

Draft explanatory material to accompany draft Defamation and Malicious Publications (Scotland) Bill – for consultation purposes

DRAFT EXPLANATORY NOTES

INTRODUCTION

These Explanatory Notes have been prepared by the Scottish Law Commission (“the Commission”) in order to assist the reader of the Bill, and to help inform debate on the recommendations made by the Commission in their Report on Defamation. They do not form part of the Bill and have not been endorsed by the Scottish Government or the Scottish Parliament.

The Notes should be read in conjunction with the Report. The Notes are not, and are not meant to be, a comprehensive description of the Bill. So, where a section or a part of a section does not seem to require any explanation or comment, none is given.

THE BILL – OVERVIEW

The Bill makes important reforms to the Scots law of defamation, by amending and modernising the law on the subject and by replacing the verbal injuries currently provided for at common law.

Discussion Paper

The law has been subject to substantive review by the Commission, which published a Discussion Paper on Defamation in March 2016 (DP 161). This has been followed up by the Report on Defamation [publication pending] which makes the recommendations given effect by the Bill.

Structure of Bill

The Bill is in 3 Parts and contains 36 sections and a schedule.

- Part 1 (Defamation) covers amendments to the law of defamation and makes provision in relation to actionability of defamatory statements and restrictions on bringing proceedings, defences, absolute and qualified privilege, offers to make amends, jurisdiction and the removal of the presumption that defamation proceedings are to be tried by jury.
- Part 2 (Verbal Injury etc.) makes provision to replace common law verbal injuries with 3 new statutory actions relating to malicious publications causing harm.
- Part 3 (General) makes provision as to remedies and limitation of defamation actions and actions under Part 2 as well as miscellaneous provisions dealing with matters such as interpretation and commencement.

THE BILL – COMMENTARY ON SECTIONS

PART 1 - DEFAMATION

Defamation

Section 1 – Actionability of defamatory statements

Background

Section 1 restricts the circumstances in which proceedings can competently be brought in respect of a statement that is alleged by the person bringing the proceedings to be defamatory. The word ‘defamatory’ is to be read in accordance with the classic test laid down in *Sim v Stretch*¹ – “Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?” This is an accepted part of Scots common law. The test does not displace the common law position that proceedings can only be brought in respect of a defamatory statement if the statement is false and made with malice. A statement that is false and defamatory will be presumed to have been made with malice.²

The use of the word ‘proceedings’ is intended to reflect the fact that, in terms of court procedure, while measures taken in respect of alleged defamation are likely to come in the form of the raising of a court action (by summons or initial writ) in the vast majority of cases, this will not necessarily always be so. They may also take the form of a different type of procedure by way of a petition presented to the court, for example where all that is sought is an interdict against making material available.

When may proceedings competently be brought?

Subsection (1) sets out the basis of the operation of the section – it applies where one person makes a defamatory statement about another person. At common law, a defamatory statement is one which would be expected to make the average member of the public think less of the subject of the statement. Applying the Interpretation and Legislative Reform (Scotland) Act 2010, that subject may be a natural person, or an entity, including a corporate body, an unincorporated association, or a partnership.

Subsection (2) identifies the circumstances in which proceedings in relation to defamation can competently be brought. First, the statement complained about must have been published to a person other than the one who is the subject of the statement. This marks a narrowing of the position under current Scots law; as things stand, proceedings for defamation can be brought even if the statement complained of is conveyed only to the person about whom it is made. Second, the publication of the statement must have caused, or be likely to cause, serious harm to the reputation of the subject of the statement; only then will the court allow the proceedings to go ahead. Subsection (3) further limits the circumstances in which proceedings in defamation may competently be brought where the party seeking to do so is a non-natural person whose primary purpose is to trade for profit. In this scenario, for the purpose of subsection (2)(b), the harm to the entity is not “serious harm” unless it has caused, or is likely to cause, serious financial loss. Subsection (4) sets out what is meant by “publishing”. Reading this in conjunction with section 32(a), these

¹ [1936] 2 All ER 1237.

² *Morrison v Ritchie* (1902) SC F 645.

definitions apply throughout the whole of the draft Bill, unless the context in which the words are used dictates otherwise.

Subsection (5) makes clear that the changes brought about by the provision do not have any effect as far as a right to bring proceedings arises before the section comes into force.

Section 2 – Prohibition on public authorities bringing proceedings

Section 2 places on a statutory footing the principle laid down by the case of *Derbyshire County Council v Times Newspapers Ltd*³ that a public authority has no right at common law to bring proceedings for defamation. Although a principle of English common law, it is thought to hold good also in Scots common law.

Subsection (1) sets out the basic principle laid down in *Derbyshire*.

Subsection (2) sets out what is meant by a public authority, namely a person whose functions include functions of a public nature. This should, however, be read in conjunction with subsection (3).

