proportion of the fee that a lawyer charges represents the cost of maintaining the fee-earner's current legal knowledge. For the fee-earners, there is a requirement that 20 hours of Continuing Professional Development is completed throughout the year so the additional time taken by familiarisation will count towards this figure. It is therefore unlikely that initial training on this Bill would represent a significant additional cost to law firms.

It is possible that some initial training might also be provided to the judiciary. We understand that the average daily cost (as opposed to cost per head) of providing training to the judiciary by the Judicial Institute at its premises is £913.66. Training on the Bill would comprise, it is anticipated, a "one off" session of no more than one hour in a half day's training on assorted issues.

The Scottish Newspaper Society ("SNS") inform us that no formal system of continual professional development exists in the news publishing industry so staff training would tend to be created from scratch, in the larger companies in conjunction with their legal representatives. Approaches would vary from company to company, but given the nature of the legislation, if enacted as contained in the

draft Bill, SNS would not expect extensive re-training would be necessary and costs would be minimal. For small, independent companies, the SNS would undertake to organise training sessions as a service to members and the only expense incurred would be for travel.

Argument that harmonisation of “serious harm” test would increase costs and see litigation move to England

A few stakeholders including Campbell Deane (solicitor) submitted in their responses to the consultation on the draft Bill that adoption of the “serious harm” threshold in Scots law (effectively harmonising the law in Scotland with that in England and Wales) would be liable to increase costs and lead to a loss of defamation litigation to England. The Faculty of Advocates expressed the view that the effect of following the English reforms in the 2013 Act in this respect, is that Scotland will not be a stronger forum for litigation and that an under-developed area of Scots law might retract.

The argument proceeds on the basis that in applying the new “serious harm” threshold the Scottish courts would be likely to adopt English court judgments on that test, which has been in place in that jurisdiction since the 2013 Act. Campbell Deane and SNS were of the view that, as such, it might be in the interests of pursuers to eliminate any uncertainty by choosing to proceed in England where potential awards are higher and where costs (under conditional fee arrangements) would be met by the defender and not, as in Scotland, from the award. Campbell Deane argued that the introduction of the “serious harm” threshold will present another hurdle for pursuers to overcome and will result in further cost and expense requiring to be met by the pursuer at an early stage in the litigation to establish serious harm.

In our view there is no reason to suppose that the scenario presented by these particular stakeholders is likely to come to pass.

Legal costs in Scottish litigation are substantially lower than those generated in the English courts. This is particularly so in the field of defamation work; the highly specialised nature of London defamation practice means that large fees can be commanded there. In Scotland legal costs in defamation cases are undoubtedly lower than in London and there is no equivalent of a specialist defamation bar. The convenience of bringing litigation in one’s own jurisdiction together with lower costs would, we consider, be likely to influence pursuers in favour of litigating in Scotland where that was generally sensible and appropriate.

It is important to recall that the Scottish Government is committed to improving access to justice in all types of civil litigation; in furtherance of this policy it has recently introduced the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill in the Scottish Parliament. Part 1 of the Bill seeks to improve access to justice via success fee agreements. These will add to the existing longstanding arrangements in Scotland whereby civil litigation, including defamation actions, can be funded on a speculative basis (essentially a no win no fee agreement, which can include a success fee). In the circumstances we do not believe that defamation claimants in Scotland will be at any disadvantage as compared to their counterparts in England

and Wales.

The fact that the law has been put on a modern footing in Scotland would be another strong reason why claimants would be likely to sue in this jurisdiction if they have a worthwhile claim. In this context it is important to recall that the purpose of the threshold test is to filter out trivial, vexatious and unmeritorious claims at an early stage. In our considered view there is every reason why Scots law should provide the same protections against such claims as the law of England and Wales. In the important decision of *Lachaux v Independent Print Limited*⁵, the Court of Appeal has recently made clear that in England and Wales the serious harm test is to be applied in a pragmatic and proportionate way and that expensive preliminary hearings on that issue will usually be inappropriate. We would expect that a similar approach would be adopted by the Scottish courts.

We would note also that as a result of the 2013 Act jury trials in defamation actions are now very unlikely to take place in England and Wales and consequently damages will be assessed by judges. There is no reason to think that judicial awards of damages will differ as between the two jurisdictions.

Overall, there is no evidence to suggest that a harmonisation of the law as between Scotland and England and Wales in relation to the “serious harm” threshold will mean that litigation will be diverted to England and Wales in cases that would more appropriately be brought in the Scottish courts.

We would observe also that whilst a desire to retain legal work in Scotland is an understandable aspiration for some legal stakeholders, this needs to be balanced against other relevant considerations, including modernisation of the law and adopting a principled solution to the challenges presented by the internet age.

Scottish Firms Impact Test

No Scottish Firms Impact Test was carried out.

The aim of the Bill is principally to provide clarification and legal certainty in the law of defamation. The law of defamation was highlighted by legal and media stakeholders as an area of the law in need of reform in our consultation on our Ninth Programme of Law Reform and we anticipate that the Bill would be beneficial to relevant professionals and individuals alike.

In particular a number of respondents took the view that Scots law needed to keep pace with the law in England and Wales which had been the subject of major reform in the 2013 Act.

Competition Assessment

It is not anticipated that the Bill would have an impact on competition within Scotland. The recommendations reflected in the Bill do not create a competitive advantage for any particular sector or individual; they simply offer benefits for professionals and

⁵ [2017] EWCA Civ 1334.

individuals alike.

