



### Open Rights Group response to the Scottish Law Commission consultation: Defamation and Malicious Publication (Scotland) Bill 2017

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 that will help protect free expression across the country. Open Rights Group welcomes the steps taken by the Scots Law Commission to modernize the law of defamation in Scotland. This submission from Open Rights Group has similarities with the submission of the Libel Reform Campaign, those similarities represent a consensus between the organisations, though there are some areas of difference that merit a separate statement.

Key reforms contained within the draft that Open Rights Group support include:

- The implementation of a single publication rule to ensure that liability remains with the original publication and does not extend the time within which an action can be brought if the content is shared or retweeted;
- An honest opinion defence that protects the free and open sharing of opinion and expression both online and off.
- Requiring the defamatory statement to be communicated to a 3<sup>rd</sup> party;
- The inclusion of a serious harm test to ensure vanity cases and those brought solely to silence others cannot make it to court;

This is a step in the right direction, but to ensure that this reform can fully protect free expression we are calling for:

#### **Online Expression**

#### **Related to s.3 & 4**

Social media and new media platforms continue to redefine how we edit, create and publish content both online and off. The move to outline responsibility and limit the scope of liability for defamatory statements establishes a clear set of definitions that individuals and organisations can use to understand which protections are available to them. The

section is a significant improvement on s.5 in the Defamation Act 2013 in force in England and Wales, which, while ostensibly giving operators of websites a process by which to protect their outlet, results in operators taking down the content irrespective of any potential defence the original commentator may have.

S.3(3) establishes a list of roles that a person can undertake in relation to a statement that will not open them up to liability in terms of defamation actions. To ensure these remain relevant as technology changes, we are calling for:

- The examples, while not limiting judicial interpretation, should seek to highlight the complex and varied activities that are undertaken within each role. This will help ensure these exemptions can be deployed in real life situations. An example of this s.3 (3)(g), as moderation goes beyond ‘correcting typographical errors’ and plays a vital role on online platforms including Reddit and Facebook.
- In addition to section 3(4), which gives the courts the power to proceed on the basis of analogy in determining who is an author, editor or publisher, to ensure that the protections keep pace with technological developments, the draft Bill should be amended to give Scottish Ministers the power by order to supplement but not subtract from the protections in section 3(3).

### **Definition of “an editor”**

#### **Related to s.3**

We are concerned that the draft Bill’s definition of “an editor” may be ambiguous, and open to a more expansive interpretation than section 3’s headline restriction on proceedings against secondary publishers suggests.

Section 3(2) enshrines a limited definition of a “publisher” of a defamatory statement, extending only to “commercial publishers” who publish the potentially defamatory statement “in the course of that business.” This definition would clearly exclude an individual using social media platforms to publish content in a personal capacity, including retweeting, linking to, or repeating content primarily published elsewhere on the internet.

By contrast, Section 3(2) defines an “editor” as “a person with editorial or equivalent responsibility for the content of the statement or the decision to publish it.” We are concerned this clause will substantially defeat the principal purpose of section 3. Even if they cannot be classified as “publishers”, there is a substantial danger that pursuers will argue that individual social media users are effectively the “editors” of the content they choose to publish on online platforms, and consequently, remain liable in defamation proceedings.

Manually linking to online content, or deciding to retweet content published by other social media accounts, is not an automated process, analogous to Google’s algorithm-led archiving of online “publications”, or a constantly updating RSS feed, which communicates new content on an ongoing basis without human interference or an individual “decision to publish,” in the language of the draft of the Bill. Nothing in section

3(4), as currently drafted, excludes this interpretation of what constitutes the “editor” of a publication.

We are calling for:

- The Bill to be amended so the definition of editor is narrowly drawn in the same manner as the definition of a “publisher” has been established to protect social media users or those retweeting content or posting links. It is important that online free expression is not unduly limited by the definition of “editor” that may not explicitly capture the complex roles undertaken by online media users that are substantially different to the roles seen in conventional offline communication or publication.

### **Specifying Persons as Publishers**

#### **Related to s. 4**

The capabilities outlined in s.4 establish a process by which Scottish Ministers can treat persons as publishers and so liable for defamation actions. We believe that while future-proofing the legislation is necessary, this section establishes a less rigorous process than the creation or amending of primary legislation that could result in more groups of persons being liable for potential defamation actions. The lack of a detailed and transparent process by which the definitions in s.3 are expanded could threaten different groups of individuals and organisations with fewer stages of independent scrutiny that can enable civil society to take part. This also weakens the potential of this bill to consolidate all legislation and regulation in relation to defamation law in Scotland.

Adding categories of persons who can be treated as publishers is a significant step towards expanding the reach of defamation actions and so should only be deployed through a vigorous, open and transparent process that supports independent scrutiny and increased levels of civil society awareness. The process that has been outlined in this proposed bill does not, in our opinion, meet this threshold.

We are calling for:

- S.4 to be removed to ensure that any move to add categories to the definitions established in s.3 must be made through primary legislation. This will establish a far more robust and open process, as well as ensuring the legislation will accurately reflect the bodies who fall inside and outside the definitions established in s.2

### **Power of court to require removal of a statement**

#### **Related to s. 29**

While we are not opposed to a court ordering the removal of content that has been complained of, it should be established as narrowly as possible to avoid this functioning as a broad takedown notice. Narrowing will ensure entire statements, pages or URLs are not removed when the statement complained of related to a specific utterance, link or

paragraph that could be removed while leaving the rest of the statement untouched. The court order should include the exact wording that needs to be removed, leaving the editorial choice with the author, editor or publisher (as defined in s.3) as to whether the piece remains published.

In the explanatory notes to the draft Bill Subsection (1), relating to the court's power to order removal of material, it is described: "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."<sup>1</sup> This provides a pursuer with the opportunity to silence a respondent's statement throughout the course of a trial while the court deliberates, when no determination on the defamatory nature of that statement has been made. This is an imbalance of powers and risks undermining the right to freedom of expression via vexatious claims that stand no chance of receiving a determination but nevertheless result in the removal of a statement for a potentially significant period of time.

We are calling for:

- The defamatory statement should be defined as narrowly as possible, down to the individual word, phrase, link or paragraph that needs to be removed.
- Any order to remove or cease distribution of a statement should only arise following the court proceedings and not during them. As this distinction is made in the explanatory notes and not the Bill, we call on this to be made apparent in the Bill to avoid confusion and judicial interpretation.

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<sup>1</sup> [https://www.scotlawcom.gov.uk/files/2015/0123/0486/Defamation\\_and\\_Malicious\\_Publications\\_Scotland\\_Bill\\_-\\_consultation\\_draft\\_-\\_Explanatory\\_Notes.pdf](https://www.scotlawcom.gov.uk/files/2015/0123/0486/Defamation_and_Malicious_Publications_Scotland_Bill_-_consultation_draft_-_Explanatory_Notes.pdf)