Subsection (3) excludes from the category of public authorities both profit-making bodies and charitable organisations which exercise public functions from time to time, and which are not owned or controlled by a public authority. Typical examples may include companies and charitable organisations contracted by Government or local authorities to discharge functions on their behalf at certain times. Use of the words ‘from time to time’ is intended to reflect the fact that such entities may operate on a contractual basis, discharging public functions sporadically. It seeks to ensure that they will not be deemed to fall into the category of public authorities as a result of such periodic discharging of public functions. The reference to their not being under the ownership or control of a public authority is designed to distinguish bodies covered by the exception from corporate vehicles set up by central or local government. Subsection (4) elaborates as to what is meant by a non-natural person being under ownership or control of a public authority. This includes situations where a public authority holds the majority of shares in it or has the right to appoint or remove a majority of the board of directors. Subsections (5) and (6) provide Scottish Ministers with the power to make regulations to specify persons or descriptions of persons who are not to be treated as public authorities for the purposes of subsection (1).

Section 3 – No proceedings against secondary publishers

Subsection (1) lays down the general principle that, except as may be provided for under section 4, no defamation proceedings may be brought against a person unless that person is the author, editor or publisher of the statement which is complained about or is an employee or agent of that person and is responsible for the content of the statement or the decision to publish it.

Subsection (2) sets out definitions of the terms “author”, “editor” and “publisher”, subject to subsections (3) and (4).

Subsection (3) sets out examples of functions that are not to be taken to place a person in the category of an author, editor, or publisher. These include moderating and processing the

³ [1993] AC 534.

material in relation to which proceedings are brought, making copies, and operating equipment. “Moderating” may involve performing functions offline, such as in relation to letters to the editor in hard copy newspapers and magazines, as well as online functions.

Subsection (4) provides for the use of the examples in subsection (3) by analogy, where appropriate, to determine whether a person is the author, editor, or publisher of a statement.

Section 4 – Power to specify persons to be treated as publishers

Section 4 effectively qualifies section 3, discussed above.

Subsection (1) gives the Scottish Ministers power to make regulations specifying categories of persons who are to be treated as publishers of a statement, for the purposes of the bringing of defamation proceedings, despite not being persons who would be classed as publishers by virtue of section 3. In other words, the provision is concerned with people who neither fall within the definition of author, editor, or publisher, based upon subsections (2) and (3) of section 3, nor are an employee or agent of such a person. This is designed to cater, in particular, for a scenario in which a new category of intermediary emerges and is actively facilitating the causing of harm.

Subsection (2) enables the Scottish Ministers to make provision in regulations under subsection (1) for a defence to defamation proceedings for persons who are treated as publishers under those regulations, who did not know, and could not reasonably be expected to have known, that the material which they disseminated contained a defamatory statement and who satisfy any further conditions specified by the regulations. Subsection (3) provides that regulations under this subsection (1) are subject to the affirmative procedure in the Scottish Parliament.

Defences

Section 5 – Defence of truth

Section 5 replaces the common law defence of veritas with a statutory equivalent, known simply as the defence of truth.

Subsection (1) sets out the basis on which the defence operates. It applies where the defender can show that the imputation conveyed by the statement complained of is substantially true. By imputation is meant a slur impinging in some way on a person’s reputation. Within this are, of course, caught imputations that are not just substantially true, but are completely accurate.

Subsection (2) deals with the scenario where defamation proceedings are brought in relation to a statement which conveys two or more distinct imputations. It makes clear that the defence does not fail if not all of the imputations are shown to be substantially true. Rather, the defence can still be relied upon if the defender can show that, having regard to the imputations that are shown to be substantially true, the publication of the remaining imputations has not caused serious harm to the reputation of the pursuer. This gives

statutory effect to the rule laid down for England & Wales in *Polly Peck (Holdings) plc v Trelford*,⁴ and thought also to apply in Scotland.

Section 6 – Defence of publication on a matter of public interest

Section 6 creates a defence on the basis that the statement in relation to which proceedings were brought related to a matter of public interest. It is based on the common law defence established in England & Wales by the leading case of *Reynolds v Times Newspapers Ltd*⁵ (and generally accepted in Scotland), and is intended to reflect the principles established in that case and subsequent case law. It may therefore be regarded simply as a statutory incarnation of the common law position, albeit with a change of focus. The test to be applied is now reasonableness of the belief that publication of the statement complained of was in the public interest, rather than the responsibility of the journalism.

Subsection (1) sets out the requisites of reliance on the defence. The defender must show that the statement which is complained of related to a matter of public interest. Moreover, the defender must have reasonably believed that it was in the public interest for the statement to be published.

Subsections (2) and (3) deal with the matters that may be taken into account in determining whether the belief that publication was in the public interest was reasonable. The overarching position is that the court may take account of all circumstances in so far as they are relevant to the particular case. Nevertheless, specific reference is made to one consideration that may be taken into account, namely exercise of editorial judgement, with appropriate allowance being made for that. This is not intended to be limited to the judgement of editors in the media context. Conversely, the provision identifies one consideration that is *not* to be taken into account, namely any failure by the defender to verify the truth of an imputation conveyed by a statement which forms part of an accurate and neutral report of a dispute to which the pursuer was a party. In effect, this places on a statutory footing the common law defence of reportage. It is intended to reflect the fact that reportage has been recognised recently as a special form of Reynolds privilege, namely in the case of *Flood v Times Newspapers Ltd*⁶. In cases other than those involving reportage, the general position will be that steps should be taken by the defender to verify the truth of the imputation complained of. The draft Bill does not, however, lay down an express requirement of verification. It will, therefore, accommodate any situation in which the public interest in publication is so strong and urgent as to justify publication without steps towards verification.

