

First, BBC Scotland would like to express gratitude to the Scottish Law Commission for picking up this Cinderella delict and giving it such careful analytical attention. Although Scottish defamation cases may not be numerous, the importance of the Article 10 right has possibly rarely been higher for Scotland than it is in 2017. In any year, the practical importance of defamation goes far beyond those cases which end up in court. In the difficult task of attempting to put a financial figure on the consequences of a defamation law which gets the balance between Article 8 and Article 10 wrong, one can use as at least a point of reflection the £400 million plus hole in the Maxwell pension fund. Granted that one can only speculate what might have been saved, had defamation law been less amenable to or less used by Robert Maxwell, it is not hard to accept the premise that what people don't know quite frequently hurts them, in monetary and other terms.

Secondly, we would like to express the view that this 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. It is to be welcomed for that alone, as well as for its thoughtful, practical contents.

BBC Scotland, therefore, 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.

In the spirit of trying to make the consultation draft as clear as it can be, we would respectfully offer the following suggestions and observations.

1(5) Would it be helpful to provide a statutory definition of "accrual", against the background of the enormous amount of publication online which would presently be treated as published at every fresh download, in Scotland?

2(4) c) The concept of influence or control might perhaps be further explored. Possibly, too, although this may be a difficult point to regulate, there could be some thought to the risk that this rule be evaded by the launching of actions in the name of individual office bearers, as has been a concern with the Derbyshire County Council principle.

4 (1) BBC Scotland would support both the principle of trying to future proof against a new category of intermediary and the choice of the affirmative procedure. Conscious, though, of the wide power this gives to the Scottish Ministers, we would favour the inclusion on the face of the Bill of the purpose envisaged by the Commission as set out in its draft Explanatory Notes, so that the discretion is not unconstrained.

6(3)(a) We would suggest that "may" be replaced by "must". The respect due for editorial discretion is widely recognised at least in the English and Strasbourg jurisprudence. Many defamation cases turn on the judicial assignation of a single meaning, for reasons which are broadly understood, but which can bear harshly on the speaker given the inevitable ambiguity of language. This makes it the more important that, in a society where a diversity of speakers and viewpoints is generally seen as healthy, decisions as to where the public interest can responsibly vary and be respected, as they are, say, in judicial review.

7(3) Some difficulties may arise where the circumstances of a controversy are so well known as to be implicitly understood without the "showing of working". Many comment columns or editorial leaders assume knowledge of topical issues without repeating them. Would it be wise to include a carve out for the situation where the average reader/viewer will know the general evidence on which a statement of opinion is based?

11(7) Some concern may arise about the breadth of publication which could potentially be regarded as “prohibited by law”. The breadth of definition in, for instance, the Offensive Behaviour at Football and Offensive Communications (Scotland) Act 2012 has caused some anxiety, notwithstanding s7 of that Act, and there are other prohibitions in similarly general terms which might criminalise speech of particular types, like the Protection from Harassment Act 1997. Given that the envisaged privilege is to be qualified only and not to include matter covered by 11(6), is it necessary to include the 11(7) carve out?

18 (1) (b) Should there be an expanded definition of this, pending Brexit?

19. It might be helpful to set out some factors governing the position as to jury trial, post the removal of the presumption.

20(2) (b) “indifferent as to the truth” offers perhaps too low a bar to the objection that not enough corroboration etc has been attempted. Malice is a relatively high bar at common law. Could we suggest “recklessly indifferent”?

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