

DEFAMATION AND MALICIOUS PUBLICATIONS (SCOTLAND) BILL

INFORMAL CONSULTATION ON WORKING DRAFT – 31 JULY – 31 AUGUST 2017

Introduction

1. The Scottish Law Commission's project on reform of defamation law is approaching its final stages. We have developed and decided on policy in light of responses to the Discussion Paper on Defamation. We are currently adjusting a draft Bill to give effect to our policy. A working draft of that Bill has been published for consultation on our website, along with draft explanatory notes. The purpose of this is to seek views on the detail and workability of the provisions before the draft is finalised and published with a report around the end of the year. We would particularly welcome views on the aspects of the Bill highlighted below, by **31 August 2017**. Comments would be welcomed by email, in whichever format you would wish to submit them. They should be sent to info@scotlawcom.gsi.gov.uk

2. Please note that information about the current consultation, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also (i) publish responses on our website (either in full or in some other way such as reformatted or summarised); and (ii) attribute comments and publish a list of respondents' names. For further details on the project please see our [project page](#).

Background to the current project

3. The law of defamation was the subject of a major reform in England and Wales in 2013, when the Defamation Act of that year was passed ("the 2013 Act"). Scottish Ministers decided at that stage there was no requirement for similar amendment to the law of Scotland, except in certain minor respects relating to the law of privilege, primarily in connection with scientific and academic publications.

4. Nevertheless, respondents to the consultation process which the Commission undertook in preparing its Ninth Programme of Law Reform indicated that, in light of the reforms made in England and Wales by the 2013 Act, it would be highly desirable to ensure that the law in Scotland was similarly updated. We accordingly recommended to the Scottish Government that it would be appropriate for us to examine the matter, and the Scottish Government accepted our recommendation.

Area where we have taken a different line to that suggested by consultees

Treatment of secondary publishers

5. We raised in the Discussion Paper the question whether there should be a full review of the responsibility and defences for publication by internet intermediaries (in other words, persons who make material available online, and who have the capacity to amend, delete or edit the material, but from whom the material does not originate). Whilst most respondents supported such a review in principle, we tend to think that there is a strong case for the view that it would be more appropriate that any such review be undertaken on a UK-wide basis. The issues involved are of relevance throughout the UK, and are far more commonly litigated in England than elsewhere. On that basis it seems right that any statutory provision regulating them should apply on a uniform basis in so far as that is compatible with the differing legal regimes in the various jurisdictions.

6. Pending such a UK-wide exercise, the draft Bill provides, in section 3, that, in general, no proceedings in defamation can be brought against a person unless they are either the author, editor or publisher of the statement which is the subject of those proceedings, or an employee or agent of the author, editor or publisher, with responsibility for the content of the statement or the decision to publish it. This is subject only to the possibility of regulations being made effectively to deem as a publisher a category of person who would not otherwise be classed as such. The regulation-making power is designed to be something of a last resort, most likely catering for the scenario in which a new “brand” of internet intermediary were to emerge which was seeking actively to facilitate the causing of harm.

7. Section 3 is intended to deal with, amongst other things, the situation where attempts would otherwise be made to bring proceedings against internet intermediaries. Notably, there is no provision for proceedings to be brought against a person who is not the author, editor or publisher simply on the grounds that it was not feasible to bring an action against the person who was the author, editor or publisher.

Topic not broached in the Discussion Paper but included in the draft Bill

Proceedings in defamation by public authorities

8. The Libel Reform Campaign, in responding to our Discussion Paper, expressed strong support for the encapsulating in statute of the principle laid down in *Derbyshire County Council v Times Newspapers Ltd and Others*.¹ This, of course, derives from English common law but is assumed, also, to apply in Scotland. The essence of the principle is that a public authority is not entitled to bring proceedings for defamation.

9. A public authority is defined in section 2(2) as a person who exercises functions of a public nature. Our intention is that the prohibition will cover, amongst others, local authorities in Scotland, the Scottish Ministers, the Scottish Parliament and the Scottish Parliamentary Corporate Body. It will also cover corporate vehicles of local authorities and the Scottish Government. On the other hand, it will not catch companies and charitable organisations contracted by Government or local authorities to discharge functions on their

¹ [1993] AC 534.

behalf on an intermittent basis, and without coming under their ownership or control. We have given thought to the possibility of excluding from the prohibition any proceedings for defamation in connection with discharge of functions of a private nature by a body classed as a public authority in terms of the Bill. This would be designed to cater for the situation in which such a body discharges a mixed range of functions. In the event we have decided against such an exclusion. It seems that this could be ripe to trigger debate as to whether particular functions are, or are not, functions of a private nature. If, though, consultees have any concerns about the absence of such an exclusion we would be grateful if these could be shared with us.

Topic covered in the Discussion Paper but not being taken forward in the draft Bill

Defamation of the deceased

10. We raised in the Discussion Paper the overarching question of whether consideration should be given to enacting statutory provision to allow an action for defamation to be brought on behalf of someone who has died, in respect of statements about them made after their death. This would involve re-visiting a number of the issues examined as part of a Scottish Government consultation on the matter, published in January 2011.

11. The vast majority of respondents who offered views on this question tended to think that, not only did the arguments advanced against provision in this area at the time of the Scottish Government consultation still apply, they were now even stronger. The allegations of abuse by Jimmy Savile, which had come to light after his death, were said to provide a particularly clear illustration of this. The investigative journalism and historical research which led to the bringing to light of the allegations may have been thwarted by any provision to enable actions in defamation to be brought where comments are made about a deceased person after his or her death.

12. On balance, and while acutely aware of the sensitivities of the issues involved here, to those directly affected by them, we have decided against making provision in the draft Bill in relation to defamation of the deceased.

Verbal injury: re-branding

13. We think it desirable that the opportunity be taken to afford the form of wrong currently known as verbal injury a title which reflects more clearly the type of conduct which it seeks to address. We refer to the wrong, in the draft Bill, by the overarching title of “Malicious publication causing harm.” The three forms of business-related delict placed on a statutory footing under that heading are also re-named – statements causing harm to business interests; statements causing doubt as to title to property; and statements criticising assets. Forms of verbal injury relating to injury to feelings are abolished in terms of the Bill, as is slander on a third party.