Subsection (4) makes clear that the defence can be relied upon regardless of whether the statement which has been complained about is one of fact or opinion.

Section 7 – Defence of honest opinion

Section 7 replaces the common law defence of fair comment with a statutory equivalent, known as honest opinion.

⁴ [1986] QB 1000.

⁵ [2001] 2 AC 127.

⁶ [2012] 2 AC 273.

Subsection (1) sets out the parameters of the defence – subject to limited qualifications, discussed below, it applies only if the defender shows that the conditions set out in subsections (2) to (4) are met.

Subsection (2) lays down the first condition, namely that the statement complained of was one of opinion (as opposed to one of fact).

Subsection (3) sets out the second condition, that the statement must have indicated, either in general or specific terms, the evidence on which it is based.

Subsection (4) sets out the third condition, that an honest person could have held the opinion conveyed by the statement on the basis of any part of that evidence. This requirement will be judged with reference to whether the view expressed can be said, objectively, to be sufficiently linked to the evidence underpinning it to make it relevant.

Subsection (5) provides that the defence fails if the pursuer shows that the defender did not genuinely hold the opinion conveyed by the statement.

Subsection (6) caters for the situation where the defender published the statement complained of but is not the author of the statement. This may apply, for example, where proceedings are brought against the editor of a newspaper, rather than the journalist who wrote the article containing the statement in question. In this scenario, the defence fails if the pursuer shows that the defender knew, or ought to have known, that the author did not genuinely hold the opinion conveyed by the statement. The court is to be left to apply the common law principles of vicarious liability as appropriate, with terms being read accordingly.

Subsection (7) provides, for the purposes of subsection (2), that a “statement of opinion” includes a statement which draws an inference of fact. This may include, for example, a contention that because a person has been charged with a criminal offence, he or she must be guilty of it.

Subsection (8) provides, for the purposes of subsections (3) and (4), that “evidence” may take three possible forms. It may take the form of any fact which existed at the time the statement was published, anything presented as a fact in a privileged statement, made available before, or on the same occasion as, the statement complained of, or anything that the defender reasonably believed to be a fact at the time the statement was published. Subsection (9) defines what a “privileged statement” is for the purposes of subsection (8)(b).

Section 8 – Abolition of common law defences

Section 8(1) provides for the abolition of a number of common law defences, for which statutory equivalents are introduced, in some form, by the Bill. These are the defences of innocent dissemination, veritas, the Reynolds defence and the defence of fair comment. Subsection (2) makes clear that the abolition of these common law defences does not affect any right to bring defamation proceedings which accrued before the commencement of subsection (1).

Absolute privilege and qualified privilege

Sections 9 – 12 and schedule - Absolute and qualified privilege

Sections 9 to 12, along with the schedule of the Bill, make provision in relation to absolute and qualified privilege. The overall effect is to provide for a consolidation of the provisions relating to privilege in Scots defamation law. The relevant existing provisions of the Defamation Act 1996 (“the 1996 Act”) relating to privilege are repealed and re-enacted, as are the relevant provisions of the Defamation Act 2013 (“the 2013 Act”), in so far as they apply to Scotland (see section 31 in relation to repeals).

Background as to the operation of privilege

The effect of privilege is to exclude or at least restrict the bringing of proceedings in relation to defamation. Where a statement is subject to absolute privilege, no proceedings in defamation can be brought in relation to it, even if there is evidence of malice. Examples of statements falling under this category include those made in the course of proceedings in Parliament and by certain persons involved in court proceedings, including judges and witnesses. Where a statement is subject to qualified privilege, no proceedings can be brought unless the pursuer can prove that it was made with malice. This applies, for example, to reports of certain types of meetings, including meetings of local authority committees and general meetings of companies. It applies, also, when a journalist or blogger produces a summary of material which has been published by or on the authority of Parliament. In effect, qualified privilege is privilege which is ousted by proof of malice.

The approach of the draft Bill

Sections 9 to 11 and the schedule of the draft Bill re-enact sections 14 and 15 of, and schedule 1 of the 1996 Act, along with sections 6 and 7(9) of the 2013 Act, in so far as they apply to Scotland. Dealing firstly with the 2013 Act provisions, section 10 of the Bill re-enacts section 6 of the 2013 Act, conferring qualified privilege on the publication of material in a scientific or academic journal, providing certain conditions are met. One of the key conditions is that the material must have been subject to peer review. In short, this means it has been subject to scrutiny by the editor who took the decision to publish the material in the journal concerned, and by one or more persons with expertise in the topic covered by the material. Paragraph 16 of the schedule re-enacts paragraph 14AA of schedule 1 of the 1996 Act, as inserted by the 2013 Act, conferring qualified privilege upon a report of a scientific or academic conference held anywhere in the world, or an extract, summary etc. of such a report. Part 2 of the schedule deals with statements which attract qualified privilege only if the defender, having been requested by the pursuer to publish a letter or statement by way of explanation or contradiction of the statement which is the subject of the proceedings, has done so in a suitable manner. The statements described in Part 1 enjoy qualified privilege without the need for explanation or contradiction.