- As discussed above, the legal sector and other relevant professionals would be positively affected by the Bill. We do not anticipate an impact upon any other particular markets or products.
- The Bill would not result in any restrictions on competition in the legal services market or in other relevant professional markets.
- The number and range of suppliers would not be affected, nor would the ability of suppliers to compete be limited.
- We do not consider that the proposal would reduce incentives to compete vigorously or limit the choices and information available to consumers.

Test run of business forms

No new business forms would be introduced.

Legal Aid Impact Test

Recommendations reflected in the Bill should result in a reduction in resort to court action because of increased clarification of the current law, for example in relation to the application of privilege and the defences of truth and public interest, and the liability of internet intermediaries. The introduction of the “serious harm” threshold should reduce the number of spurious “vanity” cases getting to court and it is hoped that the “offer of amends” procedure set out in sections 13 to 17 of the Bill will also mean that fewer disputes result in court actions.

Currently civil legal aid is made available for defamation and verbal injury cases only in very restricted circumstances in line with a 2010 Direction⁶. Accordingly, implementation of the Bill, which it is hoped will reduce the number of disputes resulting in court actions, is not expected to have any adverse impact on legal aid.

The Access to Justice Team have confirmed that they are content that the Bill would not have a significant impact on either the legal aid scheme or the legal aid fund. The Team commented that it could almost be said that the changes proposed bring the law into line with the tests applied by the Scottish Legal Aid Board under the 2010 Direction.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions and as such there is no need to monitor compliance.

The Bill clarifies and adds to an existing statutory regime and common law. Ultimately, any disputes concerning the interpretation of the provisions in the Bill would be resolved by litigation between the affected parties in relation to their own particular sets of circumstances.

⁶ See <http://www.slab.org.uk/providers/handbooks/Legislation/defamationorverbalinjurydirection.html>.

Implementation and delivery plan

The proposals will be implemented if the Scottish Government introduce and pursue the Bill in the Scottish Parliament. The timescale for implementation of any resulting Act would be determined by the Scottish Government.

If passed by the Scottish Parliament, as the draft Bill stands, sections 34 to 38 of the Bill will come into force on the day after Royal Assent whilst the remaining provisions will come into force on the day or days appointed by Scottish Ministers in regulations.

- **Post-implementation review**

In accordance with section 3(1) of the Law Commissions Act 1965, the Scottish Law Commission has a duty to “keep under review” the laws with which it is concerned and we will endeavour to stay informed of the Bill’s reception by the legal profession and wider business community.

The Commission expects that the Scottish Ministers will review the legislation within 10 years.

Summary and recommendation

Dismiss Option 1

Option 1 is maintaining the *status quo*. Although this would have no additional cost, it would bring no improvements.

Recommend Option 2.

Option 2 is implementing the Bill. This would improve the Scots law of defamation by putting it on a modern, clear and accessible statutory footing.

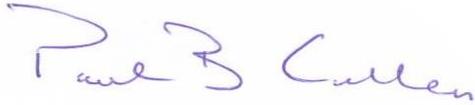
- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	£0. Option 1 (do nothing) would not produce any benefits, given that the result would be that the law of defamation in Scotland would still be in need of modernisation particularly in view of the development of information technology, the internet and social media. Also Scots law would continue be out of step with the developments in defamation law brought about for England and Wales by the 2013 Act.	£0. As option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen option 2 however, the lack of additional costs imposed by option 1 would not add any positive value.

<p>2</p>	<p>Option 2 (implement the Bill) would bring a variety of benefits. Generally it would modernise Scots law of defamation and increase clarity and legal certainty as well as making it more accessible to users.</p> <p>Implementing the Bill –</p> <p>a) Ensures defamation law is modernised and made fit-for-purpose in the age of social media;</p> <p>b) Brings key elements of defamation law into one place;</p> <p>c) Clarifies the key purpose of defamation law – to protect reputation – and will result in the reduction of “vanity cases”;</p> <p>d) Achieves a re-balancing of competing interests – right to privacy v freedom of expression;</p> <p>e) Makes defamation law apply more easily to cross-border publications;</p> <p>f) The Bill is broadly supported by stakeholders.</p>	<p>The increased clarity and legal certainty which the implementation of Option 2 would bring should, overall, <i>reduce</i> costs, particularly those associated with bringing defamation actions in court.</p> <p>The introduction of a “serious harm” threshold should mean that fewer cases reach court that are spurious or “vanity” in nature and so there will be a saving of the cost and time associated with bringing these actions to court (for both parties). Insofar as such actions continue to be brought, the new threshold provides the potential for them to be struck out at an early stage.</p> <p>Also, the “offer of amends” procedure as set out in sections 13 to 18 of the Bill should, if taken up as an option by parties, again avoid disputes reaching the courts and therefore save costs and time in the process.</p> <p>Even if cases do make it to court, it is thought that the increased clarity and certainty that the Bill provisions bring will make proceedings quicker, with a resultant saving in costs for parties.</p> <p>An initial training cost and familiarisation costs, principally for solicitors but perhaps also for other professionals in the relevant fields, would be likely. The costs would be small, and would be incurred only on first implementation. Any such costs would be quickly offset by the savings made under the Bill.</p>
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Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:A handwritten signature in blue ink that reads "Paul B Cullen". The signature is written in a cursive style with a large initial 'P' and 'C'.**Lord Pentland, Chairman, Scottish Law Commission****4 December 2017**