The provisions of the 1996 Act are subject to certain adjustments in their re-enactment. This reflects equivalent adjustments made to those provisions, in so far as they apply to England and Wales, by section 7 of the 2013 Act. A common theme among the adjustments is in the expansion of the geographical reach of the provisions. Several of the provisions now confer privilege on material produced by particular types of bodies located anywhere in the world, rather than in a more restricted locus, as was previously the case. By way of example,

section 9 of the draft Bill, in re-enacting section 14 of the 1996 Act, expands its application such that the provision now covers the contemporaneous publication of reports by courts anywhere in the world. Section 14 of the 1996 Act applied only to publication by certain courts, in the United Kingdom or Europe.

Section 12 of the draft Bill makes clear that the changes to the application of privilege brought about by sections 9 to 11 (or the schedule) of the Bill will not affect defamation proceedings that are on-going at the time the relevant provision comes into force.

Offers to make amends

Sections 13-17 - Provisions on offers to make amends

Background

Subject to a limited number of departures of approach, sections 13 to 17 of the draft Bill replace sections 2 to 4 of the Defamation Act 1996 in so far as they apply to Scotland, relating to offers to make amends. In essence, the offer of amends procedure provides a route by which a person against whom proceedings for defamation are brought may seek to make amends as an alternative to defending the proceedings. The offer may relate to the statement in general, or only to a specific defamatory meaning. In the latter scenario it is known as a qualified offer. In making an offer of amends, be it qualified or unqualified, the offeror is conceding, as appropriate, that the statement in general or the specific meaning to which the offer relates is defamatory.

Section 13 – Offers to make amends

Section 13(1) sets out the components of a valid offer to make amends. It must comprise a suitable correction, either of the statement in general or, in the case of a qualified offer, of a specific defamatory meaning conveyed by the statement. There must also be a sufficient apology, with both this and the correction being published in a manner that is reasonable and appropriate in all the circumstances. The person receiving the offer may, for example, wish no more than a privately communicated retraction, without an apology being made known more widely. The offer must include, too, details of the compensation and expenses which are to be paid by the offeror, assuming expenses and compensation are to be paid, and in so far as the parties have succeeded in agreeing on the sums payable. If they have not so agreed, the level of compensation and expenses will be determined by the court (see section 14(5) and (7)). The offer may also include an undertaking to take such other steps as the offeror may propose to take.

Subsection (2) deals with the requisites of making a valid offer to make amends. Subparagraph (a) makes clear that the opportunity to make an offer of amends is lost in the event that the offeror has lodged defences in relation to defamation proceedings brought by the party to whom the offer is made. Moreover, the offer must be made in writing, and state expressly that it is an offer or, as appropriate, a qualified offer under this section. If it is a qualified offer in relation to a specific defamatory meaning, it must set out the meaning in relation to which it is made.

Subsection (3) makes provision in relation to withdrawal and deemed rejection of offers. An offer of amends may be withdrawn before it is accepted. If it is withdrawn it may subsequently be renewed (with such renewal being treated as a new offer). Provision is also

made, in paragraph (c), for an offer to be deemed to have been rejected, by force of law, if not accepted within a reasonable period. In the event of dispute as to whether deemed rejection has taken place, it will be for the court to determine what is a reasonable period in the circumstances of any given case.

Section 14 - Acceptance and enforcement of offer to make amends

Section 14 makes provision for enforcement in the situation where an offer to make amends has been accepted.

Subsection (1) sets out the parameters of the section. It applies only where an offer to make amends made under section 13 has been accepted by the person to whom it is made.

Subsection (2) makes clear a person who has accepted an offer to make amends may not bring or continue defamation proceedings against the person who made the offer. In the case of a qualified offer, the bar on bringing or continuing proceedings will apply only in relation to the specific defamatory meaning set out in the offer. It will not apply to any other meanings that could be drawn from the statement. In the case of any other offer, the bar on bringing or continuing proceedings is in respect of the statement complained of as a whole.

Subsection (3) empowers the person who has accepted the offer to apply to the court for an order requiring the person who made the offer to take the steps agreed between the parties in fulfilment of the offer. It is not, however, compulsory that an order be obtained. The person accepting the offer may rely simply on the fact that agreement has been reached.

Subsection (4) deals with the situation where the offer of amends is accepted in principle but the parties cannot reach agreement as to the steps to be taken by way of correction, apology, and publication. A possible example may be lack of consensus as to where in a newspaper the correction and apology should be published. In that event it is open to the person making the offer to take such steps as they consider appropriate towards its implementation. In particular, they may make the correction and apology in open court, in such terms as are approved by the court and give an undertaking to the court as to the manner in which the correction and apology will be published subsequently. In effect, the offeror is, in this situation, asking the court to fill gaps left in the offer of amends process by lack of consensus between the parties.

Subsections (5) and (6) provide for the scenario where the offeror and offeree do not agree on the amount to be paid by way of compensation, as part of the offer of amends. As mentioned above, it then falls to the court to determine the amount of compensation payable. This is to be done, in terms of subsection (5), applying the same principles as apply in determining the level of damages payable in defamation proceedings. Subsection (6) sets out practical factors to be taken into account in determining the amount of compensation payable. These include any steps taken to fulfil the offer and, so far as these matters have not been agreed, the suitability of the correction, sufficiency of the apology and whether the manner of the publication of the correction and apology was reasonable in the circumstances.

Subsection (7) requires the court to determine the amount of expenses payable, in the event that the offeror and offeree do not reach agreement, on the same principles as expenses awarded in court proceedings.

Subsection (8) makes clear that there is to be no jury involvement in proceedings relating to offers to make amends.

Subsection (9) provides a definition of “qualified offer” for the purposes of the section. It is an offer to make amends, made under section 13, relating only to a specific defamatory meaning which the person making the offer accepts that the statement conveys.

Section 15 – Offer to make amends: multiple persons responsible for statement

Section 15 applies where a person has a right to bring defamation proceedings against more than one person as a result of the making of one particular statement which is alleged to be defamatory.

Subsection (1) sets out the parameters of the section. It applies where a person has accepted an offer of amends made by one of the persons against whom they have a right to bring proceedings.

Subsection (2) provides that B’s acceptance of an offer of amends made by A does not affect any right to bring defamation proceedings that B has against another person. Subsections (3) and (4) make provision as to the level of compensation payable by the person making the offer to make amends in a situation where several people are jointly responsible for the statement. Section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 is applied in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies. The effect of this is that a person (“A”) who has paid compensation under an offer of amends is entitled to recover from any other person against whom defamation proceedings could have been taken in respect of the statement, and who might also have been held liable to pay damages, such contribution, if any, as the court may deem just. In terms of subsection (4), where a person other than A is liable in respect of the same damage (whether jointly or otherwise), A is not required to pay by virtue of any contribution under section 3(2) of the 1940 Act an amount greater than the amount of compensation payable under the offer made by A.

Section 16 - Rejection of unqualified offer to make amends

Section 16 applies where an offer of amends has been made covering the whole of a statement which is alleged to be defamatory, and that offer has been rejected. It may have been rejected expressly or deemed to have been rejected as a result of the passage of time.

Subsection (1) sets out the parameters of the section. It applies where a person has rejected an offer to make amends relating to the whole of a statement which is alleged to be defamatory, or is deemed to have done so. It does not, however, apply to the rejection or deemed rejection of a qualified offer (which is dealt with in section 17).

Subsections (2) to (4) deal with the effect of the making of an offer which is rejected, from the point of view of the offeror. In general, the offeror can rely on the fact of rejection of the offer as a defence to any defamation proceedings which subsequently go ahead. This applies whether the rejection is actual or deemed. Such a course does, however, exclude the opportunity to rely on any other defence (see subsection (4)). Moreover, the rejection does not operate as a defence if the person making the offer knew or had cause to believe that the statement referred or was likely to be understood as referring to the recipient of the

offer and that it was both false and defamatory of him or her. The key consideration is the state of knowledge *at the time* the statement which is alleged to be defamatory was made (see subsection (3)). It is, however, presumed that the person making the offer did not know of these matters, meaning that the burden falls on the recipient of the offer to prove otherwise. In terms of subsection (5), the fact that the offer has been made and rejected, or deemed to have been rejected, may be relied upon in mitigation of the level of damages payable, regardless of whether it has been relied upon as a defence.

Subsection (6) provides a definition of “qualified offer” for the purposes of the section. It is an offer to make amends made under section 13 relating only to a specific defamatory meaning which the person making the offer accepts that the statement which is the subject of the proceedings conveys.

Section 17 - Rejection of qualified offer to make amends

Section 17 makes provision equivalent to that of section 16, but in relation to a situation where an offer is made only in relation to one particular defamatory meaning conveyed by a statement. In other words, it relates to rejection of qualified offers to make amends rather than unqualified ones.

Jurisdiction

Section 18 - Action against a person not domiciled in the UK or a Member State etc.

Section 18 lays down a jurisdictional threshold limiting the circumstances in which an action for defamation may competently be brought in a court in Scotland.

Subsections (1) and (2) set out the precise limitation of the jurisdiction of the Scottish courts. Subsection (1) provides that the section applies where defamation proceedings are to be brought in a Scottish court against a person who is not domiciled in the UK, an EU Member State or a State which is a party to the Lugano Convention. Subsection (2) makes clear that a court in Scotland has jurisdiction to hear and determine such proceedings only if satisfied that, of all the places in which the statement complained about has been published, Scotland is clearly the most appropriate one in which to bring proceedings. The result is that where a statement has been published in Scotland and in other jurisdictions, the court will have to look at the overall global picture.

Subsection (3) provides that references in subsection (2) to publication of the statement complained of are to be taken to include publication of any statement conveying the same, or substantially the same, imputation as the particular statement complained of. This is intended to prevent attempts to circumvent the effect of the section by drawing distinctions between different incarnations of the statement appearing in different jurisdictions, in circumstances where no meaningful distinctions exist.

Subsection (4) makes clear that the provision does not affect the opportunity of a defender to take a plea of forum non conveniens. The essence of such a plea is that, although a given court has jurisdiction to determine proceedings, the interests of all the parties involved would be better served if they were determined by a different court, which has concurrent jurisdiction.

Subsection (5), read together with subsection (6), sets out the circumstances in which a person will be taken to be domiciled in a given state.

Subsection (7) provides that the restriction on jurisdiction introduced by the provision is to have no effect in relation to defamation proceedings that are already underway at the time the provision comes into force.

Removal of presumption that proceedings are to be tried by jury

Section 19 - removal of presumption that proceedings are to be tried by jury

Section 19 removes the presumption that proceedings in defamation are to be tried by jury.

Subsection (1) provides for the repeal of paragraph (b) of section 11 of the Court of Session Act 1988. The effect of this is not to prevent a defamation action being dealt with by means of a trial by jury. Rather, it gives the courts a power to order the form of factual inquiry which they consider to be most appropriate to the circumstances of any given case. As an alternative to a trial by jury there may be a proof or a proof before answer. Given the operation of section 63 of the Courts Reform (Scotland) Act 2014, the removal of a presumption of trial by jury would apply also to defamation actions in the sheriff court, if an order were to be made under section 41(1) of the Courts Reform (Scotland) Act 2014 to reinstate the possibility of defamation trials by jury in the sheriff court.

Subsection (2) makes clear that the removal of the presumption has no effect in relation to defamation proceedings that are already underway at the time the provision comes into force.

PART 2 – VERBAL INJURY ETC.

Malicious publications causing harm

Sections 20 - 26 – Verbal injury: malicious publications causing harm - Background

Sections 20 to 26 make substantive provision in relation to certain elements of a form of wrong known at common law as verbal injury. The overall thrust is that while equivalents of the forms of verbal injury relating to the running of a business are placed on a statutory footing, those relating to injury to a natural person's feelings are abolished outright.

What is business-related verbal injury?

In the context of a business or profession, verbal injury centres on the making of statements which, though not defamatory, in the sense of being likely to make people think less of the pursuer's business or professional position or ability, would nonetheless be expected to cause harm, predominantly of a financial nature. Sections 20 to 22 of the draft Bill provide respectively for three forms of wrong related to the running of businesses – statements causing injury to business interests, statements causing doubt as to title to property, and statements criticising assets. Given that the common law equivalents of these are abolished by section 26 of the draft Bill (see further the explanation below), the effect of this provision is to provide for the re-incarnation of these forms of wrong on a statutory footing.

To provide an outline, first of all, as to how the three forms of wrong may arise in practice, causing doubt as to title to property concerns the making of a statement casting unwarranted questions over the pursuer's ownership or other right to land or other property. This may be designed to jeopardise or at least delay a transaction involving the land or property. Criticising assets involves casting unwarranted aspersions against the quality, condition, use or treatment of assets owned, possessed, or controlled by the pursuer. This may include items manufactured or leased as part of a business. It may be motivated by a malicious intention to cause financial loss to the pursuer. The third category –causing injury to business interests– is designed to sweep up forms of wrong that do not fall under either of the other two categories. In essence, it involves making a statement which would tend to make people look less favourably on the pursuer's business or business activities, though not in a way which would be expected to cast doubt on competence or scruples. An example may be a false claim that the pursuer is about to go out of business, thereby causing loss of orders. This may be motivated by a malicious intention to cause harm to the business or business activities of the pursuer. Further explanation as to the meaning intended by the reference to 'malicious intention' in this context is provided below in the explanation of sections 20 to 22.

Sections 20 – 22 – Statements causing injury to business interests; statements causing doubt as to title to property; statements criticising assets

Each of sections 20 to 22, in providing for the wrongs, sets out the detail of the requirements which must be satisfied in order to allow proceedings to be brought successfully. In short, one party may bring proceedings against the other party where the defender has made a false and malicious statement about the matter covered by the particular form of wrong, with that statement having been published to a person other than the pursuer. The statement must have caused, or be likely to cause, financial loss to the pursuer. Subsection (2) of each of the sections elaborates as to what is meant by 'malicious' in each context. It sets out two matters which the pursuer must show. The first is that the imputation conveyed by the statement complained of was presented as being a statement of fact, rather than opinion, and was sufficiently credible so as to mislead a reasonable person. The second matter reflects an either/or situation. One option is for the pursuer to show that the defender knew that the imputation was false, or that they were indifferent as to whether it was true. Alternatively, the pursuer must show that the defender's publication of the statement was motivated by a malicious intention either to cause harm to business, to delay or jeopardise a land or property transaction or to cause financial loss through disparaging assets. The question of whether there is a malicious intention will turn on whether the defender was motivated predominantly by the aim of causing detriment to the pursuer, rather than by a wish to further their own interests.

Section 23 – Limit on requirement to prove financial loss

Section 23 provides that a pursuer in proceedings under Part 2 does not need to show actual financial loss if the statement complained of is more likely than not to cause financial loss. (Section 32(c) makes clear that by proceedings under Part 2 is meant proceedings in respect of the forms of wrong set out in sections 20-22 of the draft Bill). This replaces an equivalent provision in section 3 of the Defamation Act 1952, which is repealed in terms by section 31(1)(a) of the draft Bill.

Section 24 – Statements conveying two or more meanings

The effect of section 24 is to exclude the application of the single meaning rule from proceedings brought under Part 2. The effect of that rule, in relation to defamation proceedings, is to provide a mechanism by which the judge or jury at a proof is to determine which of the meanings that may be attributed to a statement is the true meaning to be attributed to the statement in all the circumstances of a case. It is that meaning, and that meaning only, which will be considered from the point of view of determining whether the statement has been defamatory of the pursuer as a matter of fact.

Section 24 provides that, where proceedings are brought under Part 2 in respect of a statement that is capable of conveying two or more distinct meanings, it will not be necessary, in deciding whether harm has occurred, for the court to determine either which of the meanings is conveyed by the statement in the circumstances or that one meaning should be preferred to the exclusion of all others. Subsection (3) clarifies that nothing in section 24 prevents the court from excluding or disregarding possible meanings where it considers it appropriate to do so.

Section 25 – Damages for anxiety and distress

Section 25 makes clear that, in determining the appropriate amount of damages to award in proceedings under Part 2, the court may take into account any distress and anxiety caused to the pursuer by the statement complained of. This is a subsidiary head of recovery; it can only be recovered, as part of the general head of damages, where there has been economic loss. Moreover, it does not affect any other basis of claim that may be available to a pursuer in proceedings under this Part.

Abolition of common law verbal injuries

Section 26 – Abolition of common law verbal injuries

Section 26(1) provides for the repeal of all forms of verbal injury which exist at present in Scots common law. This includes convicium, which involves the disclosure of a false, or true, statement with the intention of causing harm to the person who is its subject. The harm may involve bringing that person into public hatred, ridicule or contempt (in other words, some form of abhorrence among members of the public who see or hear the statement) or making public information of a sensitive or embarrassing nature about that person. Reading this section in conjunction with sections 20 to 22, as described above, providing for the statutory incarnation of equivalents of business-related forms of verbal injury, the result is that all forms of verbal injury relating solely to injury to a natural person's feelings are abolished outright in terms of the draft Bill. The same is true of slander on a third party, relating to claims for loss, at least partly of a financial nature, arising from a defamatory attack on a third party.

Subsection (2) makes clear that the abolition of common law verbal injuries in terms of subsection (1) does not affect any right to bring proceedings which arises before subsection (1) comes into force.

PART 3 – GENERAL

Remedies

Section 27 – Power of court to order summary of its judgement to be published

Section 27 empowers the court to order the defender in defamation proceedings or proceedings under Part 2 to publish a summary of its judgement.

Subsection (1) sets out the parameters of the power. It is exercisable only where the court has found in favour of the pursuer in defamation proceedings or proceedings under Part 2.

Subsection (2) makes clear that it is for the parties to agree on the key elements of the summary. Reference is made, among other aspects, to the wording of the summary and the time and manner of its publication. Where, however, the parties cannot reach agreement on matter(s) identified in subsection (2), it falls to the court to make the relevant determination and give appropriate directions (see subsection (3)). This may include substituting its own wording for that put forward by the parties.

Section 28 - Making a statement in open court

Background

Section 28 allows a statement to be made in open court at the point where settlement is reached in defamation proceedings or proceedings under Part 2. This may be either a bilateral statement, as agreed between the parties to the proceedings, or a unilateral statement made only by the pursuer. As Scots law currently stands there is not thought to be anything to prevent the reading out of a statement of this nature, commonly known as a settlement statement, although this is not done in practice in Scotland, unlike in England and Wales. The provision is intended to clarify the existence of this remedy as an option, potentially also encouraging its use.

Subsection (1) sets out the basic power for the court to allow a statement to be made in open court.

Subsection (2) makes clear that it is for the parties to agree the wording of the statement and all other aspects of its terms. Failing such agreement, the wording may be determined by the pursuer. In terms of subsection (3) the court must, however, give its approval to the wording of a statement before it may be read out in open court. It cannot substitute new terms to replace any with which it does not agree. Its only power is to reject those terms. The parties may then propose alternative wording.

Section 29 – Power of court to require removal of a statement etc.

Section 29 is intended to cater for the fact that it may not always be possible for the author of material which is the subject of defamation proceedings or proceedings under Part 2 to prevent further distribution of the material or orchestrate its removal from a website.

Subsection (1) empowers the court to order the removal of material which is the subject of defamation or Part 2 proceedings from any website on which it appears, as well as to order a person who was not the author, editor, or publisher of the material to stop distributing,

selling, or exhibiting material containing the statement. The exercise of the power is not confined to circumstances in which the outcome of the proceedings has already been determined. Accordingly, there is nothing to prevent the court from issuing an order for removal or cessation of distribution on an interim basis, before the outcome of the proceedings is known.

Subsection (2) makes clear that the power to make such an order does not constrain the court's exercise of other powers that are available to it. This may include the granting of an interdict.

Subsection (3) makes provision as to how the terms "author", "editor" and "publisher" are to be defined.

Limitation

Section 30 - Limitation of actions

Background

Section 30 provides for three things: (1) it brings forward the date on which a right of action accrues in relation to defamation and conduct falling within Part 2; (2) it reduces the period, starting from the accrual of the right of action, within which an action must be brought; and (3) it prevents a new right of action arising, and with that a new limitation period, where there is a republication of the same or substantially the same material, by the same publisher. Instead of multiple different limitation periods, there is a single limitation period, running from the date on which the statement complained of was first published to the public or a section of the public. This will mean that it will have been made available to the public in general, or at least a cross-section of the public, and without restriction according to membership of, for example, a particular club, profession or similar. It is only within the one-year period that any action for republication of the same or substantially the same material can be brought.

Subsection (1) sets out the operation of the provision. It amends section 18A of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act").

Subsection (2) provides for adjustment of the limitation period for the bringing of defamation actions from 3 years to 1 year. The result is that any action for defamation must be brought within 1 year of the date on which the right to bring an action accrues. See further the explanation below of new subsections (1A) -(1C) for what is meant by accrual of a right of action in this context, reflecting amendment to section 18A. The one-year period applies also to proceedings under Part 2.

Subsection (3) inserts new subsections (1A) – (1C) into section 18A of the 1973 Act. Subsection (1A) imposes a restriction, in certain circumstances, on the bringing of actions in respect of republication of material that has been published previously. It is intended to address a potential risk of perpetual liability for defamation, owing in particular to the increasing prevalence of online publication. As matters currently stand each accessing of an article, image etc by a new reader/viewer/listener would trigger a new cause of action and, therefore, a new limitation period. The effect of subsection (1A) is that, where material has already been published, the right to bring an action in respect of any republication of the same or substantially the same material by the same publisher will be taken to have accrued on the same date as the date on which the statement, having been made available to the

public, or a section of the public, was first seen or heard and understood by at least one person. (This must be a person other than the subject of the statement – in other words, a third party). As a result, there will, in general, be a single limitation period of one year, during which any actions in respect of the republication can competently be brought. The court will, though, retain its discretion, in terms of section 19A of the 1973 Act, to allow an action to be brought notwithstanding that it would ordinarily be excluded by limitation, in terms of section 18A. This exercise of discretion could include disregarding the one-year limitation period which will, in terms of the draft Bill, ordinarily be applicable to republication of a statement which is the same or substantially the same as that published previously.

Subsection (1B) makes clear that the restriction outlined above does not apply if the court determines that the manner of the subsequent publication is materially different to that of the original publication. Subsection (1C) provides guidance as to how the question of whether there is a material difference in publication should be determined. Two specific factors are identified which may be taken into account, as appropriate: the level of prominence of the statement whose republication is complained of, and the extent of the republication. These matters are to be judged relative to its prominence and extent of publication when first published to the public. So, for example, the court may look at whether it has been transferred from a relatively obscure position on a website to somewhere more obvious and easy to access. This may speak of a material difference in the level of both publication and prominence. Beyond this, the court may take account of any other circumstances it considers relevant to the particular case.

Subsection (5) provides for the insertion of new subsections (3A) and (3B) into section 18A of the 1973 Act. Subsection (3A) makes clear that the alteration to the dates on which rights of action accrue has no effect in relation to a statement published before the coming into force of this section of the draft Bill. Subsection (3B) provides refinement as to how the application, or otherwise, of subsection (3A) is to be determined.

Subsection (6) provides for amendments to section 18A(4) of the 1973 Act, giving effect to the changes introduced by subsections (2) and (3) as described above. Most substantively, it alters the date on which the right of action accrues in relation to defamation actions not involving publication of material to the public but rather publication only to a recipient or recipients as individuals. A right arises, in those cases, each time the statement complained of is seen or heard for the first time by a particular recipient - a party other than the subject of the statement, who understands its gist. It is not necessary that the person who is the subject of the statement should be aware that it has been seen or heard.

Miscellaneous

Section 31 – Consequential modifications

Section 31(1) provides for the repeal of a number of provisions of the Defamation Act 1952, to reflect the placing on a statutory footing of the common law defences of veritas and fair comment, along with such equivalents of verbal injury as are to be provided for.

Subsection (2) makes consequential amendments to section 8 of the Rehabilitation of Offenders Act 1974. This reflects the new defences of truth and honest opinion. Section 8 of the 1974 Act applies to actions for defamation brought by rehabilitated persons based on

statements made about offences which are the subject of a spent conviction, with the statements having been published after the conviction has become spent.

Subsections (3) and (4) provide for repeal of the provisions relating to privilege which are re-enacted by sections 9 to 11 and the schedule of the draft Bill, together with other consequential repeals.

Section 32 – Interpretation

Section 32, read together with section 1, sets out definitions of terms that are of recurring significance in the draft Bill. The word “statement” is defined in broad terms to ensure that the draft Bill will apply to a broad range of material, in different mediums. It includes, for example, the conveying of an imputation by means of a gesture or a visual image.

Section 33 – Regulations

Section 33 makes provision in relation to the exercise of regulation-making powers conferred by the draft Bill, other than those concerning ancillary provision and commencement. Regulations made in exercise of powers under the draft Bill may, in general, include transitional, consequential, and saving provision.

Section 34 – Ancillary provision

Section 34 allows the Scottish Ministers, by regulations, to make such supplementary, incidental, or consequential provision as they consider appropriate in order to give full effect to any provision of the draft Bill. Such regulations may also make such transitional, transitory or savings provision as the Scottish Ministers consider necessary.

Section 35 – Commencement

In accordance with section 35, commencement of the provisions will predominantly be in accordance with dates appointed in regulations made by the Scottish Ministers. This is subject to a limited number of exceptions in the form of provisions coming into force on the day after the draft Bill becomes law (sections 32 to 36) which include those governing interpretation and ancillary provision.

Section 36 – Short title

Section 36 sets out the short title of the draft Bill.